NORTH CAROLINA COURT OF APPEALS REPORTS

VOLUME 16

FALL SESSION 1972

RALEIGH
1973

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[1] Resigned 7 February 1973.
[2] Appointed Chief Judge 8 February 1973.

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CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

FALL SESSION 1972

STATE OF NORTH CAROLINA v. HOWARD MACK MILLER

No. 7226SC173

(Filed 30 August 1972)

1. **Constitutional Law § 4; Searches and Seizures § 1— gambing house employee — standing to object to search**

An employee of a gambling house who was in charge of the premises when a search was made had standing to invoke the protection of the Fourth Amendment against an unlawful search of the premises.

2. **Searches and Seizures § 3— affidavit relating to gambling — warrant to search for intoxicating liquor — invalidity of warrant**

Although a police officer's affidavit would have been sufficient to support a finding of probable cause for issuing a warrant authorizing the search of a house for gambling equipment, it was insufficient to support a finding of probable cause as contained in the warrant actually issued authorizing a search of the house for intoxicating liquor.

3. **Searches and Seizures § 3— issuance of warrant — probable cause — duty of magistrate**

By simply signing without reading the warrant which a police officer placed before him, a magistrate failed to perform his judicial function of making his own independent determination from the affidavit submitted to him as to whether probable cause existed for issuance of the warrant which he signed.

4. **Criminal Law § 84; Searches and Seizures § 1— statutory exclusionary rule — applicable to all trials**

The exclusionary rule provided by G.S. 15-27(a) applies in any trial, not just in a trial for the offense by reason of which the illegal search was initially undertaken.

5. **Searches and Seizures § 1— observation of gambling — illegal entry on premises**

Fact that officers could observe gambling after passing through two doors of a house and opening a third door did not give them

authority to enter and seize the gambling apparatus in use where they arrived at the position to observe the gambling while purporting to act under an invalid search warrant and under circumstances in which a valid warrant was required.

6. **Arrest and Bail § 3; Searches and Seizures § 1— observation of misdemeanor — prior illegal entry**

The fact that after police officers passed through two doors of a house and opened a third door the officers could claim to have reasonable ground to believe that a misdemeanor, gambling, was being committed in their presence did not legalize their original entry into the house or justify a further intrusion into the premises for the purpose of making arrests. G.S. 15-41(1).

7. **Criminal Law § 86; Homicide § 15— injuries to defendant by police officers — competency to show bias of officers**

In a prosecution for the murder of a police officer during a police raid on a gambling house, testimony and exhibits with respect to beatings and injuries inflicted by the police upon defendant and other occupants of the premises following the shooting of the officer were competent to show the bias against defendant of officers who testified for the State, and the trial court committed prejudicial error in excluding such evidence.

8. **Homicide § 15— homicide during police raid — testimony concerning other robberies — competency to show apprehension of robbery**

In a prosecution for the murder of a police officer who was shot during a police raid on a gambling house, testimony by defendant, a "house man" employed at the gambling house, concerning information he had received prior to the shooting about robberies of gambling games in the area in recent years was relevant as bearing upon the reasonableness of defendant's apprehension that a robbery might have been in progress when he saw unidentified armed men walking rapidly into the room.

9. **Criminal Law § 73— statements by third parties — competency — hearsay**

In a prosecution for the murder of a police officer during a police raid on a gambling house, defendant's testimony as to information he had received from third parties about robberies of other gambling games was not excludable as hearsay, where the testimony was not offered to prove the truth of the statements made by the third parties but only to show that the statements had been made to defendant.

ON *Certiorari* to review judgment of *McLean, Judge,* 19 April 1971 Special Criminal Session of Superior Court held in MECKLENBURG County.

Defendant was indicted for the first-degree murder of R. E. McGraw, a police officer. He pleaded not guilty. The killing occurred at approximately 1:50 a.m. on 17 October 1970 while

McGraw and other officers were raiding a gambling house in Charlotte, N. C. Defendant was a "house man" employed at the gambling house.

The State's evidence in substance showed the following:

About 10:00 p.m. on 16 October 1970 Sergeant B. S. Treadaway of the Vice Control Division of the Charlotte Police Department received information from a confidential informant that gambling was then taking place at 1322 East Fourth Street, a house located about three blocks from the Law Enforcement Center. Pursuant to this information he and other officers went to the address between 11:00 p.m. and midnight and obtained the license numbers of cars parked behind the house. On returning to the Law Enforcement Center and checking these license numbers, Sergeant Treadaway identified owners of some of the cars and recognized among them the names of several persons who had a reputation for gambling. He related this information to Officer R. E. McGraw, who typed an affidavit and a search warrant. The affidavit recited that affiant had "reliable information and reasonable cause to believe that Occupants (of the premises at 1322 East Fourth Street) has (sic) on the premises and under their control cards, money, dice and gambling paraphernalia," and set forth the grounds for affiant's belief. The search warrant, which was prepared on a "form-type blank" which bore at the top the heading, "Search Warrant — Intoxicating Liquor Possessed for Purpose of Sale," recited that affiant had "stated under oath that Occupants has (sic) in his possession intoxicating liquor for the purpose of sale, described in the attached affidavit," and directed the officers to search the premises "for the property in question," and "[i]f this intoxicating liquor is found, seize it and all other intoxicating liquor found by you to be possessed there in violation of law, plus all glasses, bottles, jugs, pumps, bars, or other equipment used in the business of selling or manufacturing intoxicating liquor. . . ." Sergeant Treadaway took the affidavit and warrant to the office of J. P. Eatman, Jr., a magistrate, and requested that the search warrant be issued based on the affidavit. Sergeant Treadaway read, signed, and swore to the affidavit in front of the magistrate, but did not read the warrant. The magistrate read the affidavit and "scanned over the search warrant to see if all the blanks were filled," but "did not read completely the search warrant itself." The magistrate asked Treadaway if he was "going out

to round up some gamblers," inquired as to the last time Treadaway had been in touch with his confidential informant, and then signed the warrant without having read it. This occurred at 1:40 a.m. on 17 October 1970 after Treadaway had been in the magistrate's office a total of "two or three minutes." The magistrate knew that Treadaway was "right much in a hurry to get the raid under way." On leaving the magistrate's office Sergeant Treadaway took the affidavit and warrant, folded together but not attached to each other, out to the car and gave them to Officer McGraw, who put them "out of sight," and that was the last time Sergeant Treadaway saw the search warrant.

Sergeant Treadaway and thirteen or fourteen officers from the Charlotte City Police Department and the Mecklenburg County ABC Board, all of whom were in plain clothes, then went to the house at 1322 East Fourth Street, where they arrived about 1:50 a.m. Sergeant Treadaway, Officer McGraw, and six other officers went to the back of the house, while the other officers went to the front and side. The officers found the back door standing open. They did not knock at this door or give any notice of their presence to the occupants of the house. Looking through the open back door into a hallway, the officers saw a second door, which had a one-way glass in the top half. They entered the hallway through the open back door, crouched down to avoid detection, and proceeded to the second door. There was a door bell at the second door, but the officers did not ring the bell or knock at the second door, which was unlocked and ajar. Sergeant Treadaway opened the second door wide enough so that he and the other officers could get through, and then proceeded down the hallway to a third door, which was closed. This door also had a one-way glass in it, which was similar to the glass which was in the second door. The hallway from the outside door to the third door was approximately thirteen feet long. At the third door Sergeant Treadaway stood up and knocked lightly. A man named McGowan, whom Sergeant Treadaway recalled having arrested for gambling on a previous occasion, opened the door. The door swung outward into the hallway toward Sergeant Treadaway, who caught it and pulled it on back, at which point he was able to see into the room. At that time Officers McGraw, Taylor, Tanner, Smith and Patterson were with Treadaway in the portion of the hallway between the second and third doors.

Other officers were in the portion of the hallway between the first and second doors.

The room into which Sergeant Treadaway looked after the third door was opened was about 36 feet long, facing straight ahead, northward, and about 15 feet wide. In the room Sergeant Treadaway saw two tables. The first, nearest to the door, was a round table about six feet in diameter, at which seven or eight men were seated, holding cards in their hands and with money on the table. Further back and against the north wall of the room was a second, octagon shaped, table with six or seven men around it. Immediately the third door was opened, Sergeant Treadaway walked into the room, followed by the other officers. When he was two or three steps inside the room, he said, "Police, police. Sit down." He proceeded northward walking at a rapid pace down the west side of the room, past the first table, and had almost reached the second table when he heard a shot. Three or four seconds elapsed between the time Sergeant Treadaway entered through the third door until he heard the first shot. A total of four, five or six shots were fired. These were fired in two short bursts, first two or three shots, then a pause, then some more shots, the entire time elapsing during the shooting being between 2.2 and 2.8 seconds. Sergeant Treadaway turned and saw Officer McGraw down on the floor on his knees at the south end of the room in the area of the doorway through which he had just entered. Defendant was standing about eight to ten feet away and in the doorway to a bathroom at the southeast corner of the room. Defendant was holding a blue steel snub-nose revolver in his right hand, held across his chest towards his left shoulder and pointing towards the ceiling. The defendant went into the bathroom. After the shooting Sergeant Treadaway found in the bathroom a blue .38 revolver, similar to the one he had seen in defendant's hand. This revolver had five spent rounds.

McGraw had followed Treadaway into the room, about one or two steps behind him, and Officer Tanner had followed immediately behind McGraw. While Treadaway had walked north down the west wall of the room toward the second table, McGraw and Tanner had turned slightly to their right and moved toward the first table. Tanner was hit by three bullets, but recovered from his wounds. McGraw also received three

bullet wounds, two in his back and one on his right forearm. He died as result of the wounds in his back. Officer Taylor, who followed Officers McGraw and Tanner into the room and who had been in the room one or two seconds when the shooting started, testified that he saw defendant fire at McGraw three times and that the last shot was fired by defendant at McGraw after McGraw had fallen to the floor. When McGraw fell, Taylor stepped up over him and McGraw went on through Taylor's legs. As quickly as he could on hearing the first shot, Taylor started drawing his own pistol, a .38 Smith and Wesson, from the holster which he wore on his right hip. In addition to Taylor, five other officers who were present at the shooting, namely, Treadaway, Smith, Patterson, Russell and Wallace, testified that they were armed with .38 caliber pistols at the time.

An S.B.I. expert in firearms testified that, after making tests, he was of the opinion that a bullet found in McGraw's clothing when he was being undressed in the emergency room at the hospital had been fired from the blue .38 revolver which Sergeant Treadaway had found in the bathroom immediately following the shooting. It was also the opinion of this expert that a bullet which was removed from the shoulder of Officer Tanner and a bullet found in the floor near the west wall had been fired from this same .38 caliber revolver, while a fourth bullet, which was found in the floor right inside the door, had been fired by Officer Smith's gun. The witness had no opinion as to what gun had fired a bullet which was removed from beneath McGraw's right arm or a bullet which was found in the east wall of the room. Sergeant Treadaway testified that when he entered the bathroom after the shooting, his own weapon was still in its holster on his right side, that he had not drawn it, and that to his knowledge no other officers had their guns out.

Defendant's evidence in substance showed the following:

Defendant was on the premises as an employee of one Scruggs, who had rented the house in September and had been operating it for gambling for about three weeks. Defendant's duties were to look after the place, to serve food, coffee, sometimes beer and sometimes whiskey. Defendant had been working at the gambling house for four or five days before the night of

the shooting. His salary was to be 25% of the week's take after overhead.

Immediately prior to the officers' entrance, defendant had been mopping the floor around one of the tables where five or six men were playing poker. He had just returned the mop to the bathroom adjoining the main room when he heard a noise in the area of the doorway leading from the entrance hall into the main room. "It sounded like somebody kicked the door down." Defendant looked through the open bathroom door into the main room and saw a man heading in a northerly direction. As this man was proceeding north, defendant saw him knock Mr. McGowan to the floor and also knock over a small table which was against the west wall of the room. The man had a pistol in his hand pointed at the table at the north end of the room where men were playing cards. Two other men came within defendant's view. One of these had a pistol. Defendant did not know these men. Up to that point defendant had not heard anything about police being there or about a search warrant. As the men entered the room one of the poker players at the round table started to get up and defendant heard someone say, "Keep your seat, put your hands over your head. Leave the money on the table." Defendant, thinking it was a robbery, pulled his pistol, and hollered, "Hold it." Defendant then saw the intruder at the northern end of the room (whom defendant later learned was Sergeant Treadaway) turn his pistol toward defendant and run in a southern direction. Defendant heard a shot and thought this man had fired. Defendant ducked in the bathroom doorway and then came back up shooting. Defendant fired because he was being shot at and because he thought they were being robbed. To the best of defendant's recollection he fired three times. Defendant then turned around and reentered the bathroom and stood with his pistol pointed at the bathroom door to see if anybody would come through the door. Then someone hollered, "This is the police. Come out of the bathroom with your hands over your head." Defendant dropped his gun and came out with his hands up.

McGowan, called as a witness for defendant, testified that before the officers entered he was preparing to leave the gambling hall. He looked through the two-way mirror in the door and saw no one. He heard no knock or bell and did not

know anyone was out there. He turned the door knob and it was snatched out of his hand. Some men rushed the door and shoved him backward. Someone coming in the door was carrying a gun. He did not know Treadaway and had never had a conversation with him. He heard no one say they were police when they came inside the room and heard no one say anything with respect to a search warrant. Other occupants of the room also testified that they heard no knock at the door, heard no one say "police" or otherwise make any announcement of identification or purpose, heard no mention of a warrant, and saw no badges or other visible indications identifying the intruders as police officers at any time before the shooting.

The jury found defendant guilty of murder in the second-degree. From judgment imposing prison sentence, defendant appealed. To allow sufficient time for settling the case on appeal, the Court of Appeals granted petition for writ of certiorari.

Attorney General Robert Morgan by Associate Attorney General Walter E. Ricks III for the State.

Sanders, Walker & London by James E. Walker and Arnold M. Stone for defendant appellant.

PARKER, Judge.

Defendant objected to testimony by the officers concerning what they observed on entering the house where the shooting occurred and moved to suppress any evidence which the officers obtained after entering the building on the grounds that the search warrant was invalid and the entry unlawful. After a *voir dire* examination, the trial judge concluded that the warrant, when interpreted with the affidavit, was sufficient to give the officers "at least color of authority to go upon the premises," that therefore the officers "were upon the premises legally, not as trespassers, and that from observing the gambling in the room or the playing of poker by those located at the first table, that the officers had a right and lawful authority to enter and seize the gambling apparatus in use, that is, the playing cards and the money." Upon these conclusions, the judge denied defendant's motion to suppress and overruled his objections to the testimony of the officers. In this there was error.

At the outset, it should be observed that we are not here concerned with any question of whether a search warrant, though defective, may nevertheless be sufficient "color of authority" to protect the officers attempting to serve it from civil liability or from a charge of criminal trespass. Our Supreme Court has held that if properly served, an arrest warrant, though defective, may still be sufficient to protect the officers from an action for false arrest, *Alexander v. Lindsey,* 230 N.C. 663, 55 S.E. 2d 470, and this Court has held that police officers armed with process, if they are known to be officers or if they properly identify themselves, may not be lawfully resisted, though the writ be defective or irregular in some respect. *State v. Wright,* 1 N.C. App. 479, 162 S.E. 2d 56. Such questions are not here presented. Rather, we are here concerned with the question whether defendant's Fourth Amendment rights, made available to him by *Mapp v. Ohio,* 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed. 2d 1081, and his statutory rights provided by Chapter 15, Article 4 of the General Statutes of North Carolina, were violated by the trial court's rulings. We hold that they were.

It is elementary that the Fourth Amendment right to be secure against unreasonable searches and seizures "extends to all equally: to those justly accused, as well as to the innocent." *State v. Mills,* 246 N.C. 237, 98 S.E. 2d 329; that an "unlawful search does not become lawful by the discoveries which result from it"; *State v. Hall,* 264 N.C. 559, 142 S.E. 2d 177; and that a search made without a valid search warrant under circumstances requiring a warrant is an unreasonable search within the meaning of the Fourth Amendment. *State v. Vestal,* 278 N.C. 561, 180 S.E. 2d 755.

[1] Defendant in the present case, as the agent of Scruggs, the lessee of the premises, and as a joint venturer with him in operating the gambling establishment thereon, was the person in charge of the premises at the time the search was made. Accordingly, he had sufficient standing to invoke the protection of the Fourth Amendment against an unlawful search of the premises. *Jones v. United States,* 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed. 2d 697; *Commonwealth v. Rossetti,* 349 Mass. 626, 211 N.E. 2d 658.

[2-4] The Fourth Amendment provides that "no warrants shall issue but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the

persons or things to be seized." Essentially the same requirement is made by our statutes relating to search warrants. G.S. 15-26 provides in part:

> "(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"; and
>
> "(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."

The affidavit in the present case would have been sufficient to support a finding of probable cause for issuing a warrant authorizing a search of the premises for gambling equipment. No such warrant was issued and nothing in the affidavit furnished any basis whatever for the finding of probable cause as contained in the warrant which was in fact issued, i.e., a finding of probable cause to believe that the occupants of the premises to be searched possessed thereon intoxicating liquor in violation of law. The record before us makes manifest that the magistrate, by simply signing without reading the paper which the police officer placed before him, utterly failed to perform the important judicial function which it was his duty to perform as a neutral and detached magistrate of making his own independent determination from the affidavit submitted to him as to whether probable cause existed for issuance of the search warrant which he signed. Had he performed his duty, it is inconceivable that the mistake would have occurred. We deal here not with mere clerical error, but with the safeguarding of fundamental constitutional rights which belong to all of us, rights which, in the first instance, it was the magistrate's high duty to defend. He failed to perform that duty. As a result, the search warrant which he signed was not merely technically defective; it was totally invalid since the finding of probable cause which he purported to make was in no way supported by the affidavit or evidence before him.

G.S. 15-27(a) provides as follows:

> "(a) No evidence obtained or facts discovered by means of an illegal search shall be competent as evidence *in any trial.*" (Emphasis added.)

It should be noted that the language of the statute is broad enough to make the exclusionary rule applicable in any trial, not just in a trial for the offense by reason of which the illegal search was initially undertaken. The trial court's rulings in the present case violated this statutory exclusionary rule. They violated as well the Federal constitutional exclusionary rule announced in *Weeks v. United States,* 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652, and which *Mapp v. Ohio, supra,* made binding upon the States.

[5] We do not accept the trial judge's reasoning, contained in his order overruling defendant's motion to suppress, that "the officers had a right and lawful authority to enter and seize the gambling apparatus in use," because they could observe gambling in the room after the third door was opened. Such reasoning would tend to wipe out the Fourth Amendment altogether. After all, in almost every case an object will become in plain view once a search reveals its presence, but this fact does not dispense with the need for a valid search warrant if the object came within view of the officers under circumstances otherwise requiring one. The pertinent question in the present case is not what was in plain view of the officers once they were in a position to peer through the opened third doorway. Rather, the pertinent question is as to under what circumstances did the officers arrive at that position. In this case they did so while purporting to act under authority of an invalid search warrant and under circumstances in which a valid warrant was required.

[6] Similarly, the fact that after the third door was opened the officers could then claim to have reasonable ground to believe that a misdemeanor, gambling, was being committed in their presence did not, in our opinion, serve to legalize their original entry or to justify a further intrusion into the premises for the purpose of making arrests. No contention has been made that the officers had any ground to believe that a felony had been or was about to be committed by any occupant of the room so as to make the provisions of G.S. 15-43 or G.S. 15-44 here applicable. And in our opinion G.S. 15-41(1), which authorizes a peace officer to make an arrest without a warrant for a misdemeanor committed in his presence, was never intended to legalize a warrantless entry upon premises which could not otherwise be lawfully entered except under authority of a valid warrant. The crucial question still remains as to how

the officers got into such position that they could observe a misdemeanor being committed in their presence.

We hold that the trial court committed prejudicial error in denying defendant's motion to suppress and in overruling defendant's objections to testimony by the officers as to what they saw upon entering the premises which was the subject of their search.

In view of our holding, we need not consider whether the search was illegal for the additional reason, urged by defendant, that, quite apart from any question of validity of the search warrant, entrance to the premises was made in an unlawful manner. We do point out, however, that our Supreme Court has cautioned that even though police officers have a valid search or arrest warrant, absent invitation or permission ordinarily they may not enter a private home unless they first give notice of their authority and purpose and make a demand for entry. *State v. Sparrow,* 276 N.C. 499, 173 S.E. 2d 897. "Compliance with this requirement serves to identify the official status of those seeking admittance. The requirement is for the protection of the officers as well as for the protection of the occupant and the recognition of his constitutional rights." *State v. Covington,* 273 N.C. 690, 161 S.E. 2d 140. While the evidence in the present case was conflicting as to whether the officers knocked before entering the third door and as to when and how clearly they announced their identity as police officers, all of the evidence discloses that the officers took precautions to conceal their presence on the premises until after they had passed through two doorways, that they wore no uniforms and displayed no badges of authority, and that they made no announcement of their identity or purpose until after they had stepped inside the room. Sergeant Treadaway, the first officer to enter the room, testified on cross-examination:

> "I knocked lightly on the third door and it opened. . . I stepped back and opened the door around. . . and I walked in at a pretty rapid pace. . . .
>
> "When I reached a point two or three feet beside of the refrigerator I said we were the police. . . I had taken one or two steps inside the room when I announced we were police. . . . "

* * * * *

"I made no statement regarding a search warrant when I went into the room . . . never mentioned it to anybody . . . never heard anyone else mention it to anybody . . . never heard anyone else mention the words 'search warrant' to anybody."

* * * * *

" . . . We had no warrant to arrest anyone. A search warrant authorizes a search for objects. What we really wanted to do, rather than search for objects, was to catch people in the process of violating the law."

To suppress a misdemeanor, the officers invited a felony. One of their own fell victim. Had they but observed the law themselves, in all probability the tragedy would not have occurred.

[7] Appellant also assigns error to the trial court's rulings excluding testimony and exhibits with respect to beatings and injuries inflicted by the police upon the defendant and other occupants of the premises following the shooting. Defendant's counsel initially sought to elicit this testimony on cross-examination of the officers who testified as State's witnesses. "Cross-examination of an opposing witness for the purpose of showing his bias or interest is a substantial legal right, which the trial judge can neither abrogate nor abridge to the prejudice of the cross-examining party." *State v. Hart,* 239 N.C. 709, 80 S.E. 2d 901. The excluded evidence was clearly competent to show the bias of the witnesses against the defendant, and the trial court committed prejudicial error in excluding it in this case. *State v. Hart, supra; State v. Sam,* 53 N.C. 150.

[8, 9] The trial court refused to permit defendant to testify concerning information he had received prior to the shooting as to robberies of gambling games in the Charlotte area in recent years. This testimony was relevant as bearing upon the reasonableness of defendant's apprehension that a robbery might have been in progress when he saw unidentified armed men walking rapidly into the room. While defendant obtained his information as to the robberies of the other gambling games from third parties, his testimony concerning their statements to him was not offered to prove the truth of their statements but only to show that the statements had been made to him. The exclusionary force of the hearsay rule is not applicable when the extrajudicial statement of a third person is not offered to prove the truth of the utterance, but only to show

that the statement was made. In this case the fact that such statements had been made to defendant was independently relevant to defendant's state of mind quite apart from any question of the truth or falsity of the statements. Defendant suffered prejudicial error in the exclusion of this testimony.

Appellant has made other assignments of error, some of which appear to have merit. We do not discuss them, however, since the questions presented may not recur upon a new trial. For the errors noted above, defendant is entitled to a

New trial.

Judges CAMPBELL and MORRIS concur.

HERMAN FLAKE BRASWELL, INDIVIDUALLY, AND CLYDE M. HUNTLEY, INDIVIDUALLY AND ALSO AS BISHOP AND ELDER OF THE SHILOH TRUE LIGHT CHURCH OF CHRIST, RESPECTIVELY AND THE SHILOH TRUE LIGHT CHURCH OF CHRIST v. JAMES ROMMIE PURSER, JAMES TED GRIFFIN, MARLEY C. GRIFFIN, ROBERT L. WATSON AND TIMMY EARP

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JAMES ROMMIE PURSER, INDIVIDUALLY, AND AS ELDER OF THE SHILOH TRUE LIGHT CHURCH OF CHRIST, ROBERT L. WATSON, INDIVIDUALLY, AND AS DEACON OF THE SHILOH TRUE LIGHT CHURCH OF CHRIST ON BEHALF OF THE SHILOH TRUE LIGHT CHURCH OF CHRIST AND THE MEMBERS THEREOF v. HERMAN FLAKE BRASWELL, CLYDE M. HUNTLEY, NANCY HUNTLEY, M. E. AUSTIN, DEVON HILL, NETTIE S. HORD, GLENN E. AUSTIN, PHYLLIS ANN AUSTIN, AND ALL OTHER PERSONS IN ACTIVE CONCERT WITH THEM

No. 7226DC464

(Filed 30 August 1972)

1. **Appeal and Error § 30— competency of evidence — absence of objection or exception**

The competency of evidence is not presented when there is no objection or exception to its admission, and such evidence is properly considered by the court even though it is incompetent and should have been excluded had objection been made.

2. **Appeal and Error § 24— abandonment of exceptions**

Exceptions not brought forward and assigned as error are deemed abandoned.

3. Trial § 33— instructions — subordinate features

When the court adequately charges on all substantive features of a case, it is not error for the court to fail to give instructions on subordinate features, since the party desiring such instruction or greater elaboration must request it.

4. Religious Societies and Corporations § 2— institutional church — connectional church

The terms "institutional church" and "connectional church" are synonymous.

5. Religious Societies and Corporations § 3— determination of church leadership —instructions — definitions of terms

The trial court in an action to determine the true leadership of a religious society sufficiently defined the terms "connectional church," "congregational church," and "conference," and failure of the court to define such terms in the precise manner desired by appellants was not error, particularly when no request for specific instructions was submitted.

6. Trial § 34— instructions on contentions

The trial court is not required to state the contentions of the parties, but if the court undertakes to state the contentions of one party upon a particular aspect of the case, the court must give the contentions of the adverse party.

7. Religious Societies and Corporations § 3— action to determine church leadership — statement of plaintiffs' contentions

In an action to determine the true leadership of a religious society, the trial court did not err in failing to state plaintiffs' contentions as to the law of usages, customs and practices of the church, as to who constituted the conference, as to the authority of one plaintiff, as to why the church was not congregationally governed and as to the invalidity of an election by the religious society, where the charge accurately reflects the essential features of the case and no request was made for additional instructions as to plaintiffs' contentions.

8. Trial § 31— peremptory instruction

A peremptory instruction in favor of the party having the burden of proof is proper only when there is no conflict in the evidence and all the evidence tends to support such party's right to relief.

9. Religious Societies and Corporations § 3— leadership of church — failure to give peremptory instructions

In an action to determine the true leadership of a religious society, the trial court did not err in failing to give peremptory instructions in favor of plaintiff on issues as to whether a church was a connectional church governed by a chief elder, chief bishop or a person referred to as head of the church, whether plaintiff was the duly elected chief elder, chief bishop or head of the church, and whether plaintiff had authority as chief elder, chief bishop or head of the church to appoint elders of the separate societies, where the evidence was conflicting on all three issues.

10. Appeal and Error § 45— abandonment of assignments of error

Assignments of error not brought forward and argued in the brief are deemed abandoned. Court of Appeals Rule 28.

11. Religious Societies and Corporations § 3— leadership of church — issues

In an action to determine the true leadership of a religious society, the evidence supported the submission of an issue as to whether defendant had been duly elected as elder of the society at either one of two elections held by the congregation.

12. Trial § 20— failure to move for directed verdict or nonsuit — issue raised on appeal

Appellants who failed to move for a directed verdict or for nonsuit at the close of the evidence cannot raise such an issue for the first time on appeal.

13. Appeal and Error § 24— assignment presenting several questions

An assignment of error which is based on separate exceptions and which attempts to present several questions of law is broadside and ineffective.

14. Appeal and Error § 24— assignment of error — showing of question presented

An assignment of error must show within itself the question sought to be presented, and a mere reference to the record page where the asserted error may be discovered is not sufficient.

15. Religious Societies and Corporations § 3; Trial § 10— reasons for excluding evidence — expression of opinion

In an action to establish the true leadership of a religious society, the trial court did not express an opinion on the evidence when, in sustaining an objection to a question plaintiff had asked defendant, the court stated that defendant was not qualified as an ecclesiastical scholar and that the question inquired into doctrinal matters over which the court had no jurisdiction, since the court was merely stating the reasons for excluding the testimony and the court's conclusion was correct. G.S. 1A-1, Rule 51(a).

16. Religious Societies and Corporations § 3; Trial § 10— expression of opinion — reference to "this man's church"

In an action to determine the true leadership of a religious society, the trial court did not express an opinion in referring to "this man's church at Shiloh" even if the court was referring to defendant, as the statement only indicated defendant's membership in the church and did not intimate that defendant's rights were any greater than those of plaintiff.

17. Religious Societies and Corporations § 3; Trial § 10— determination of church leadership — expression of opinion

In an action to determine the true leadership of a religious society, the trial court did not express an opinion in stating that the court had heard enough as to plaintiff's being carried out of the

church, that it was not important in the decision and that a lot of time was being wasted on that point.

Chief Judge MALLARD dissents.

APPEAL by plaintiffs *(Braswell v. Purser,* case number 69 CVD 11258) and defendants *(Purser v. Braswell,* case number 70 CVD 2332) from *Stukes, District Judge,* 29 November 1971 Session of MECKLENBURG District Court.

These two actions involve the leadership of the Shiloh True Light Church of Christ (Shiloh) located in Mecklenburg County. A summary of material pleadings and orders in each case is appropriate.

BRASWELL, et al v. PURSER, et al

This action was brought by "Herman Flake Braswell, Individually, and Clyde M. Huntley, Individually and also as Bishop and Elder of the Shiloh True Light Church of Christ, Respectively and the *Shiloh True Light Church of Christ v. James Rommie Purser, James Ted Griffin, Marley C. Griffin, Robert L. Watson and Timmy Earp.*" It was instituted on 31 December 1969 and the complaint is summarized as follows:

Shiloh is one of a number of True Light Churches of Christ (True Light Church) located in North Carolina and South Carolina. Each church is a society presided over by an elder appointed by the head bishop, also known as the head elder. The head bishop is the highest officer in the church government. Each elder may appoint a member of his society to assist him in his duties, said assistant being designated as a preacher. The head bishop is elected at a conference composed of elders and preachers of the various societies.

On 23 December 1969 the head bishop, E. H. Mullis (Mullis), an elder at Shiloh, died and on 26 December 1969 at a conference of elders and preachers called in accordance with established procedure, plaintiff Braswell (Braswell) was duly elected head bishop of the True Light Church. On 28 December 1969 Braswell appointed plaintiff Huntley (Huntley) elder for Shiloh. (Huntley died before the trial). Prior to his death Mullis appointed Purser his assistant at Shiloh but Purser's appointment terminated following Mullis's death and Braswell's appointment of Huntley as elder of Shiloh.

On Sunday, 28 December 1969, Braswell, as head bishop, went to Shiloh for the purpose of presiding over a regular worship service but was physically removed from the Shiloh church building by defendants other than Purser but with Purser's approval. On said occasion defendants threatened Braswell with violence and prevented him from exercising the powers and duties of the office to which he had been duly elected. After Braswell was removed from the building Purser took charge and presided over the service. Neither of defendants was a duly elected official of Shiloh. Plaintiffs prayed for a temporary restraining order and a permanent injunction restraining and enjoining defendants from interfering with plaintiffs in the execution, performance and enjoyment of their privileges, rights and duties as head bishop and elder.

Defendants' answer, filed 6 February 1970, is summarized as follows:

Continuously since its organization in 1906 Shiloh has been a separate entity congregationally ruled. For many years prior to his death Mullis served Shiloh as its spiritual leader, having been elected elder by the membership of Shiloh. For some three years prior to Mullis's death and at his request and with the consent of Shiloh members, Purser served as Mullis's assistant. Following Mullis's death a majority of the Shiloh membership elected Purser to serve as elder.

So far as defendants know, at the time this action was instituted Shiloh was the only church of its kind in the United States meeting on a regular weekly basis. Prior to December 1969 there had been three churches of like faith in South Carolina and two in Union County, North Carolina, but they had ceased to function regularly.

In previous years when the other churches or societies were functioning, the elders of the various societies would meet periodically in conference but there was never any attempt by the conference to dictate policy to or control of any local society or deprive the membership of a local society of its right to select its leaders and otherwise control its program. Since the institution of this action plaintiffs have attempted to reactivate some of the former societies. Defendants prayed that the court determine the rightful officials of Shiloh and enjoin all others from interfering with said officials.

On 2 March 1970, following a hearing on plaintiffs' motion for a temporary injunction, an order was entered finding facts in favor of defendants and denying plaintiffs' motion.

PURSER, et al v. BRASWELL, et al

This action was brought by "James Rommie Purser, Individually, and as Elder of the Shiloh True Light Church of Christ, Robert L. Watson, Individually, and as Deacon of the Shiloh True Light Church of Christ, Robert L. Watson, Individually, and as Deacon of the Shiloh True Light Church of Christ on Behalf of the Shiloh True Light Church of Christ and the Members Thereof v. Herman Flake Braswell, Clyde M. Huntley, Nancy Huntley, M. E. Austin, DeVon Hill, Nettie S. Hord, Glenn E. Austin, Phyllis Ann Austin, and all other Persons in Active Concert With Them." The action was instituted on 4 March 1970 and the complaint is summarized as follows:

Shiloh has been and is congregationally ruled and its members have a right to choose their own leaders and to govern and manage their own affairs. On 14 January 1970 at a duly called meeting, the membership of Shiloh elected Purser as its elder and he is now serving in that capacity. On Sunday, 1 March 1970, as Purser was conducting the regularly scheduled worship service at Shiloh, certain of defendants entered the church building in a loud, boisterous and menacing manner and demanded that Purser remove himself from the pulpit. Purser was unable thereafter to conduct the service and for fear that there would be violence adjourned the meeting. Braswell was not present at the time of the disruption but on information and belief plaintiffs allege that those disrupting the service were acting at Braswell's direction. Braswell and those acting in concert with him have no authority to exercise any control at Shiloh. Plaintiffs prayed for injunctive relief.

In their answer defendants denied the material allegations of the complaint and in a further answer and cross action, with some variations, set forth substantially the same allegations as contained in their action previously filed. One of the variations is that the elders, *deacons* and preachers of the respective societies constituted the conference and elected the head bishop. They also elaborated on the customs, practices,

usages and doctrines of the True Light Church and alleged in some detail how Purser had departed from the principles of the church.

On 13 March 1970 following a hearing the district court entered an order finding facts substantially as alleged by Purser, particularly that Braswell is not "Bishop" or "Head Bishop" and is without any authority to rule Shiloh, and that Braswell and those acting in concert with him be enjoined from directly or indirectly interfering with worship services at Shiloh.

* * * * * *

On 29 November 1971 Braswell's attorney, James J. Caldwell, Esq., filed a motion setting forth that his clients desired to represent themselves in the trial in these actions and asked that he be allowed to withdraw as counsel. With the written consent of Braswell and his codefendants in the second case, the court entered an order allowing Attorney Caldwell to withdraw.

By agreement of the parties the cases was consolidated for trial. At trial Braswell proceeded as plaintiff and served as his own counsel. He called as an adverse witness Purser whose testimony covers some 126 pages in the record. Braswell attempted to show that the True Light Church is a religious denomination with a connectional form of government. Purser attempted to show by his testimony and witnesses presented by him that the True Light societies, particularly Shiloh, are local churches, congregationally controlled. The evidence failed to disclose any written document providing for the government of the local society or the conference. Braswell did introduce a small seven page publication entitled "Articles of Faith of the Truelight Church of Christ" which addressed itself to doctrines and beliefs of the True Light Church but said nothing about church government. Braswell also introduced a document entitled "Minutes of the 1920-1924 Conferences of the Truelight Church of Christ." The latter document indicated that between November 1920 and December 1924 annual conferences composed of elders, preachers and deacons of the various societies were held. The minutes reveal that a chairman for the conference was elected by the conference at the 1920, 1921 and 1922 meetings; and that at the 1923 meeting J. D. Reynolds and R. H. Reynolds were elected "to serve permanently as chairman and clerk, respectively." Further reference to the minutes is made in the opinion.

The parties stipulated that the Shiloh Church property was conveyed by deed dated 16 January 1906 "to the deacons of Shiloh Church known as True Light Church, W. E. Pinyon, R. D. Huntley, M. L. Huntley, deacons of said church and their successors in office to be held by them for and on behalf of the church and its membership."

Issues were submitted to and answered by the jury as follows:

1. Is the Truelight Church of Christ a connectional church governed by a Chief Elder, Chief Bishop or by a person referred to as Head of the Truelight Church of Christ?

ANSWER: No.

2. If so, was Herman Falke (sic) Braswell duly elected as Chief Elder, Chief Bishop or Head of the Church at a duly called and constituted conference of the Truelight Church of Christ on December 26, 1969?

ANSWER: .....

3. If so, does Herman Flake Braswell, as such Chief Elder, Chief Bishop or Head of the Church, have authority to appoint Elders of the separate societies, including the Shiloh Truelight Church of Christ?

ANSWER: .....

4. Is the Truelight Church of Christ a congregationally governed church?

ANSWER: Yes.

5. If so, was James Rommey Purser duly elected as Elder of the Shiloh Truelight Church of Christ by the congregation thereof on December 28, 1969, or on January 14, 1970.

ANSWER: Yes.

The trial judge charged the jury, *inter alia,* that if they answered the first issue No, they would not answer the second and third issues but would proceed to consider and answer the fourth and fifth issues.

The court entered judgment predicated on the verdict, adjudging that the True Light Church is a congregationally

governed church, that Purser is the duly elected elder of Shiloh, and permanently enjoining Braswell and his codefendants in the second action from interfering with the operation of Shiloh. Braswell and his codefendants in the second action appealed from the judgment and reemployed Attorney Caldwell to represent them on appeal.

James J. Caldwell for plaintiff appellants.

Bailey & Davis by Douglas A. Brackett for defendant appellees.

BRITT, Judge.

[1, 2] Neither of the numerous assignments of error is based on the introduction of exclusion of evidence. No doubt the lack of exceptions to the evidence is attributable to the fact that appellant Braswell, without prior legal experience, chose to represent himself. There being no assignments of error concerning the introduction or exclusion of evidence brought forward all the evidence is deemed to be competent. The competency of evidence is not presented when there is no objection or exception to its admission and such evidence is properly considered by the court even though the evidence is incompetent and should have been excluded had objection been made. *Lambros v. Zrakas,* 234 N.C. 287, 66 S.E. 2d 895 (1951); *Manufacturing Corp. v. Mutual Exchange,* 213 N.C. 658, 197 S.E. 196 (1938). Where exceptions are taken they must be brought forward and assigned as error or they are deemed abandoned. *Iredell County v. Crawford,* 262 N.C. 720, 138 S.E. 2d 539 (1964); *Cline v. Cline,* 6 N.C. App. 523, 170 S.E. 2d 645 (1969).

Twelve of appellants' sixteen assignments of error relate to exceptions to the court's charge to the jury. For purpose of discussion similar portions of assignments of error will be considered together.

[3] Appellants contend in assignments of error 1, 2, 4, and 15 that the court erred in failing to define certain words, phrases or terms. It is the duty of the court to charge the law applicable to the substantive facts of the case without special request, *Panhorst v. Panhorst,* 277 N.C. 664, 178 S.E. 2d 387 (1971); however, where the court adequately charges on

all substantive features of a case it will not be error to fail to give instructions on subordinate features of the case, since the party desiring such instruction or greater elaboration is under a duty to request it. *Koutsis v. Waddel,* 10 N.C. App. 731, 179 S.E. 2d 797 (1971).

The words and terms alleged to be insufficiently defined or necessary to be defined are "institutional church," "connectional church," "congregational church" and "conference."

[4] Two types of church government are generally recognized, congregational and connectional. In 45 Am. Jur., Religious Societies, § 4, p. 725, we find: "Under some systems each church or religious society is an independent body, with a congregational form of government, not subject to the control of any higher ecclesiastical judicature, but a law unto itself, and self-governing in its religious functions. Under other systems a local church is but a member of a larger and more important religious organization, and is under its government and control, and the voluntary act of joining the general denominational organization subjects the local church to its rules and regulations." We think the terms "institutional church" and "connectional church" are synonymous.

[5] In its charge the court spelled out what is meant by a "connectional church," that such a church is a member of a conference or similar higher body and could be subject to a person appointed or elected by the higher body. The court then gave a definition of "congregational church" stating in essence that such a church is independent and its affairs are governed by the congregation, i.e., its members. The word "conference" was defined by analogy as being a higher organizational body than the individual church. We think the definition of terms was sufficient under the evidence in this case. *Conference v. Creech, et al,* 256 N.C. 128, 123 S.E. 2d 619 (1962). The failure of the court to define the terms in the precise manner desired by appellants was not error, particularly when no requests for specific instructions were submitted.

[6, 7] Appellants contend in assignments of error 1, 2, 3, 4, and 5 that the court erred in failing to state the contentions of appellants to the jury. The trial court is not required to state the contentions of the parties. *In re Will of Wilson,* 258 N.C.

310, 128 S.E. 2d 601 (1962). But if the court undertakes to state the contentions of one party upon a particular aspect of the case, it is incumbent upon the court to give the contentions of the adverse party. *Key v. Welding Supplies,* 273 N.C. 609, 160 S.E. 2d 687 (1968). In this case the court carefully gave the contentions of each party when contentions of either were given thus complying with the rule. We perceive no error in the failure of the court, absent a request to do so, to state appellants' contentions as to the law of usages, customs and practices of the True Light Church, as to who constituted the conference, as to the authority of appellant Braswell, as to why the church was not congregationally governed and as to the invalidity of the election. After reviewing the charge we hold that it accurately reflects the essential features of the case and that in the absence of a request for further instructions or in apt time asking the court to give further or different contentions, the charge as to contentions is sufficient. *Peterson v. McManus,* 210 N.C. 822, 185 S.E. 462 (1936).

Appellants next contend in assignments of error 10, 14 and 15 that the court erred in the manner in which it instructed the jury. Assignments of error 10 and 14 deal with the court's failing to instruct the jury that if they believed that there were numerous societies, that it was the custom and practice of the church to have conference meetings with representatives from the various societies with one representative designated as head elder and recognized as the head of the church, whether designated or not, then the first issue should be answered yes. We find no merit in the assignments and hold that the instructions given on the first issue were sufficient, absent a request for further instructions. Assignment of error 15 alleges error in not instructing the jury that a society may be congregational as to election of local officers, but connectional as far as election of conference officers are involved. Again, we think the portion of the charge explaining "connectional" and "congregational" was sufficient absent a request for special instructions. The court adequately charged the law on every material aspect of the case arising on the evidence and applied the law fairly to the various factual situations presented by the evidence, therefore, the charge was sufficient and will not be held error for failure of the court to give instructions on subordinate features of the case, since it is the duty of a party desiring

greater elaboration to tender a request therefor. 7 Strong, N.C. Index 2d, Trial, § 33, p. 329.

Appellants contend in assignments of error 2, 3 and 9 that the court erred in failing to give peremptory instructions as to issues 1, 2 and 3, contending that the jury should have been instructed to answer the first three issues yes. They contend that all the evidence was conclusive on those three issues. This contention is without merit.

[8, 9] The jury answered the first issue no and the second and third issues were unanswered. As to the first three issues Braswell was plaintiff and as such the burden of proof rested on him. It is settled law that a peremptory instruction in favor of the party upon whom rests the burden of proof is proper when there is no conflict in the evidence and all the evidence tends to support the party's right to relief. *Flintall v. Insurance Co.*, 259 N.C. 666, 131 S.E. 2d 312 (1963). But a peremptory instruction for plaintiff is error when different inferences can be drawn from the facts admitted or established, or when the evidence is conflicting upon the issue. *Gouldin v. Insurance Co.*, 248 N.C. 161, 102 S.E. 2d 846 (1958); *Perry v. Trust Co.*, 226 N.C. 667, 40 S.E. 2d 116 (1946). A careful review of the evidence reveals that there was conflicting evidence as to all three issues and thus the right to any peremptory instruction is negated. As to the first issue appellants' own evidence, the minutes of the 1920-24 Conference of the True Light Church, provides on pages 35-37 as follows:

> "The government of the True Light Church is congregational ruled (sic) by a two-third (sic) majority in matters of discipline. . . . (a)nd further we would say when a community of True Lights increase to a sufficient number to justify it, they should organize by appointing one of their influential members of good report as Elder, to look after the spiritual welfare of that particular society."

As to the second issue the record is replete with testimony that no such position as Chief Elder or Chief Bishop exists, thereby raising a question for the jury. As to the third issue appellants' own evidence once again prohibits a peremptory instruction. The above quoted segment from the 1920-24 conference minutes indicates each society "appoints" an elder to lead that particular society. Therefore, the evidence being in

conflict as to all three issues the court was correct in not giving peremptory instructions as to those issues.

[10] Appellants' assignments of error 6, 8, 11, 12 and 13 are not brought forward and argued in their brief as required by Rule 28 of the Rules of Practice in the North Carolina Court of Appeals, therefore, they are deemed to be abandoned. *Jackson v. Collins,* 9 N.C. App. 548, 176 S.E. 2d 878 (1970).

[11] Appellants contend in assignment of error 5 that the court erred in allowing the jury on the question of the election of Purser as Elder at Shiloh to consider one of two elections to be valid. There is sufficient evidence to support the submission of this issue to the jury. It was a question of fact as to what would constitute a duly elected elder by the church (society) and the jury found that such an election occurred at one of two elections. It is not necessary in determining the rights of the parties to determine at which election Purser was duly elected. The assignment of error is overruled.

[12] Appellants contend in assignment of error 7 that the court erred in failing at the close of all the evidence to direct a verdict in favor of plaintiff Braswell in the first case and in failing to nonsuit the plaintiffs Purser, et al, in the second case. A careful review of the record discloses that appellants failed to move for a directed verdict or for nonsuit at the close of the evidence; they cannot raise this issue for the first time on appeal. 7 Strong, N.C. Index 2d, Trial, § 20, pp. 291, 292. In addition it has been held that the court cannot direct a verdict in favor of the party having the burden of proof. *Cutts v. Casey,* 278 N.C. 390, 180 S.E. 2d 297 (1971).

[13, 14] Appellants contend "(t)he court erred in expressing an opinion through comments in those incidents too numerous to set out in this Assignment of Error, but which are based upon plaintiffs' Exceptions Nos." 2 through 50. The assignment sets forth the pages of the record on which the exceptions appear. Appellants then restate that the instances and comments are too numerous to set out but bring forward four instances that are supported by reason and argument. Where one assignment of error is based on separate exceptions and attempts to present several separate questions of law, it is ineffectual as a broadside assignment. *Hines v. Frink,* 257 N.C. 723, 127 S.E. 2d 509 (1962). The assignment must show

within itself the question sought to be presented and a mere reference in the assignment of error to the record page where the asserted error may be discovered is not sufficient. *In re Will of Adams,* 268 N.C. 565, 151 S.E. 2d 59 (1966). We consider only the instances brought forward and argued.

[15] On Pages 109-110 of the record appears a discussion between Braswell, Purser's attorney and the court which occurred during the course of Braswell's lengthy examination of Purser. Braswell stated: "I asked him if this doesn't verify that if the congregation refused to accept what the Conference Body presents to them that the Conference Body is clear of their blood, and that puts them under condemnation?" The court sustained an objection to the question and stated: "You're asking him for some interpretation of some scripture . . . . Now, you may later on, read in your argument to the jury and give your interpretation of it, but he can't do that . . . . His conclusions about it, I think, at this point, is incompetent because he hasn't been qualified as an ecclesiastical scholar, and another thing, I don't think he can testify to it if he was a scholar because you get into doctrinal matters which the court has no jurisdiction over."

We do not think the court expressed an opinion "whether a fact is fully or sufficiently proved" in violation of G.S. 1A-1, Rule 51(a). We think the court was merely stating an opinion as to the admissibility of the evidence and we agree with the conclusion. The legal or temporal tribunals of the State have no jurisdiction over, and no concern with, purely ecclesiastical questions and controversies. *Reid v. Johnston,* 241 N.C. 201, 85 S.E. 2d 114 (1954).

[16] Appellants contend that it was error for the court to refer to the Shiloh Church as "this man's church at Shiloh." They contend "this man's" refers to Purser and indicated that the court believed Purser was entitled to the church. If the remark is viewed in context there is no definite referral to Purser and even if Purser were being referred to in the statement it would seem to indicate only Purser's membership in the church and certainly did not intimate that Purser's rights to Shiloh were any greater than appellants'.

[17] Finally, appellants contend the court expressed an opinion in stating that the court had heard enough as to Braswell's being carried out of the church, that it was not important in the

decision and that a lot of time was being wasted on that point. Appellants contend this is the very reason an injunction was sought. We agree that this was the reason but it in no way could aid the jury in answering the issues submitted and particularly in determining whether Shiloh was a connectional or congregational church or society. The prohibition of an expression of opinion relates only to facts which are pertinent to the issues to be decided by the jury, and it is incumbent upon the appellant to show prejudice. *Kanoy v. Hinshaw,* 273 N.C. 418, 160 S.E. 2d 296 (1968); *Greer v. Whittington,* 251 N.C. 630, 111 S.E. 2d 912 (1960). We hold that appellants have failed to show any prejudice resulting from the remarks of the trial judge. The remarks did not constitute an expression of opinion, but were merely conscientious attempts to afford Braswell, acting by his own choice without counsel, every opportunity to present his evidence but at the same time exercise the court's responsibility to control and regulate the conduct of the trial.

We have carefully considered all of the assignments of error properly brought forward and presented but finding them without merit, they are all overruled.

No error.

Judge CAMPBELL concurs.

Chief Judge MALLARD dissents.

J. H. PATRICK AND WACHOVIA BANK & TRUST COMPANY, EXECUTORS OF THE WILL OF P. P. GREGORY, DECEASED v. JOE L. HURDLE (CASE #67-CVS-8 AND CASE #70-CVS-179)

No. 721SC545

(Filed 30 August 1972)

1. Trial § 3— denial of motion for continuance — no abuse of discretion

The trial court did not abuse its discretion in denying defendant's motion for continuance where such motions had been granted twice before, where defendant, who was in declining health, had been ordered to preserve his testimony by deposition or file a physician's certificate that substantial risk of harm to his physical condition would arise from his doing so and he did not comply with such order,

and where the granting of a further continuance would severely prejudice plaintiffs.

2. **Appeal and Error § 6— interlocutory order — no right of appeal — appeal treated as petition for certiorari**

Though defendant had no right of appeal from the entry of partial summary judgment in two cases, the court on appeal nevertheless treated the appeals as petitions for certiorari, allowed them and passed upon the merits of the questions raised. G.S. 1A-1, Rule 54; G.S. 1-277.

3. **Accounts § 1; Pleadings § 11— mutual running account — counterclaim — summary judgment — no error**

The trial court properly entered partial summary judgment for plaintiff in an action on a mutual running account arising out of farming and business operations, despite defendant's counterclaim, where there was no genuine issue with respect to defendant's indebtedness and where defendant's counterclaim involved items of personal service allegedly rendered plaintiff which could, at most, entitle defendant to a set-off.

4. **Mortgages and Deeds of Trust § 24— right to foreclosure — partial summary judgment — ample evidence to support motion — general denial of evidence**

The trial court did not err in determining that there was no genuine issue with respect to defendant's obligation under notes executed by him or with respect to plaintiff's right to foreclose on the notes and deeds of trust where plaintiff offered abundant evidence that defendant and wife executed the notes and deeds of trust, that the instruments were executed under seal and for consideration and that they were unsatisfied, where defendant offered only a general denial in response to a request that he admit certain particulars regarding the notes and deeds of trust, and where defendant's counsel was given an opportunity before entry of summary judgment to advise the court as to what evidence defendant would produce in support of his denial of the execution of the notes and such advice was not given.

APPEAL by defendant from *Godwin, Special Judge,* 29 November 1971 Civil Session of Superior Court held in CURRITUCK County.

Defendant appeals from an order granting partial summary judgment in companion cases and from judgment entered upon a jury verdict finding certain items in defendant's counterclaim barred by the statute of limitations.

For many years prior to his death on 26 May 1966, plaintiffs' testator, P. P. Gregory, was engaged in various businesses including sawmilling, produce, seed, feed and farming. In the

mid-1940s defendant Hurdle started working with Gregory in his sawmill operations, doing bulldozer work for him, and farming with cash and supplies furnished by Gregory. After Gregory's death plaintiffs' brought two actions seeking to recover the total sum of $101,268.27, an indebtedness allegedly arising from the business dealings between Hurdle and Gregory through the years.

In the first action (principal action), instituted 7 April 1967, plaintiffs seek judgment for the total sum, alleging in four separate claims that Hurdle is indebted (1) on a mutual and open running account in the sum of $64,210.52; (2) under a note dated 31 July 1957 on which there is a balance due in the sum of $14,500.00; (3) under a note dated 26 April 1954 in the amount of $22,557.75, and (4) under a stated account for the total of the amounts alleged in the first three causes of action.

In the second action (foreclosure action), instituted 28 December 1970, plaintiffs seek the foreclosure of two deeds of trust allegedly executed by Hurdle, and one allegedly executed by Hurdle and his wife. All three were allegedly given as security for the indebtedness alleged in the first complaint. Hurdle's wife, India Marie Hurdle, and the trustees under the deeds of trust are included as defendants in this action.

Hurdle filed answers denying any indebtedness to the estate and setting forth identical counterclaims in both actions alleging that $500,000.00 is due him for various services performed for Gregory from the mid-1940s until Gregory's death.

Issues raised in the principal action as to whether the various claims are barred by the statute of limitations were tried before Judge Hubbard, and a jury, at the January 1970 Civil Session of Superior Court. The jury found as follows: (1) The items in plaintiffs' first claim on the alleged open account, accruing more than three years before Gregory's death, are not barred by the statute of limitations; (2) the transactions in Hurdle's counterclaim accruing more than three years before Gregory's death are barred by the statute of limitations; (3) plaintiffs' second claim on the note on which $14,500.00 is allegedly due is not barred by the statute of limitations; (4) plaintiffs' third claim on the note on which $22,557.75 is allegedly due is barred by the statute of limitations and (5)

plaintiffs' claim for an account stated is not barred by the statute of limitations. The jury's verdict on the second issue was set aside by the court in its discretion and judgment was entered on the verdicts as to the other issues.

On 4 November 1971 plaintiffs moved in each case for summary judgment. The cases came on for trial, and for hearing on plaintiffs' motions for summary judgment, at the 29 November 1971 Civil Session. Hurdle moved for a continuance. His motion was denied and plaintiffs' motions for summary judgment were partially allowed.

In the principal action the court adjudged that (1) Hurdle is indebted to plaintiffs on the mutual, open and running account, alleged as plaintiffs' first claim for relief, in the sum of $64,210.52, plus interest from the date of Gregory's death, and (2) Hurdle is indebted to plaintiffs in the sum of $14,500.00, plus interest from Gregory's death, on the note dated 31 July 1957 as alleged in plaintiffs' second claim for relief. Final judgment was stayed pending a determination of the amount, if any, defendant is entitled to recover on his counterclaim. The remaining issues for trial were set forth in the judgment as: (1) What amount, if any, are plaintiffs entitled to recover from Hurdle on the account stated as alleged in plaintiffs' fourth claim for relief? (2) Are the transactions set forth in Hurdle's counterclaim accruing more than three years before the death of Gregory barred by the statute of limitations? (3) What amount, if any, is Hurdle entitled to recover of plaintiffs on his counterclaim alleged in the answer?

The second issue set out above was tried and answered by the jury in the affirmative. Judgment was entered thereon and Hurdle excepted. The remaining issues were ordered tried at a later trial or reference.

In the foreclosure action summary judgment was entered adjudging plaintiffs entitled to foreclose all the notes and deeds of trust therein alleged, subject to a final determination of the amount, if any, found to be owing to plaintiffs on the mutual account alleged in the principal action after resolution of Hurdle's counterclaim. Foreclosure was stayed pending this final determination, and also pending future determinations of the legal rights, if any, of the defendant "India Marie Hurdle

arising from her marital relationship with the defendant Joe L. Hurdle and the legal and equitable rights, if any, of both defendants Hurdle and/or their heirs and assigns, including, but not limited to, possible rights of marshalling of assets."

Only the defendant Hurdle has appealed.

Leroy, Wells, Shaw, Hornthal & Riley by Dewey W. Wells and L. P. Hornthal, Jr., for plaintiff appellees.

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

GRAHAM, Judge.

We first consider the appeal from judgment entered in the principal action on the jury verdict finding items in Hurdle's counterclaim accruing more than three years before the death of Gregory barred by the statute of limitations.

[1] Hurdle assigns as error the court's denial of his motion for a continuance. This assignment of error is overruled. Continuances are not favored. *Wilburn v. Wilburn,* 260 N.C. 208, 132 S.E. 2d 332. This action has been pending since 7 April 1967 and has twice before been the subject of appeals to this Court. See 6 N.C. App. 51, 169 S.E. 2d 239, and 7 N.C. App. 44, 171 S.E. 2d 58. Both cases were continued twice upon Hurdle's motions based upon contentions that he is physically unable to attend court. When he moved for a continuance on 30 November 1970, an independent medical examination was ordered. This examination tended to show that Hurdle was physically able to come to court and go through trial but not to stand a lot of "abuse on the witness stand." The court nevertheless continued the case upon being advised by Hurdle's counsel that they were not prepared for trial since they had believed their client's illness would prevent his attending court.

The cases were set peremptorily as the first cases for trial at the 25 January 1971 Session of Superior Court. At this session of court, a continuance was again ordered because of Hurdle's physical inability to attend trial. However, Judge Peel, the presiding judge, found at that time that while Hurdle is suffering from a chronic, progressive condition which may prevent his ever attending trial, he may be able to preserve

his testimony by deposition. Hurdle was thereupon ordered to preserve his testimony by deposition within sixty days, or to file with the clerk a physician's certificate that substantial risk of harm to his physical condition would arise from his doing so. He did neither.

In denying Hurdle's motion to continue the cases when called at the 29 November 1971 Session, Judge Godwin found that Hurdle "has been physically able to be deposed and that defendant has failed to show, by certificate of physician as required by Judge Peel's order or otherwise, that he could not, within 60 days of such order, give his testimony by deposition without substantial risk of harm to his physical condition." Judge Godwin also found from evidence in the record that Hurdle's physical condition is deteriorating; that he is not likely to improve; and that a further continuance would severely prejudice plaintiffs.

It is well established in this jurisdiction that a motion for a continuance is addressed to the sound discretion of the trial judge and his ruling thereon is not reviewable in the absence of manifest abuse of discretion. 7 Strong, N.C. Index 2d, Trial, § 3, p. 258. The facts appearing in the record fail to show any abuse of discretion on the part of the court. To the contrary, they indicate that defendant has been afforded reasonable opportunity to present by deposition any defenses he may have. Moreover, all of the evidence before the court tended to show that defendant's physical condition is not likely to improve. "Since the purpose of a continuance granted because of the poor health of a party is to postpone the proceedings to a later date when the party will be in a better condition to present his case, the delay will generally be refused unless there is a reasonable likelihood that this purpose will be served, that is, that the party's health will improve." 17 Am. Jur. 2d, Continuance, § 18, pp. 139, 140.

Hurdle brings forward several assignments of error to the court's rulings with respect to the admission of evidence and also to certain portions of the court's charge to the jury. These assignments of error have been considered and are overruled.

We move now to Hurdle's contentions with respect to the court's entry of partial summary judgments in each case.

[2] At the outset, a question arises as to whether defendant's appeals from these orders are premature. G.S. 1A-1, Rule 56(d) clearly contemplates that summary judgment may be entered upon less than the whole case and that the court may make a summary adjudication that is not final. As pointed out by Professor Moore in discussing the identical federal procedure, "[I]n this situation, unless the interlocutory order is appealable and in most instances it will not be, the court has rendered a 'partial summary judgment' that is technically not a judgment." 6 Moore's Federal Practice, § 56.20[3.-0], p. 2746. Final judgments, enforceable against Hurdle, have not been entered. Whether Hurdle is prejudiced by the interlocutory disposition of the issues involved depends upon a determination of issues which are still pending for trial. In the absence of the entry of a final judgment, "any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties . . . shall not then be subject to review either by appeal or otherwise except as expressly provided by these rules or other statutes." G.S. 1A-1, Rule 54.

While we are of the opinion Hurdle has no right of appeal at this time, G.S. 1-277, we nevertheless elect to treat the appeals as petitions for certiorari, allow them, and pass upon the merits of the questions raised.

In support of their motion for summary judgment in the principal action, plaintiffs presented substantial and convincing evidence as to the accuracy of the running account alleged. Defendant offered no affidavit or other evidence tending to show that he was improperly charged with any items specified in the amount alleged in plaintiffs' first cause of action.

[3] Hurdle states in his affidavit, and contends in his answer, that Gregory and his bookkeeper "wrongfully failed to reflect credit to me, in said mutual and open running account for the items set forth in my counterclaim." The items in Hurdle's counterclaim not barred by the statute of limitations do not, in our opinion, constitute items that should be considered in connection with the mutual account alleged in plaintiffs' first cause of action. They are at most items which may entitle Hurdle to a set-off. This is so because these items arise out of matters completely unrelated to the business items set forth in

the mutual account alleged by plaintiffs. For instance, in his counterclaim, Hurdle alleges he is entitled to recover $110,000.00 for assistance he rendered Gregory in securing proof that a lady, claiming Gregory had promised to marry her, was lying; thus discouraging the lady from suing Gregory for breach of promise. In another allegation, entitled by Hurdle as the "Lonely Millionaire Matter," he contends the estate owes him $27,250.00 for getting Gregory released from pressure being applied by a woman seeking to marry him. Also, a substantial sum is claimed for staying with Gregory and taking him to a doctor and out to eat from time to time. The other allegations tend also to relate to claims for personal services allegedly rendered. It is not difficult to see that these matters should be dealt with in a separate issue and not submitted to the jury as items to be considered in connection with a mutual account arising out of farming and business operations. See *Haywood v. Hutchins*, 65 N.C. 574.

Considering defendant's counterclaim as a matter of set-off, the question then becomes: Is there any genuine issue with respect to plaintiffs' claim that defendant is indebted under an open, mutual running account in the sum of $64,210.52? In our opinion, the trial judge correctly determined that there is not.

[4] We think the trial judge also correctly determined that there is no genuine issue with respect to defendant's obligation under the note alleged as plaintiffs' second claim in the principal action, or with respect to plaintiffs' right to foreclose on the notes and deeds of trust as alleged in the foreclosure case, subject to the conditions outlined in the judgment. An abundance of evidence was offered by plaintiffs that Hurdle, joined by his wife in some instances, executed the notes and deeds of trust in question, that the instruments were executed under seal and for consideration, and that they have not been satisfied. Hurdle does not deny in his answers that he and his wife executed the notes in question. He states specifically in his answer with respect to all of the notes and deeds of trust that "[i]t is not denied that this answering defendant and India Marie Hurdle signed certain papers from time to time for the late P. P. Gregory but this answering defendant denies that consideration was received for the said signatures and this answering defendant avers that the amounts set forth in

the alleged papers are incorrect and defendant denies being indebted in any manner under any of the papers that are alleged to have been signed by this answering defendant and India Marie Hurdle."

Defendant contends that the court erred in failing to find that his general denial, in response to a request that he admit certain particulars regarding the notes and deeds of trust, raises a question as to whether he actually executed the instruments.

We think that under the circumstances, this general denial was entitled to no more weight than if it had been contained in defendant's answer in response to allegations in the complaint. "When a motion for summary judgment is made and supported . . . , 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." G.S. 1A-1, Rule 56(e). As stated in the case of *Bruce Construction Corp. v. United States*, 242 F. 2d 873, 875 (5th Cir. 1957), "when a movant makes out a convincing showing that genuine issues of fact are lacking, we require that the adversary adequately demonstrate by receivable facts that a real, not formal, controversy exists, and, of course, he does not do that by mere denial or holding back evidence."

As previously noted Hurdle did not deny in his answer or affidavit that he executed the instruments in question. Neither Hurdle nor his counsel suggested in any way that evidence could be produced which would tend to dispute the overwhelming showing of plaintiffs that Hurdle executed the instruments. In this connection it is significant that before entering summary judgment Judge Godwin inquired of Hurdle's counsel as to what evidence Hurdle was prepared to offer "in support of his denial of the execution of said notes, the balance owing thereon and the right of foreclosure under said deeds of trust." When counsel stated they were unable to respond as to what Hurdle might say if he were to testify, the hearing was recessed until the next day and Hurdle's counsel were requested to ascertain in the interim, and frankly advise the court, what evidence Hurdle would be prepared to offer at trial in support of his contentions with respect to the notes and deeds of

trust, including the names of witnesses and the substance of their testimony in that regard. Counsel were also advised that they should take whatever time they needed to make these determinations and that their tardiness on convening of court the next morning would be excused.

In spite of the opportunity given, defendant's counsel were unable to advise the court as to any evidence which might place in issue any material fact with respect to the questions then being considered. In the case of *Kessing v. Mortgage Co.*, 278 N.C. 523, 535, 180 S.E. 2d 823, 831, the court noted the following:

> "Defendant, on inquiry by the trial court as to whether any responsive countervailing evidence could be presented, failed to present such. Under these circumstances, defendant's mere allegations were not sufficient and summary judgment was appropriately entered dismissing the first counterclaim. G.S. 1A-1, Rule 56(e)...."

Summary judgment procedure is designed to permit penetration in advance of trial of unfounded claims or defenses and to allow summary disposition when this is effectively done. 2 McIntosh, N. C. Practice and Procedure 2d, § 1660.5, p. 72 (Phillips' Supp. 1970). It has been effectively shown here that Hurdle's only possible defense, with respect to any of the issues on which summary judgment has been granted, is by way of a possible set-off. He may still establish this defense by proving at trial the validity of any items in his counterclaim which have not been adjudged barred by the statute of limitations. Consequently, Hurdle has not been denied the opportunity of a trial with respect to the only possible valid defense he has.

Affirmed.

Judges PARKER and VAUGHN concur.

IN THE MATTER OF: WALTER JOHNSTON AND BANK OF NORTH CAROLINA, NATIONAL ASSOCIATION (FORMERLY FIRST NATIONAL BANK OF EASTERN NORTH CAROLINA), CO-ADMINISTRATORS OF THE ESTATE OF CHARLES H. SALEEM, DECEASED

No. 7216SC465

(Filed 30 August 1972)

1. **Descent and Distribution § 1— right of aliens to inherit — constitutionality of statutory requirement of reciprocity**

G.S. 64-3, which restricts the right of a nonresident alien to inherit property to those cases where reciprocal rights of inheritance are shown to exist, is constitutional on its face.

2. **Descent and Distribution § 1— alien's right to inherit personal property**

At common law an alien can take lands by purchase, grant, conveyance, or devise, though not by descent; however, it is a general rule at common law that an alien has the right to hold and convey personal property, including the right to bequeath it to another and to inherit it as next of kin or legatee.

3. **Descent and Distribution § 3— distinction between real and personal property abolished — right of nonresident alien to inherit by intestate succession**

North Carolina has abolished by statute the distinction between real and personal property for the purpose of rights to property by descent and distribution; therefore, absent statutory restriction, a nonresident alien is entitled to inherit by intestate succession as fully as a resident alien or a citizen of the United States.

4. **Descent and Distribution § 1— right of aliens to inherit— reciprocity requirement — burden of proof on alien**

Before a nonresident alien is entitled to inherit by intestate succession in North Carolina, the alien must prove by the greater weight of the evidence that there are reciprocal rights of inheritance between citizens and residents of the foreign country in which he resides and between citizens and residents of the United States. G.S. 64-3; G.S. 64-4; G.S. 64-5.

5. **Appeal and Error § 57— findings on burden of proof — findings on reciprocity — error**

In an action to determine the rights of certain nonresident aliens to inherit personal property situated in North Carolina, the trial court erred in finding that the aliens failed to establish the existence of the reciprocity required by G.S. 64-3 for two reasons: (1) since the trial court found G.S. 64-3 unconstitutional, the court on appeal could not determine what burden to establish reciprocity the trial court found the nonresident aliens had failed to carry; (2) the trial court failed to take into consideration records purporting to be birth records of the nonresident aliens and documents purporting to establish the

existence of Syrian laws granting reciprocal rights of inheritance for a citizen of the United States, such records and documents having been furnished by an attorney in Syria who purportedly represented the nonresident aliens.

APPEAL by co-administrators from *Hobgood, Judge,* 6 March 1972 Session of Superior Court held in ROBESON County.

This is an action by the co-administrators of the estate of Charles H. Saleem for a declaratory judgment determining the rights of certain nonresident aliens to inherit personal property situated in North Carolina.

Charles H. Saleem (Habid Salim Nohra) was born in Syria and immigrated to the United States. He became a naturalized citizen of the United States and resided in or near Maxton, Robeson County, North Carolina. Charles H. Saleem died intestate on 24 June 1968 leaving an estate consisting entirely of personal property.

It is alleged in the complaint that Charles H. Saleem left no wife or lineal descendent surving. It is alleged that Charles H. Saleem is survived by three children of a deceased brother, Charles T. Saleem (Tewfik Salim Nohra) who was also a naturalized citizen of the United States; and that these three children, Marie S. Bellomy, Margaret S. Johnston, and George E. Saleem, are citizens and residents of North Carolina.

The complaint further alleges that the deceased is survived by five children of a deceased sister, Miriam Salim, and that the five live in, or in the vicinity of, Damascus, Syria. The names of these five children are: Elia Nohra, Youssef Nohra, Rosa Nohra, Wadia Nohra, and Wadad Nohra.

The co-administrators engaged in some correspondence with a Mr. Souheil Sarkis, Avocat A La Cour, Damascus, Syria, who represented himself to be attorney for the five children of Miriam Salim.

None of the alleged heirs at law, citizen or alien, filed formal answer to the complaint.

Judge Hobgood found as facts that the five alleged nonresident heirs at law of Charles H. Saleem had failed to present evidence of kinship with the deceased; that the five alleged nonresident alien heirs at law of Charles H. Saleem had failed to establish reciprocal rights of inheritance in accordance with

G.S. 64-3 and G.S. 64-4; that G.S. 64-3 is unconstitutional; and that no treaty exists between the United States and either Lebanon or Syria respecting rights of inheritance.

He thereupon ruled that the three next of kin residing in the United States and State of North Carolina were entitled to share the assets of the intestate's estate and that alleged next of kin residing in Syria or Lebanon shall inherit no part thereof.

The co-administrators were ordered by Judge Hobgood to appeal to this court.

Lee, Lee and Murray, by Douglas P. Murray, attorneys for the co-administrators.

No appearance contra.

BROCK, Judge.

The judgment states: "It is further *found as a fact* that no treaty exists with Lebanon or Syria respecting the rights of citizens of those countries to inherit property within the United States." We presume the "found as a fact" to be *lapsus linguae* for two reasons: first, there is no competent evidence to support such determination as a finding of fact; and second, all courts take judicial notice of treaties between the United States and other countries. 29 Am. Jur. 2d, Evidence, § 33, p. 68. The existence or nonexistence of a treaty between the United States and Lebanon or Syria respecting rights of inheritance is pertinent only for the purpose of determining whether the North Carolina Statute is in conflict with such treaty, in which case the treaty would control. 3 Am. Jur. 2d, Aliens and Citizens, § 12, p. 859. If no treaty exists, there is no conflict.

The judgment states: "It is further *found as a fact* that Chapter 64, Section 3, of the General Statutes of North Carolina dealing with the right of nonresident aliens to take real and personal property is unconstitutional." Again we presume the "found as a fact" to be *lapsus linguae* for two reasons: first, there is no competent evidence to support such determination as a finding of fact; and second, the determination of whether a statute is constitutional is a matter of law.

It is not clear to us how or why the constitutionality of the statute became a question in this case. G.S. 64-3 is restrictive

of the right of a nonresident alien to inherit property in that it requires the existence of reciprocal rights. The judgment found as a fact that the alleged nonresident alien heirs had failed to establish any reciprocal rights of inheritance. Having ruled against the alleged nonresident alien heirs for failure to comply with the statute, it seems inconsistent to then declare the statute unconstitutional. Also, we have been unable to find where anyone has properly raised the question of the constitutionality of the statute.

[1] Nevertheless, we hold that the trial judge committed error on the merits. In our opinion G.S. 64-3 is constitutional on its face. We recognize that the United States Supreme Court has held that an Oregon statute, similar to ours, was unconstitutionally applied, but this does not destroy the validity of the provisions themselves. See, *Zschernig v. Miller,* 389 U.S. 429, 19 L.Ed. 2d 683, 88 S.Ct. 664 (1968). It seems that the unconstitutional application arose from Oregon's interpretation of the quantum of proof required to establish reciprocity. Such a question has not arisen in this case. The holding by the trial court that G.S. 64-3 is unconstitutional must be reversed.

[2] At common law an alien can take lands by purchase, grant, conveyance, or devise, though not by descent. 3 Am. Jur. 2d, Aliens and Citizens, § 13, p. 859. However, it is a general rule at common law that an alien may hold and convey personal property. The right to hold personal property includes the right to bequeath it to another, and to inherit it as next of kin or legatee. 3 Am. Jur. 2d, Aliens and Citizens, § 12, p. 858. The common law is in force in North Carolina except where modified by statute. G.S. 4-1; *State v. Bass,* 255 N.C. 42, 120 S.E. 2d 580.

[3] North Carolina has abolished by statute the distinction between real and personal property for the purpose of rights to property by descent and distribution. G.S. 29-3 states: "In the determination of those persons who take upon intestate succession there is no distinction: between real and personal property. . . ." Therefore, absent statutory restriction, it seems that a nonresident alien would be entitled to inherit by intestate succession on the same basis as a citizen or resident. G.S. 64-1 provides: "It is lawful for aliens to take both by purchase and descent, or other operation of law, any lands, tenements or hereditaments, and to hold and convey the same as fully as citizens of this State can or may do, any law or usage to the con-

trary notwithstanding." Except for the reciprocity provisions contained in G.S. 64-3, G.S. 64-4, and G.S. 64-5, a nonresident alien is entitled to inherit by intestate succession as fully as a resident alien or a citizen of this country.

We turn now to that portion of the judgment of the trial court which reads as follows: "It is further found as a fact that the alleged heirs at law or the next of kin of the said Charles H. Saleem who reside in Syria or in Lebanon have presented no proof whatsoever of their kinship or the degree of the same nor have they established any reciprocal rights of inheritance between the countries or between citizens and residents of this country and between citizens and residents of a foreign country."

[4] First we will discuss the finding relative to failure to establish reciprocal rights. G.S. 64-3 provides as follows:

> "The right of aliens not residing within the United States or its territories to take real property in this State by succession or testamentary disposition, upon the same terms and conditions as residents and citizens of the United States is dependent in each case upon the existence of a reciprocal right upon the part of citizens of the United States to take real property upon the same terms and conditions as residents and citizens of the respective countries of which such aliens are residents and the right of aliens not residing in the United States or its territories to take personal property in this State by succession or testamentary disposition, upon the same terms and conditions as residents and citizens of the United States is dependent in each case upon the existence of a reciprocal right upon the part of citizens of the United States to take personal property upon the same terms and conditions as residents and citizens of the respective countries of which such aliens are residents."

G.S. 64-4 provides that the burden of proving the existence of the reciprocal rights required by G.S. 64-3 shall be upon the nonresident alien. Therefore, if the nonresident alien fails to prove by the greater weight of the evidence the existence of the law providing for such reciprocal rights, he will not be entitled to share in the estate.

[5] The finding by the trial court of a failure by the nonresident aliens to establish the existence of the reciprocity required by G.S. 64-3 is faulty for two reasons. First, and most apparent, is that the trial court found G.S. 64-3 to be unconstitutional and we cannot tell what burden to establish reciprocity he found the nonresident aliens had failed to carry. Second, and most persuasive, are the following circumstances. The record on appeal contains the following statement:

> "Prior to the filing of the action for declaratory judgment, the Co-Administrators of Charles H. Saleem's Estate were informed by letter of Souheil Sarkis of Damascus, Syria, that Mr. Sarkis was an attorney and represented Elia Nohra, Youssef Nohra, Rosa Nohra, Wadia Nohra and Wadad Nohra, the five issue of Charles H. Saleem's deceased sister, Miriam Salim Nohra. Additional correspondence was received from Mr. Sarkis by the co-administrators pertaining to the administration of the decedent's estate both prior to and during the period in which this declaratory judgment proceeding was pending and Mr. Sarkis forwarded documents which purported to be notarized English translations of official birth and death records and documents relating to Syrian and Lebanese inheritance laws purportedly giving nonresident aliens the right to inherit property belonging to Lebanese and Syrian citizens so long as the laws of the nonresident alien's country gave similar rights to Lebanese and Syrian citizens."

It seems clear from the foregoing statement that the co-administrators were in contact with an attorney in Syria who purportedly represented the five nonresident aliens. It also appears that said attorney had furnished to the co-administrators certain records purporting to be birth records of the nonresident aliens, and certain documents purporting to establish the existence in Syria and Lebanon of laws granting reciprocal rights of inheritance for a citizen of the United States. Yet it clearly appears that none of this information was considered by the trial court. The only communication which the trial court seems to have considered is a letter from Mr. Sarkis dated 15 February 1972 (about two months after this action was instituted) wherein Mr. Sarkis refers to the earlier forwarding by him to the co-administrators of papers to establish kinship of his clients to the deceased, and papers to establish the existence of laws

granting reciprocal rights for citizens of the United States to inherit in Syria and Lebanon.

If the co-administrators, or their attorneys, were in possession of such documents it seems to us that they were obligated to file them with the trial court for appropriate consideration. From the record on appeal it appears affirmatively that the trial judge considered only the contents of the letter from Mr. Sarkis dated 15 February 1972. The trial judge could, and should, have required the co-administrators to file all papers, and documents competent for consideration for the purpose of rendering judgment in this case. If no such papers or documents were ever forwarded to the co-administrators they would be well advised to offer evidence explanatory of the references in the record on appeal as quoted above and the reference in the 15 February 1972 Sarkis letter. We are not suggesting that the papers and documents referred to constitute competent evidence. We are saying that they should be presented to the court for consideration as evidence and allow the court to rule upon their competence as evidence.

Finally we discuss the finding relative to failure of the evidence of kinship of the nonresident aliens to the deceased. Naturally if kinship to a deceased cannot be established there is no right to intestate succession. In this regard we note that the record on appeal is devoid of evidence of kinship of those persons to whom the judgment ordered the estate to be distributed.

The complaint alleged in paragraph 13 that to the best of the knowledge and belief of the co-administrators, an accurate genealogical table involving the deceased is attached to the complaint as Exhibit A, and further alleged that "the same is specifically alleged to be the genealogy of the said Charles H. Saleem, deceased." Exhibit A as attached to the complaint shows the names and year of birth of each of the nonresident aliens, and shows their degree of kinship to the deceased to be exactly the same as the three resident heirs at law. The residents are shown to be the children of a deceased brother of deceased, and the nonresidents are shown to be the children of a deceased sister of the deceased.

From a reading of the complaint there seems to be no question raised as to the kinship of either the residents or the

nonresidents. The only question raised by the complaint is the right of nonresident aliens to take personal property by descent and distribution, particularly under G.S. Chapter 64. According to a statement appearing in the record on appeal, Walter Johnston, co-administrator, is the husband of one of the resident next of kin of deceased. It ought to be reasonably assumed that these resident next of kin know their first cousins (the nonresident aliens) and that they supplied information to the co-administrators for the purpose of instituting this action. If the co-administrators, or their attorneys, were in possession of evidence of kinship of the nonresident aliens to the deceased, either through testimony of the resident heirs at law or through documents furnished by Mr. Sarkis, it seems to us that they were obligated to offer such for the court's consideration.

That portion of the judgment appealed from which purports to declare G.S. 64-3 to be unconstitutional is reversed. Those portions of the judgment which direct the co-administrators to distribute the net assets of the estate of Charles H. Saleem to his next of kin residing in the United States and holding that the nonresident aliens who are alleged to be next of kin of Charles H. Saleem shall inherit no part of his estate are vacated. This case must be remanded to the Superior Court for a new hearing to determine who are the next of kin of Charles H. Saleem, deceased; and, if any of his next of kin are nonresident aliens, whether they are entitled under G.S. 64-3 and G.S. 64-4 to share in the distribution of his estate.

Judgment reversed in part.

Judgment vacated in part.

Cause remanded.

Judges MORRIS and HEDRICK concur.

GRACE JERNIGAN v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY AND INDIANA LUMBERMEN'S MUTUAL INSURANCE COMPANY AND SHELBA J. JERNIGAN v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY AND INDIANA LUMBERMEN'S MUTUAL INSURANCE COMPANY

No. 7211DC415

(Filed 30 August 1972)

Insurance § 87— automobile liability policy — person in lawful possession — permission of owner or original permittee

The driver of an automobile was not a "person in lawful possession" within the meaning of G.S. 20-279.31(b)(2), and thus was not covered under a liability policy on the automobile, where neither the insured owner nor his daughter, who had the owner's permission to use the automobile, gave the driver permission to use the automobile and the driver, who did not have a driver's license, did not ask for permission.

APPEAL by defendant Indiana Lumbermen's Mutual Insurance Company, from *Morgan, District Judge,* 14 February 1972 Session of District Court held in HARNETT County.

These are civil actions consolidated for trial by consent, instituted by plaintiffs, holders of judgments for personal injury and property damage, to recover in the alternative from: (1) defendant, State Farm Mutual Automobile Insurance Company (State Farm) on the "uninsured motorist" provision of its liability policy issued to plaintiff Shelba J. Jernigan or (2) defendant, Indiana Lumbermen's Mutual Insurance Company (Lumbermen's) on its automobile liability insurance policy issued to William James Blue. Defendant, State Farm filed a cross claim against the defendant Lumbermen's to recover $585.00 legal expenses and costs incurred by it in defending plaintiffs' suits against Lumbermen's insured, which suits Lumbermen's had refused to defend. The facts stipulated by the parties are summarized as follows: There is outstanding and unpaid of record in the office of the Clerk of Superior Court of Harnett County, North Carolina, a judgment in favor of plaintiff, Shelba J. Jernigan, against one Margaret Blue in the sum of Two Thousand Two Hundred and Fifty Dollars ($2,250.00) for personal injuries and Six Hundred Dollars ($600.00) for property damages and a judgment in favor of plaintiff, Grace Jernigan, against the said Margaret Blue in the sum of Two Thousand Dollars ($2,000.00) for personal injuries. Each judgment resulted from a civil action instituted

by the respective plaintiffs against Margaret Blue as operator of a certain 1967 Buick automobile owned by William James Blue on 27 March 1970. On 27 March 1970 Lumbermen's had outstanding and in force, pursuant to the Motor Vehicle Safety and Financial Responsibility Act of 1953, as amended, and The Vehicle Financial Responsibility Act of 1957, as amended, a policy of automobile liability insurance on the 1967 Buick automobile owned by and registered in the name of William James Blue. On March 27, 1970, defendant, State Farm had outstanding and in force, pursuant to the Motor Vehicle Safety and Financial Responsibility Act of 1953, as amended, and The Vehicle Financial Responsibility Act of 1957, as amended, a policy of automobile liability insurance on the 1968 Ford automobile owned by and registered in the name of plaintiff, Shelba J. Jernigan and occupied by the said Shelba J. Jernigan and plaintiff, Grace Jernigan, which provided uninsured motorist insurance. On March 27, 1970, Margaret Blue was not a resident of the household of William James Blue and she and William James Blue were living separate and apart and had so lived for ten years or more. Ellen Blue Darden was and is the daughter of William James Blue and Margaret Blue and was given permission by the said William James Blue to drive his aforesaid 1967 Buick automobile. Shortly prior to the accident herein involved, Ellen Blue Darden had driven said 1967 Buick automobile to South Third Street in the Town of Smithfield, Johnston County, North Carolina, accompanied by her mother, Margaret Blue, and she parked said 1967 Buick automobile in a parallel parking space on South Third Street in Smithfield, North Carolina. Ellen Blue Darden then went to shop and left her mother, Margaret Blue, in the parked automobile and left the keys to the automobile in the car. While the car was parked, Margaret Blue was asked by someone to move the parked car to facilitate another car being moved. She acceded to this request and while moving said 1967 Buick automobile, she collided with the 1968 Ford automobile owned by plaintiff, Shelba J. Jernigan, out of which collision the previous lawsuits and resulting judgments arose. At the time of the collision referred to, on March 27, 1970, Margaret Blue did not know how to drive a car and had never had a driver's license; and neither Ellen Blue Darden nor William James Blue had told Margaret Blue that she could drive the car. The defendant Lumbermen's automobile liability policy defined "persons insured" as:

"(1) The named insured and any resident of the same household

(2) Any other person using such automobile with the permission of the named insured, provided his actual operation . . . is within the scope of such permission, and

(3) Any other person or organization but only with respect to his or its liability because of acts or omissions of an insured under (a) 1 or 2 above."

The provisions of Section 20-279.21(b)(2) of the General Statutes of North Carolina are incorporated in and made a part of the policy of automobile liability insurance issued by defendant Lumbermen's. The provisions of North Carolina General Statutes Section 20-279.21(b)(3) are incorporated in and made a part of the policy of automobile liability insurance issued by defendant State Farm. Defendant Lumbermen's has denied coverage to Margaret Blue as an insured under its policy of automobile liability insurance and did not provide any defense to the suits by plaintiffs against Margaret Blue arising out of her operation of said automobile on the 27th day of March, 1970. Pursuant to the provisions of North Carolina General Statutes Section 20-279.21(b)(3) defendant State Farm was as Uninsured Motorist Insurer made a party to the action instituted in the District Court of Harnett County, North Carolina, by Grace Jernigan and Shelba J. Jernigan against Margaret Blue. Defendant State Farm filed answers to the suits, appeared in the trial of the actions, and in investigating and defending plaintiffs' suits against Margaret Blue incurred expenses in the amount of $585. Defendant State Farm has refused to pay plaintiffs' judgments against Margaret Blue. The plaintiffs contend in the alternative that (1) Lumbermen's policy of insurance extended coverage to Margaret Blue in her operation of William James Blue's 1967 Buick automobile or (2) said Margaret Blue was an "Uninsured Motorist" coming within the provisions of State Farm's policy on the 1968 Ford automobile belonging to Shelba J. Jernigan, and by reason of "coverage" or "no coverage" extending to said Margaret Blue are entitled to recover of either (a) Lumbermen's or (b) State Farm for the amounts of their respective judgments, less such credits for payments made by State Farm as may be by

law allowed for payments under medical payments provisions and/or collision insurance.

Based on the stipulations of the parties, the trial judge in pertinent part concluded: The 1967 Buick automobile was an insured motor vehicle and the tort-feasor, Margaret Blue, was an insured operator within the provisions of the liability insurance policy issued by defendant Lumbermen's. The 1967 Buick automobile was not an uninsured motor vehicle and the tort-feasor, Margaret Blue, was not an uninsured operator within the provisions of the policy of the automobile insurance issued by defendant State Farm. Defendant Lumbermen's has, by denying coverage to Margaret Blue as an insured under its policy of automobile liability insurance and by refusing to pay plaintiffs' judgments herein sued on and by failing to provide any defense to the suits by plaintiffs against Margaret Blue, breached the provisions of its policy of automobile liability insurance, and the General Statutes of North Carolina applicable thereto, and made a part thereof. By so doing, defendant Lumbermen's has wrongfully caused defendant State Farm to incur expenses in defense of said suits in the amount of Five Hundred and Eighty-Five Dollars ($585.00).

From a judgment that the plaintiff Shelba J. Jernigan and the plaintiff Grace Jernigan recover of the defendant Lumbermen's $2,850 and $2,250, respectively, and that the defendant State Farm recover of the defendant Lumbermen's $585, the defendant Lumbermen's appealed.

Bryan, Jones, Johnson, Hunter & Greene by C. McFarland Hunter for plaintiff appellees (Grace Jernigan and Shelba J. Jernigan).

Butler, High & Baer by Ervin I. Baer for defendant appellee (State Farm Mutual Automobile Insurance Company).

Anderson, Nimocks & Broadfoot by Henry L. Anderson for defendant appellant (Indiana Lumbermen's Mutual Insurance Company).

HEDRICK, Judge.

The defendant Lumbermen's assigns as error the denial of its motion for summary judgment as to plaintiffs' claims and as to the cross claim of the defendant State Farm. "(T)he

movant is allowed to preserve his exception to the denial of the motion for consideration on appeal from the final judgment." The question thus presented on appeal is whether the pleadings and stipulations of the parties show there is a genuine issue as to any material fact and whether any party is entitled to judgment as a matter of law. G.S. 1A-1, Rule 56.

> "Evidence which may be considered under Rule 56 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, 533, 180 S.E. 2d 823, 829 (1971).

The detailed stipulation of facts made by the parties shows clearly there was no genuine issue as to any material fact; therefore, the question presented to the trial judge by Lumbermen's motion for summary judgment was whether, under the stipulated facts, it was entitled to judgment as a matter of law. We hold that it was.

This appeal presents for resolution a question of first impression in North Carolina—the construction to be given to the phrase "persons in lawful possession" as used in G.S. 20-279.21(b)(2), which is by statute made a part of the policy of automobile liability insurance issued by defendant Lumbermen's. By the terms of that statute, coverage is extended to the named insured, those operating the motor vehicle with the express or implied permission of the named insured and to "persons in lawful possession." The phrase "persons in lawful possession" appeared in the original 1947 version of this statute, was deleted by the 1953 Legislature and was reinstated by Chapter 1162 of the Session Laws of 1967.

Appellent contends, "Neither the owner nor Ellen, who had been given permission to use the car, told Margaret she could drive it and Margaret did not ask for permission. . . ." It thus becomes necessary for the court to determine whether permission, express or implied, is an essential element of "lawful possession." We hold that it is. To hold otherwise would constitute anyone other than a thief a person in "lawful possession."

It is stated in 12 Couch *On Insurance* 345 § 45:340 (2d ed. 1964), "Omnibus coverage clauses protect others than the named

insured only when such other persons are using or operating the insured motor vehicle with the 'permission' or 'consent' of the named insured. Conversely, there is no coverage by virtue of the omnibus clause in the absence of such permission." In 4 A.L.R. 3d § 3 (A), p. 25, it is stated, "It appears well settled that the named insured's mere permission to another to use the automobile does not of itself authorize the permittee to delegate his right of user to a third person so as to bring the latter within the coverage of the omnibus clause." And at page 24, "The consent of the first permittee is likewise essential where a second user claims coverage by virtue of the named insured's initial permission."

Three rules of construction are utilized by the courts of different states in construing omnibus clauses. Regardless of which rule is applied, permission, whether express or implied, is required. It is stated in 41 N. C. L. Rev. 232, 234 (1963):

> "(1) Under the strict or 'conversion' rule, any deviation from the time, place, or purpose specified by the person granting permission is sufficient to take the permittee outside the coverage of the omnibus clause.
>
> (2) Under the moderate or 'minor deviation' rule, a material deviation from the permission granted constitutes a use without permission, but a slight deviation is not sufficient to exclude the permittee from coverage.
>
> (3) Under the liberal or 'initial permission' rule, if the permittee has permission to use the automobile in the first instance, any subsequent use while it remains in his possession, though not within the contemplation of the parties at the time of the bailment, is a permissive use within the terms of the clause."

In 1953 the Legislature deleted the phrase ". . . any other person in lawful possession" from the statute [G.S. 20-227(2)(b)]. Mr. Justice Moore, writing for the court in *Hawley v. Insurance Co.* stated, "We interpret this statutory change to mean that the Legislature intended no more radical coverage than is expressed in the moderate rule of construction, *i.e.*, coverage shall include use with permission, express or implied." The court indicated that prior to this deletion, the statute "was sufficiently broad to embrace the liberal rule. It required that

policies of insurance insure all operators irrespective of limits of permission, if in the lawful possession of the vehicle." 257 N.C. 381, 387, 126 S.E. 2d 161, 166-67 (1962).

The 1967 amendment, adding the words "any other person in lawful possession" is interpreted to signify that the Legislature favors adoption of a liberal rule of construction in applying and interpreting the scope of permission under the omnibus clause. It is stated in 48 N. C. L. Rev. 984, 991 (1970), "As the 1967 amendment clearly provides the opportunity for adoption of the liberal rule in North Carolina as to the scope of permission once granted, it appears permissible for the courts to similarly liberalize the view of what constitutes initial permission. . . ."

A statute prescribing an omnibus clause is a remedial act and should be liberally construed to assure fulfillment of the beneficial goal for which it was enacted. 12 Couch *On Insurance* 326 § 45:313 (2d ed. 1964). Regardless of the liberality of the rule of construction applied, permission of the named insured or of the original permittee is essential to extend coverage to a second permittee. Here, there was no evidence signifying either express or implied permission for Margaret Blue to operate the vehicle. Accordingly, she was not a "person in lawful possession" and the trial court erred in failing to grant summary judgment for defendant Lumbermen's. The judgment of the trial court is therefore

Reversed.

Judges BROCK and MORRIS concur.

MARTIN FOX AND EDWARD EZRAILSON, PETITIONERS v. TRUSTEES OF THE CONSOLIDATED UNIVERSITY OF NORTH CAROLINA; WILLIAM C. FRIDAY, PRESIDENT OF THE CONSOLIDATED UNIVERSITY OF NORTH CAROLINA; FEREBEE TAYLOR, CHANCELLOR OF THE UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL; CHRISTOPHER C. FORDHAM III, DEAN OF THE SCHOOL OF MEDICINE OF THE UNIVERSITY OF NORTH CAROLINA; AND THE COMMITTEE ON ADMISSIONS OF THE SCHOOL OF MEDICINE OF THE UNIVERSITY OF NORTH CAROLINA, RESPONDENTS

No. 7210SC468

(Filed 30 August 1972)

Colleges and Universities; Constitutional Law § 20— in-state residence status — admission purposes — constitutionality of statute and regulations

Statute and regulations which require that in-state resident status for the purpose of admission to a State-supported institution of higher education be accorded only to those who are domiciliaries of North Carolina and who have been so domiciled without being enrolled in an institution of higher education for at least twelve months preceding the date of first enrollment or re-enrollment at such an institution, *held* not to deny student citizens originally from other states their right to equal educational opportunities, and not to violate the constitutional right to travel freely from one state to another. G.S. 116-143.1(b).

APPEAL by petitoners, Martin Fox and Edward Ezrailson, from *Canaday, Judge,* 21 February 1972 Session of Superior Court held in WAKE County.

This is a civil action wherein petitioners seek injunctive and declaratory relief from application of "the Twelve Month Rule, as set forth in *N.C.G.S.* 116-143.1(b) and as applied to admissions standards by order of the Board of Trustees of the Consolidated University of North Carolina. . . ."

The matter was heard by Judge Canaday on stipulated facts which are summarized as follows:

Petitioners, Martin Fox and Edward Ezrailson, have registered to vote in North Carolina, are enrolled on their respective counties' tax rolls, possess North Carolina drivers' licenses and automobile registration and are married to women who will have been living in North Carolina, not as students, for twelve months next preceding the commencement of the 1972-73 academic year.

During their residence in North Carolina, there has never been a consecutive twelve month period in which petitioners

have not been enrolled in institutions of higher education in the State of North Carolina.

Petitioners have applied for admission to the School of Medicine of the University of North Carolina at Chapel Hill. Their applications are under consideration by the Committee on Admissions of the School of Medicine.

The regulation of the Board of Trustees of the University of North Carolina determining residency status for admissions purposes contains the same language as G.S. 116-143.1(b). Pursuant to this statute and the regulations, to qualify as an in-state resident, one must have resided in North Carolina for twelve consecutive months. Time spent in North Carolina while a student at an institution of higher learning is not counted toward satisfying this twelve month requirement.

The Board of Trustees has adopted a regulation limiting the number of nonresidents who may be admitted to the first year class of the School of Medicine to fifteen (15) percent of the entire first year class.

The trial judge made findings of fact substantially the same as stipulated by the parties and made the following conclusions:

"1. That neither of the Petitioners has been a legal resident and maintained his domicile for twlve continuous months in North Carolina prior to the date of first enrollment or re-enrollment in an institution of higher learning located in this State.

2. That in order to qualify for admission to the 1972-73 freshmen class of the University of North Carolina School of Medicine as a resident of this State, the applicant must have maintained his domicile in this State for twelve continuous months prior to the date of admission and time spent while in attendance at an institution of higher learning located in this State may not be counted as a part of the twelve month period.

3. That G.S. 116-143.1(a) and (b) are constitutional as applied to the Petitioners."

From a judgment denying the injunctive and declaratory relief prayed for, petitioners appealed.

Karla Harbin Fox for petitioner appellants.

Attorney General Robert Morgan and Deputy Attorney General Andrew A. Vanore, Jr., for respondent appellees.

HEDRICK, Judge.

The following regulations of the Board of Trustees of the University of North Carolina are based on G.S. 116-143.1(a) and (b) and they determine the status of residency of students for both admission and tuition purposes.

> "(a) A nonresident shall be any person not qualifying for in-state tuition as hereinafter defined. (b) To qualify for in-state tuition, a legal resident must have maintained his domicile in North Carolina for at least the 12 months next preceding the date of first enrollment or re-enrollment in an institution of higher education in this State. Student status in an institution of higher learning in this State shall not constitute eligibility for residence to qualify said student for in-state tuition."

Petitioners contend that "the University of North Carolina residency requirements deny equal protection of the laws to student citizens originally from other states," in that the statute and regulations based thereon as applied to admissions quotas ". . . create an irrebutable presumption that, as long as a person originally coming from another state remains in North Carolina as a student at an institution of higher learning, he can never become a North Carolina resident for purposes of admission to the University of North Carolina." This contention is without merit.

In the recent cases of *Glusman v. Board of Trustees* and *Lamb v. Board of Trustees*, 281 N.C. 629, 190 S.E. 2d 213 (1972), the North Carolina Supreme Court considered a similar attack on regulations governing the determination of residency status for tuition purposes and found the challenges to the constitutionality of those regulations to be without merit. The Court recognized that since these challenged regulations " . . . do not relate to basic constitutional rights, the regulations are to be tested by less stringent traditional equal-protection standards." It thus becomes necessary for this Court to determine whether the challenged statute and regulations " . . . attain a

minimum (undefined and undefinable) level of RATIONALITY." (Emphasis ours.) *Glusman v. Board of Trustees and Lamb v. Board of Trustees, supra; Dandridge v. Williams,* 397 U.S. 471, 25 L.Ed. 2d 491, 90 S.Ct. 1153 (1970). We hold that they do.

In the *Glusman* and *Lamb* cases, *supra,* Chief Justice Bobbitt, writing for the majority of the Court, stated at p. 638:

> "In the establishment and operation of its institutions of higher education, North Carolina's obligation and primary purpose is to provide opportunities to citizens of this state. . . . Indeed, in view of present crowded conditions, only a limited number of persons domiciled in other states may be enrolled in our institutions of higher education."

The question thus becomes whether it is reasonable for the State to require that one desiring in-state resident status for purposes of admission, be a domiciliary of North Carolina and be so domiciled while not in attendance at an institution of higher education for a consecutive twelve month period next preceding the date of first enrollment or re-enrollment in an institution of higher education in this State.

We hold that such requirement is reasonable. The object is to assure that students who benefit from the operation of the State's University are in fact North Carolina citizens. The General Assembly and the Board of Trustees have concluded that domicile alone will not suffice for the determination of in-state resident status. In *Glusman* and *Lamb, supra,* Chief Justice Bobbitt states:

> "The . . . nonattendance requirement adds objectivity and certainty to the requirement of domicile. It is a certainty not obtained by placing an unreasonable burden on students. Petitioners were not barred by respondent's regulations from becoming domiciliaries of North Carolina."

To gain resident status, it is only necessary that petitioners maintain their domicile in North Carolina for twelve consecutive months while not enrolled in an institution of higher learning. In view of the legitimate State objective in providing ample educational opportunities for citizens of North Carolina, the challenged regulations and statute are clearly reasonable. *Glusman v. Board of Trustees* and *Lamb v. Board of Trustees,*

supra; Landwehr v. Regents of University of Colorado, 156 Colo. 1, 396 P. 2d 451 (1964); *Thompson v. Board of Regents of University of Neb.,* 187 Neb. 252, 188 N.W. 2d 840 (1971).

Petitioners also contend that the:

> "North Carolina one-year nonresidence requirement creates a chilling effect on the right to travel because it discourages out-of-state potential students from establishing their domicile in North Carolina."

In support of this argument, petitioners rely on the case of *Shapiro v. Thompson,* 394 U.S. 618, 22 L.Ed. 2d 600, 89 S.Ct. 1322 (1969) in which "the United States Supreme Court relied on this right to travel in invalidating regulations requiring persons to be state residents for a year before they could become eligible for public assistance."

The case of *Shapiro v. Thompson, supra,* is factually and legally distinguishable in that when the durational residency requirement was applied to the right to receive public assistance it infringed the fundamental right to travel. Thus, the statute there condemned was subjected to a more stringent test of equal protection—whether it was necessary to promote a COMPELLING STATE INTEREST. One's right to in-state resident status for admissions purposes is quite different from his basic constitutional right to travel freely from one state to another. Since they do not affect fundamental constitutional rights, the statute and regulations are subject only to the less exacting rationality test. Clearly they satisfy that test.

Petitioners also contend that "the University of North Carolina residency requirements deny student citizens originally from other states their right to equal educational opportunity." This contention is also without merit.

In establishing and operating its institutions of higher learning, the state's duty and primary purpose is to provide opportunities to citizens of North Carolina. Chief Justice Bobbitt stated in *Glusman v. Board of Trustees* and *Lamb v. Board of Trustees, supra,* "The State has no obligation to provide educational opportunities to noncitizens."

Thus, petitioners have not been denied any right to equal educational opportunities. Their applications for admission to the School of Medicine will be considered equally with the

applications of other nonresidents. Should petitioners desire to apply as residents of North Carolina, it will first be necessary for them to satisfy the challenged statute and regulations of the Board of Trustees of the University of North Carolina.

We hold that the trial judge was correct in concluding that G.S. 116-143.1(b) as applied to these petitioners is constitutional. The judgment appealed from is

Affirmed.

Judges BROCK and MORRIS concur.

DIANNE DAWKINS (NOW DIANNE MARIE DAWKINS SPENCE) v. CHARLIE B. BENTON

No. 7226SC294

(Filed 30 August 1972)

Automobiles § 88— intersection collision — plaintiff and defendant contributorily negligent as a matter of law — directed verdicts proper

In an action to recover for personal injuries and property damage sustained in an automobile accident, the trial court correctly allowed plaintiff's and defendant's motions for a directed verdict where the evidence showed each guilty of contributory negligence as a matter of law, the plaintiff in entering an intersection at an excessive rate of speed without giving proper attention to the traffic light, and defendant in making a turn in front of plaintiff without keeping a proper lookout.

APPEALS by plaintiff and defendant from *McLean, Judge,* 18 October 1971 Schedule "B" Civil Session of Superior Court held in MECKLENBURG County.

Plaintiff sought to recover of defendant on the grounds of alleged actionable negligence for personal injuries and property damage received when an automobile being operated by defendant collided with an automobile being operated by the plaintiff on Independence Boulevard near its intersection with Hawthorne Lane in the City of Charlotte. In the captions of the case on the original record on appeal filed in this court, the defendant is referred to as "Charlie B. Benton," and in the body of the pleadings the defendant is referred to as "Mrs. Charlie B. Benton." The defendant denied that she was negligent, pleaded contributory negligence, and filed a counterclaim

in which she seeks to recover of the plaintiff on the grounds of alleged actionable negligence for personal injuries and property damage she received in the collision. Plaintiff filed a reply to the counterclaim in which she denied that she was negligent and pleaded contributory negligence.

Plaintiff's evidence tended to show that Independence Boulevard runs generally east and west. Hawthorne Lane runs north and south. Hawthorne Lane, where it intersects the south line of Independence Boulevard, has two lanes for northbound traffic and two lanes for southbound traffic. Independence Boulevard, where it intersects the west line of Hawthorne Lane, has three lanes for traffic going east and a middle or turning lane for eastbound traffic turning north on Hawthorne Lane. Independence Boulevard, where it intersects the east line of Hawthorne Lane has three lanes for traffic going west, and a middle or turning lane for westbound traffic turning south on Hawthorne Lane. Traffic is controlled at this intersection by electrically controlled traffic signals.

Plaintiff approached this intersection at a speed of 35 miles per hour on Independence Boulevard in the middle lane for eastbound traffic. Defendant approached the intersection on Independence Boulevard traveling west and stopped in the turning lane for westbound traffic on Independence Boulevard turning south into Hawthorne Lane. Defendant saw the traffic light in front of her turn yellow and then proceeded to make her turn without further determination of the color of the traffic control signal facing her, and after a car facing her had made a left turn in front of her, and the defendant did not see the plaintiff's car until it collided with her car. Defendant was making this left turn to enter Hawthorne Lane at a speed of about ten miles per hour. The defendant entered the intersection first and at a time when the plaintiff's automobile was about 50 or 75 feet west of the west line extended of Hawthorne Lane. Plaintiff's first witness testified that "neither car stopped or appeared to make an effort to stop" before they collided. The collision occurred at about 8:15 a.m. on 25 July 1969 at approximately the center line of Hawthorne Lane extended and the center of the middle lane extended for eastbound traffic. It was a clear day. Plaintiff testified she was traveling east on Independence Boulevard in the "curb lane, the extreme outside lane," that as she entered the intersection the traffic light turned to yellow and that "(i)n response to your question as to whether

or not I saw the automobile with which my car had a collision prior to the accident, it almost happened simultaneously, because when I entered the intersection her car was moving and turning and that is when I hit her. I don't remember where my car was located the first time I observed the other car prior to impact; all I know is when I entered the intersection she was there, she was moving and turning, and I was there and I hit her."

On cross-examination, plaintiff testified, "It was about a second between the time that I saw Mrs. Benton's car and the time I hit her."

Both parties were injured in the collision.

Defendant's evidence tended to show that plaintiff told the investigating police officer that "as she approached the intersection her light came on caution, that she thought she could make the light, and as she entered the intersection she collided with the Benton car. The legal speed limit out there is 35 miles per hour, and Miss Dawkins told me she was running 40 or 45 miles per hour. The weather was clear at the time. As well as I remember the traffic was extremely heavy."

Another of defendant's witnesses testified that "(t)he weather was clear and the sun was shining. I was going to take my wife to work at the time of the accident, which was about 8:25 or 8:20. The car going straight through on Independence Boulevard (the plaintiff) did not slow down at all as it approached the intersection. Brakes were put on a couple of feet before the accident occurred, but up to that time it maintained its same speed."

Defendant testified that she was traveling west on Independence Boulevard and stopped in the turning lane for traffic turning south on Hawthorne Lane and that:

> "While we were stopped there, the light was green, and in a few minutes, or seconds, the light changed to caution and the other car immediately took off to the left. The very best I can remember I saw him turn first and then saw the light turn. I looked to see the light, because I wanted to complete my turn as soon as possible. There was nothing in this lane then; the traffic light was caution.

* * *

* * * After I looked at the traffic and the caution light, I didn't watch the light any more to see what color it was, I wanted to watch the traffic to see if it was going to stop or if there would be a break and I could complete my turn. After I saw it was safe to turn, I went ahead. I was planning to go in the outside lane; I had crossed two lanes the best I remember, and I thought I was almost into Hawthorne when I felt a bump. The best I can remember when my car got hit the front end might have been into Hawthorne Street along there. I did not see the car that struck me at all prior to its hitting me. The car struck me on the passenger side where the door connects with the fender and on the front wheel.

In my opinion I was going no more than 10 to 15 miles an hour at the time of impact. * * *

* * *

While the light was still green for me, I pulled forward to complete the left turn as soon as I could, as soon as the traffic let up so that I could complete the turn. While I was sitting in the center of the intersection, that is when the light changed. I pulled forward just a little bit — straight ahead, while the light was still green.

As soon as I could after the light changed to yellow, I began to make my left turn, because I was in the center and I knew that traffic would be stopping and the other traffic would be starting and I would be in the center.

As soon as the light turned to caution I began to look to see if the traffic was going to stop so I could go ahead and complete my turn. I didn't want to go out before that. * * *"

At the conclusion of the plaintiff's evidence and again at the conclusion of all the evidence, the defendant moved for a directed verdict against the plaintiff under Rule 50, and at the conclusion of all the evidence, the plaintiff moved for a directed verdict against the defendant's counterclaim. All of these motions were based upon the grounds of a lack of actionable negligence on the part of the movant and contributory negligence as a matter of law on the part of the adverse party. The trial judge allowed the motion of the plaintiff, and also allowed the motion made by the defendant at the conclusion

of all the evidence. From the entry of the judgment dismissing with prejudice the plaintiff's action and the defendant's counterclaim, both parties appealed.

Calvin L. Brown, and Kennedy, Covington, Lobdell & Hickman by Hugh L. Lobdell for plaintiff appellant.

John D. Warren, and Carpenter, Golding, Crews & Meekins by James P. Crews for defendant appellant.

MALLARD, Chief Judge.

Under the evidence in this case, we are of the opinion and so hold that both of the parties were contributorily negligent as a matter of law, and the trial judge correctly allowed the motions for a directed verdict.

No error.

Judges MORRIS and PARKER concur.

STATE OF NORTH CAROLINA v. JAMES H. THOMPSON

No. 725SC560

(Filed 30 August 1972)

1. **Criminal Law § 23— plea of guilty — finding of voluntariness supported by evidence**

In a prosecution for forgery and uttering forged instruments, the trial court's adjudication that the defendant's pleas of guilty were freely, understandingly and voluntarily entered was fully supported by the evidence.

2. **Criminal Law § 23— plea of guilty — question presented on appeal**

Defendant's voluntary plea of guilty to charges of uttering forged instruments obviated the necessity of proof by the State, and his appeal presented for review only whether the indictment charged an offense punishable under the Constitution and law.

3. **Criminal Law § 140— consecutive sentences — certainty of judgment**

Defendant's contention that the sentence imposed lacked the degree of certainty required of judgments in criminal cases was untenable where the record clearly disclosed that it was the intention of the trial judge that the sentence imposed was to commence "at the expiration of the sentence the defendant is now serving."

State v. Thompson

APPEAL by defendant from *Blount, Judge,* 28 February 1972 Session of Superior Court held in NEW HANOVER County.

The defendant James H. Thompson was charged in three two-count bills of indictment, proper in form, with forgery and uttering forged instruments. The defendant, represented by counsel, pleaded guilty to the count charging uttering a forged instrument in each bill of indictment. From a judgment imposing a prison sentence of 5 to 7 years in each case, the defendant appealed.

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

Jeffrey T. Myles for the defendant appellant.

HEDRICK, Judge.

[1] The defendant first asserts the Court erred "in failing to explain to the defendant the charges of uttering a forged instrument and in failing to make sure that he understood all the elements of this charge." This contention challenges the trial court's adjudication that the defendant's pleas of guilty were freely, understandingly, and voluntarily entered. The record reveals that the defendant signed the "transcript of plea" contained in the record and that the trial judge, after the defendant was sworn to tell the truth, made careful inquiry of the defendant regarding his pleas of guilty. The record is replete with evidence to support the adjudication that the defendant's pleas of guilty were in fact freely, understandingly, and voluntarily given. *State v. Hunter,* 11 N.C. App. 573, 181 S.E. 2d 752 (1971); *State v. Hunter,* 279 N.C. 498, 183 S.E. 2d 665 (1971); cert. den. 31 L.Ed. 2d 249 (1972); *State v. Cadora,* 13 N.C. App. 176, 185 S.E. 2d 297 (1971). This contention is meritless.

[2] Next, the defendant contends "that the trial Judge erred in entering judgment against the defendant on three charges of Uttering a Forged Instrument in that the State had failed to prove that the defendant had uttered a forged instrument."

Defendant's voluntary plea of guilty obviated any necessity of proof by the State, and when such plea was entered, his appeal presents for review only whether the indictment

charges an offense punishable under the Constitution and law. *State v. Wynn,* 278 N.C. 513, 180 S.E. 2d 135 (1971); *State v. Cadora, supra.* In this case the record affirmatively shows the defendant freely and understandingly pleaded guilty to three valid charges of uttering forged instruments and the prison sentences imposed are within the limits prescribed for a violation of the statute, G.S. 14-120. This assignment of error has no merit.

[3] In his fifth assignment of error, "defendant respectfully contends, that based upon the North Carolina Supreme Court decision in *In re Swink,* 243 N.C. 86, 89 S.E. 2d 792 (1955), the sentence imposed in 72CR1586 lacks the degree of certainty required of judgments in criminal cases." The case of *In re Swink, supra,* is factually distinguishable and is not controlling. In *In re Smith,* 235 N.C. 169, 172, 69 S.E. 2d 174, 175 (1952), it is stated:

> " 'When a term of imprisonment is still unexpired, the prisoner being in custody, the proper course at common law is to appoint the second imprisonment to begin at the expiration of the first, to be specifically referred to in the sentence; and a sentence to this effect, when the prior imprisonment is specified, is sufficiently exact.' Whart. Criminal Law, 10th Ed., p. 2307; 24 C.J.S. 107; 15 Am. Jur. 123; Anno. 70 A.L.R. 1511 *et seq.; In re Black* . . . [162 N.C. 457, 78 S.E. 273]; *State v. Cathey,* 170 N.C. 794, 87 S.E. 532; *State v. Duncan* . . . [208 N.C. 316, 80 S.E. 595]; *In re Parker* . . . [225 N.C. 369, 35 S.E. 2d 169]."

In *State v. Lightsey,* 6 N.C. App. 745, 746, 171 S.E. 2d 27, 29 (1969), this Court held that the imposition of sentence "to begin at the expiration of any and all sentences the defendant is now serving in the North Carolina Department of Correction" clearly indicated the intent of the trial judge that the sentences of defendant be served consecutively without resort to evidence *aliunde.* In the present case, without resorting to evidence *aliunde,* the record clearly discloses that it was the intention of the trial judge that the prison sentence imposed in case number 72CR1586 was to commence "at the expiration of the sentence the defendant is now serving." This assignment of error is overruled.

The defendant has other contentions which we have considered and find without merit. The defendant had a fair trial free from prejudicial error.

No error.

Judges BROCK and MORRIS concur.

MARY LOU BLEVINS SHAMEL v. LAWRENCE MARTIN SHAMEL

No. 7221DC540

(Filed 30 August 1972)

1. **Appeal and Error § 24— abandonment of exceptions**

Where an assignment of error is not brought forward in an appellant's brief and no reason or argument is stated or authority cited in support of the exceptions upon which it is based, such exceptions are deemed abandoned. Court of Appeals Rule 28.

2. **Appeal and Error § 57— findings of fact — conclusiveness on appeal**

Findings of fact made by the trial court which are supported by competent evidence are binding on appeal.

3. **Habeas Corpus § 3— custody of minors — limitation of visitation rights — no abuse of discretion**

In an action where custody of two minor children was awarded to defendant, the trial court did not abuse its discretion in placing limitations upon plaintiff's visitation rights.

APPEAL by plaintiff from *Alexander, District Judge,* 21 February 1972 Session of District Court held in FORSYTH County.

This civil action was filed by plaintiff-mother against defendant-father to determine custody of two minor children, born in 1963 and 1965. The parties were married in 1950 and lived together until January 1971, when they separated. They have four children, the two oldest being now of age. After hearing evidence presented by both parties, the court awarded custody of the two minor children to defendant, subject to certain visitation rights granted to plaintiff. Plaintiff appealed.

White & Crumpler by James G. White and Michael J. Lewis for plaintiff appellant.

Hatfield, Allman & Hall by James W. Armentrout for defendant appellee.

PARKER, Judge.

[1, 2] Appellant first assigns as error that certain of the findings of fact in the order appealed from are not supported by the evidence. This assignment is not brought forward in appellant's brief and no reason or argument is stated or authority cited in support of the exceptions upon which it is based. Therefore, these exceptions are deemed abandoned. Rule 28, Rules of Practice in the Court of Appeals. In any event, examination of the record reveals that there was competent evidence to support all material findings of fact made by the trial court. The weight to be given conflicting evidence was for the trial court to determine, and its findings of fact supported by competent evidence are binding upon this appeal. *In re McCraw Children*, 3 N.C. App. 390, 165 S.E. 2d 1.

The findings of fact made by the trial court fully support its conclusion that defendant is, and plaintiff is not, a fit and proper person to have custody of the two younger children and that the best interests of the children will be served by granting custody to the defendant-father. Accordingly, appellant's second assignment of error is overruled.

[3] Finally, appellant contends that even if no error was committed in awarding custody of the children to her husband, her visitation rights were too narrowly limited. In granting visitation privileges, as well as in awarding primary custody of minor children, necessarily a wide discretion is vested in the trial judge. His is the opportunity to see the parties in person and to hear the witnesses, and his decision ought not to be upset on appeal absent a clear showing of abuse of discretion. *In re Custody of Pitts*, 2 N.C. App. 211, 162 S.E. 2d 524. In view of the evidence in the record before us and in view of the facts found therefrom by the trial judge, the limitations which the court imposed upon plaintiff's visitation rights do not

appear unreasonable. Certainly no abuse of discretion has been shown.

Affirmed.

Judges VAUGHN and GRAHAM concur.

STATE OF NORTH CAROLINA v. THOMAS J. KALLAM, JR.

No. 7221SC605

(Filed 30 August 1972)

1. **Criminal Law § 134— sentencing procedure — when judgment will be vacated**

A judgment will not be disturbed because of sentencing procedures unless there is a showing of abuse of discretion, procedural conduct prejudicial to defendant, circumstances which manifest inherent unfairness and injustice, or conduct which offends the public sense of fair play.

2. **Criminal Law § 134— sentencing procedure — no abuse of discretion shown**

The sentencing procedure was fair and proper in a prosecution for forging a check and uttering the check knowing it to be forged where defendant was given repeated opportunities to rebut any of the matters being considered by the judge before sentence was imposed, to give his version of the offenses to which he had pleaded guilty and to testify or make representations in mitigation.

APPEAL by defendant from *Long, Judge,* 17 April 1972 Session of Superior Court held in FORSYTH County.

Defendant was brought to trial under two bills of indictment each charging him in separate counts with forging a check and thereafter uttering the check knowing it to be forged.

On 12 April 1972 defendant tendered pleas of guilty. After questioning defendant relating to the voluntariness of his pleas, the court adjudged them to have been freely, understandingly and voluntarily made and ordered them entered upon the record. Sentencing was deferred until Friday, 14 April 1972. On that date defendant was called but did not appear. Prayer for judgment was continued until the next session of court and the cases came on for judgment on 21 April 1972. Judgment was

entered imposing consecutive sentences of not less than five nor more than ten years in each case. The sentence in the first case was ordered served concurrently with a sentence being served by defendant in federal prison. Charges in eight other bills of indictment were nol prossed with leave by the State.

Attorney General Morgan by Associate Attorney Ricks for the State.

W. Leslie Johnson, Jr., for defendant appellant.

GRAHAM, Judge.

Defendant challenges the sentencing procedure, contending, among other things, that improper evidence was admitted and considered by the court in rendering judgment and sentence.

[1] "A judgment will not be disturbed because of sentencing procedures unless there is a showing of abuse of discretion, procedural conduct prejudicial to defendant, circumstances which manifest inherent unfairness and injustice, or conduct which offends the public sense of fair play." *State v. Pope,* 257 N.C. 326, 335, 126 S.E. 2d 126, 133.

[2] Defendant here was given repeated opportunities to rebut any of the matters being considered by the judge before sentence was imposed, to give his version of the offenses to which he had pleaded guilty, and to testify or make representations in mitigation. We find nothing so manifestly unfair about the procedure employed as to require that the judgments be vacated.

The sentences imposed were within the maximum limits allowed by law and no error appears on the face of the record.

Affirmed.

Judges PARKER and VAUGHN concur.

STATE OF NORTH CAROLINA, EX REL, UTILITIES COMMISSION AND PUBLIC SERVICE COMPANY OF NORTH CAROLINA v. CITY OF DURHAM, SANFORD BRICK & TILE COMPANY, TRIANGLE BRICK COMPANY, BORDEN BRICK COMPANY, CHEROKEE BRICK COMPANY, LEE BRICK & TILE COMPANY, AND CHATHAM BRICK & TILE COMPANY

No. 7210UC45

(Filed 30 August 1972)

APPEAL by defendants (protestants) from an order of the North Carolina Utilities Commission entered 27 May 1971, and as amended by order entered 1 June 1971.

This proceeding was declared by the Utilities Commission to be a general rate case governed by G.S. 62-133.

The applicant, Public Service Company of North Carolina, Inc., a distributor of natural gas in North Carolina, applied to the Utilities Commission for authority to adjust its rates and charges for natural gas services.

The Commission's orders grant rate increases to applicant which afford it an opportunity to realize additional annual gross revenues of approximately $3,097,171.00 ($1,652,003.00 of which is for purchased gas increases, and $1,445,168.00 of which is for additional general rate increases).

The protestants appealed.

Boyce, Mitchell, Burns and Smith, by F. Kent Burns, for Public Service Company, Inc.

Edward B. Hipp and Maurice W. Horne, for the North Carolina Utilities Commission.

Claude V. Jones for the City of Durham.

Broughton, Broughton, McConnell and Boxley, by J. Melville Broughton, Jr., for Sanford Brick and Tile Company, Triangle Brick Company, Borden Brick Company, Cherokee Brick Company, Lee Brick and Tile Company, and Chatham Brick and Tile Company.

BROCK, Judge.

This appeal calls for a review of a decision of the North Carolina Utilities Commission in a general rate-making case. See G.S. 7A-30(3).

Appellants' assignments of error numbers 1, 2, and 5 are sustained. The order appealed from is

Reversed.

Judges HEDRICK and VAUGHN concur.

HOWARD G. BOWEN, SR., ADMINISTRATOR OF ESTATE OF HOWARD GIBSON BOWEN, JR., DECEASED v. CONSTRUCTORS EQUIPMENT RENTAL COMPANY, A NORTH CAROLINA CORPORATION, AND JAMES STEPHEN WILSON

No. 7218SC454

(Filed 20 September 1972)

1. **Appeal and Error § 6— damages issue set aside — matter of law — right to appeal**

Where the verdict as to damages was set aside as a matter of law, rather than in the court's discretion, plaintiff could appeal as an aggrieved party.

2. **Death § 7— wrongful death — instructions — life expectancy of recipients of damages**

Where, in an action brought under the wrongful death statute as rewritten in 1969, there is evidence tending to show that persons entitled to receive the damages have a shorter life expectancy than that of deceased, the court must instruct the jury to consider the life expectancy of such persons in determining the amount of damages, if any, recoverable for the death. G.S. 28-174(a)(4).

3. **Electricity § 8; Negligence § 35— crane cable striking power line — electrocution — contributory negligence**

In an action for the wrongful death of plaintiff's intestate who was electrocuted when the cable of a crane, which the intestate had the task of attaching to sections of concrete pipe, struck a power line, plaintiff's evidence did not establish that his intestate was contributorily negligent as a matter of law where it tended to show that the boom of the crane had been successfully operated underneath the wires for almost two hours, that the boom was extended to a point

higher than the wires only brief moments before the fatal accident, and that plaintiff's intestate could not watch the boom every instant and still accomplish his task of hooking the end of the cable into the pipe, and where there was evidence which would support the inference that the movement of the boom by the crane operator, and not the movement of the cable by the intestate, caused the cable to strike the power line.

Judge VAUGHN *concurring in part and dissenting in part.*

APPEAL by plaintiff and defendants from *Exum, Judge,* 3 January 1972 Regular Civil Session of Superior Court held in GUILFORD County, High Point Division.

Civil action for the alleged wrongful death of plaintiff's intestate who was killed by electrocution while working on a construction site in High Point on 26 June 1969. Plaintiff offered evidence which tended to show the following:

At the time of his death, plaintiff's intestate was 17 years of age, unemancipated, and living with his father (the plaintiff), his mother and a sister. He planned to enter college as a freshman in the fall of 1969 and obtained employment for that summer with Samet Construction Company. Samet was erecting a building on Kettering Road. In connection with the project it was necessary to construct a storm sewer by installing sections of concrete pipe in a ditch running diagonally for approximately 100 feet between the building and the curb of the road. Each section of pipe was thirty inches in diameter, approximately four feet long, and weighed from 1400 to 1500 pounds. The pipe had been unloaded near the curb of the road. High tension power lines, approximately 32 feet in height, ran parallel to the road and near the curb.

The corporate defendant was engaged by Samet to furnish a crane and operator to place the pipe in the ditch. Plaintiff's intestate was assigned to assist. On 25 June 1969 defendants brought to the site a crane which had a stationary boom that could not maneuver safely underneath the power lines. For this reason this crane was not used, and it was replaced the following day with one which had a 20-foot boom that could be lowered and extended 60 feet in a telescopic manner. The president of Samet testified that the power company was not requested to cut off the power because this crane could be operated lower than the power lines.

A cable extended from the boom of the crane and a "finger-type" hook, weighing approximately 20 pounds, was at the end of the cable to hook into the pipe. The job of plaintiff's intestate was to insert the hook into the pipes. The individual defendant operated the crane. For a considerable period of time the boom was operated underneath the wires. Odell Couch testified that he watched the operation for almost two hours and during this time the boom was kept low. He stated that "the cable will pick up real close to the boom, and it was out to an angle enough to get under the wires and not do nothing." At no time during this period did the witness see the boom extend above the wires or get closer than three to four feet from them. The witness left the premises for about 10 minutes and returned to make a telephone call from an office on the job site. As he came out of the door of the office, the witness heard a buzzing noise and saw the crane up above the wire. The crane boom and cable were "right straight up over the wire." He ran to see what had happened and found Mr. Samet trying to revive the Bowen boy.

Samet testified: "I looked up and saw that the boom of the crane was up very high and that the boom was moving very close to the power lines, and almost at the same instant as he was swinging around there seemed to be only a slight hesitation as it got very near the power line and then it moved closer to the power line, and the next thing I knew there was an electrical buzzing and arcing noise. . . . I looked up and saw the wire in contact with the cable from the crane, in contact with the electrical wires—and I looked down and saw Gibby Bowen, known as Howard Gibson Bowen, Jr., standing very close to this fork or finger that was hanging from the cable. At that time, I couldn't tell for sure if he was touching this piece of metal or not because of the angle and distance. . . . [H]e started moving away from this piece of metal, the fork, and appeared to be running from it." Plaintiff's intestate fell after running a few steps and died immediately from electrical shock.

In his deposition, offered in evidence by plaintiff, defendant Wilson admitted that he was operating the boom higher than the power line at the time of the accident, but he did not say when he first extended it to such a height. He stated, "I swung my boom within some 12 to 18 inches of those high-

voltage wires, and a distance of some eight to 10 feet over and above the high-voltage wires." Wilson considered this necessary for the operation. He contended that the cable made contact with the wire when plaintiff's intestate pulled the cable toward a section of pipe.

Defendants did not offer evidence.

The jury answered issues of negligence and contributory negligence in plaintiff's favor and awarded substantial damages. A fourth issue relating to defendants' cross action against Samet is not involved on this appeal.

Judgment was entered upon the first two issues. The court allowed defendants' motion to set aside the issue of damages for errors of law. In setting aside this issue, the court stated:

> " . . . [T]he Court should have instructed the Jury that on the value, the monetary value of the services, protection, care and assistance, society, companionship, comfort, guidance, and kindly offices and advice, the Jury should have taken into account the life expectancy of the parents of the decedent, they being those persons who are entitled to these things under the evidence, the Court being of the opinion that the age of the parents having been offered and the Court should have instructed the Jury on what the Mortuary Tables showed as to their life expectancy so as to give the Jury the opportunity to consider the fact that their life expectancy may have been shorter than the life expectancy of the deceased, and on that ground and on that ground only the Court is going to allow the defendants' motion to set aside the verdict on the Third Issue only.
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> * * *
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> . . . [T]he motion is denied on any other ground, which is to say the Court does not feel the verdict is excessive and does not allow the motion on that ground, but only on the law in the case."

Morgan, Byerly, Post & Herring by W. B. Byerly, Jr., for plaintiff appellant-appellee.

Smith, Moore, Smith, Schell & Hunter by Bynum M. Hunter and David M. Moore II for defendant appellants-appellees.

GRAHAM, Judge.

PLAINTIFF'S APPEAL

[1] Plaintiff appeals from the court's order setting aside the issue of damages. Since this portion of the verdict was set aside as a matter of law, rather than in the court's discretion, plaintiff may appeal as an aggrieved party. *McNeill v. McDougald,* 242 N.C. 255, 87 S.E. 2d 502; *Akin v. Bank,* 227 N.C. 453, 42 S.E. 2d 518.

[2] This appeal raises the question: Where, in an action brought under our wrongful death statute as rewritten in 1969, there is evidence tending to show that persons entitled to receive the damages recovered have a shorter life expectancy than that of deceased, is it error for the court to fail to instruct the jury to consider the life expectancy of such persons in determining the amount of damages, if any, recoverable pursuant to G.S. 28-174(a) (4)? We answer in the affirmative and affirm the order setting aside the issue of damages for the reason that the jury was not so instructed.

G.S. 28-173 confers upon the personal representative of a decedent the right of action to recover for the decedent's wrongful death. G.S. 28-174 sets forth the basis on which the amount of damages is to be determined. Prior to 14 April 1969, G.S. 28-174 provided: "The plaintiff in such action may recover such damages as are a fair and just compensation for the pecuniary injury resulting from such death." Under this provision damages were "determinable on the basis of the pecuniary injury suffered by the decedent's estate as a result of his death," *Smith v. Mercer,* 276 N.C. 329, 334, 172 S.E. 2d 489, 492, and the measure of damages was the present value of the net pecuniary worth of the deceased based upon his life expectancy. *Smith v. Mercer, supra; Bryant v. Woodlief,* 252 N.C. 488, 114 S.E. 2d 241; 81 A.L.R. 2d 939.

In 1969 the provisions of G.S. 28-174 were rewritten. The new statute, effective 14 April 1969, provides in pertinent part:

> "Sec. 28-174. *Damages recoverable for death by wrongful act; evidence of damages.* (a) Damages recoverable for death by wrongful act include:

(1) Expenses for care, treatment and hospitalization incident to the injury resulting in death;

(2) Compensation for pain and suffering of the decedent;

(3) The reasonable funeral expenses of the decedent;

(4) The present monetary value of the decedent to the persons entitled to receive the damages recovered, including but not limited to compensation for the loss of the reasonably expected:

a. Net income of the decedent,

b. Services, protection, care and assistance of the decedent, whether voluntary or obligatory, to the persons entitled to the damages recovered,

c. Society, companionship, comfort, guidance, kindly offices and advice of the decedent to the persons entitled to the damages recovered;

(5) Such punitive damages as the decedent could have recovered had he survived, and punitive damages for wrongfully causing the death of the decedent through maliciousness, wilful or wanton injury, or gross negligence;

(6) Nominal damages when the jury so finds.

(b) All evidence which reasonably tends to establish any of the elements of damages included in subsection (a), or otherwise reasonably tends to establish the present monetary value of the decedent to the persons entitled to receive the damages recovered, is admissible in an action for damages for death by wrongful act."

In commenting on the new statute Chief Justice Bobbitt stated in *Smith v. Mercer, supra* at 333, 172 S.E. 2d at 492:

"The 1969 Act provides for the recovery in the personal representative's action of (1) expenses for care, treatment and hospitalization incident to the injury resulting in death; (2) compensation for pain and suffering of the decedent; (3) the reasonable funeral expenses of the decedent; (4) punitive damages; and (5) nominal damages. Prior to the 1969 Act, the administrator had no right of action to recover such damages. Moreover, the

1969 Act provides for the recovery of '(t)he present monetary value of the decedent *to the persons entitled to receive the damages recovered,*' including but not limited to compensation for enumerated items. (Our italics.) We do not undertake now to define the legal significance of this provision. Suffice to say, damages determinable in accordance with this provision of the 1969 Act are quite different from damages determinable on the basis of the pecuniary injury suffered *by the decedent's estate* as the result of his death."

In discussing the 1969 changes in the law relating to damages recoverable in a wrongful death action, Professor Byrd states:

"The basic measure of recovery, as well as some of the specific items included under it in the statute, seems to shift the focus for the determination of wrongful death damages from ascertaining the loss of net income to the decedent's estate to ascertaining all monetary losses to the beneficiaries. A reasonable interpretation of the statute might well hold that not only the present worth of the decedent's net income (the measure of recovery under the prior statute) but also the beneficiaries' life expectancies and expectations of gain from the decedent must be considered in determining the losses based upon termination of the decedent's earnings." Byrd, Recent Developments in N.C. Tort Law, 48 N.C.L. Rev. 791, 804-805.

It is consistently held in jurisdictions where the measure of damages in death cases is "loss to beneficiaries," rather than the "loss to estate," that a beneficiary's right to recover the value of expected benefits is limited to his life expectancy. See for instance: *Rikimatsu Kawamura v. Honek,* 127 Cal. App. 509, 16 P. 2d 150; *Parsons v. Easton,* 184 Cal. 764, 195 P. 419; *Siebeking v. Ford,* 128 Ind. App. 475, 148 N.E. 2d 194; *Baltimore Transit Co. v. State,* 194 Md. 421, 71 A. 2d 442; *Mississippi Oil Co. v. Smith,* 95 Miss. 528, 48 So. 735; *Fisher v. Trester,* 119 Neb. 529, 229 N.W. 901; *Whitaker v. Blidberg Rothchild Co.,* 296 F. 2d 554 (4th Cir. 1961); 25A C.J.S., Death, § 121, p. 1013; 22 Am. Jur. 2d, Death, § 162, p. 723; Annot., Death of Infant—Measure of Damages, 14 A.L.R. 2d 485, § 23; S. Speiser, Recovery for Wrongful Death, § 3:5, p. 78. *Cf. Jones v. Dague,* 252 S.C. 261, 166 S.E. 2d 99.

We think it clear that damages recoverable under G.S. 28-174(a) (4) are not determined by ascertaining the net pecuniary loss suffered by the estate, as was the case under former G.S. 28-174. They are determined by ascertaining the present monetary loss suffered by those persons entitled to receive the damages. (Beneficiaries under the Intestate Succession Act.) Here, the parents of the deceased are "the persons entitled to receive the damages." Since they obviously could not receive any benefit after their own death, their life expectancy is material in determining "the present monetary value of the decedent" to them. The jury should have been instructed that in making this determination, it is the shorter expectancy of life that is to be taken into consideration and that if the life expectancies of the parents were determined to be shorter than that of the son, the benefits to be considered would be those only which might reasonably be expected to accrue during the life of the parents.

DEFENDANTS' APPEAL

[3] Defendants' first contention is addressed to the denial of their motions for directed verdict and judgment N.O.V. They raise only the question of whether plaintiff's evidence establishes the contributory negligence of his intestate as a matter of law. It is elementary that unless the evidence so clearly establishes the contributory negligence of plaintiff's intestate that no other conclusion can reasonably be reached, this question must be resolved against defendants. Further, any discrepancies and contradictions in the evidence are to be resolved by the jury, and not by the court. *Naylor v. Naylor,* 11 N.C. App. 384, 181 S.E. 2d 222, and cases cited.

The law imposed upon plaintiff's intestate the duty to use ordinary care to protect himself from injury; the degree of care required being commensurate with the danger to be avoided. *Rosser v. Smith,* 260 N.C. 647, 133 S.E. 2d 499; *Alford v. Washington,* 244 N.C. 132, 92 S.E. 2d 788; *Rice v. Lumberton,* 235 N.C. 227, 69 S.E. 2d 543; *Mintz v. Murphy,* 235 N.C. 304, 69 S.E. 2d 849. Whether plaintiff's intestate exercised the required degree of care under the circumstances presented here is, in our opinion, a question that was properly left to the jury.

The evidence, when considered in the light most favorable to plaintiff, strongly suggests that it was only brief moments before the fatal movement of the cable that the boom of the crane was extended to a point higher than the power lines. For almost two hours previously the boom had been successfully operated underneath the wires where there was no danger that it could move the cable, or permit it to be moved, into contact with the lines. Indeed, this particular crane had been substituted for the one first brought to the site so that it could be operated in this manner. The evidence certainly does not compel the conclusion that plaintiff's intestate knew, or in the exercise of reasonable care should have known, that the operator of the crane would suddenly and without notice extend the height of the boom above the wires so as to increase substantially the danger involved. Absent notice to the contrary, a person may assume, and act upon the assumption, that every other person will perform his duty and obey the law and that he will not be exposed to danger which can come to him from the violation of duty by such other person. *Weavil v. Myers,* 243 N.C. 386, 90 S.E. 2d 733.

Moreover, it is manifest from the evidence that plaintiff's intestate could not watch the boom every instant and still accomplish his task of hooking the end of the cable into the pipe. The individual defendant testified that attention and care were required in inserting the 20-pound finger into a pipe; otherwise, the pipe could sustain damage by chipping or something of that nature. "One engaged in work which can be done safely, and whose assignment prevents him from maintaining a lookout, may not be held contributorily negligent, as a matter of law, when he proceeds with his duties on the assumption that another worker will perform his own assignment in a reasonably careful manner and thus not increase the danger." *Lewis v. Barnhill,* 267 N.C. 457, 464, 148 S.E. 2d 536, 542.

Lewis v. Barnhill, supra, presented facts strikingly similar to those involved in this case. The plaintiff sustained an electric shock when a steel joist being hoisted by a crane came in contact with an electric wire. Plaintiff's job was to place one end of the joist on a center beam. In holding that the evidence did not establish plaintiff's contributory negligence as a matter of law, the Supreme Court emphasized that plaintiff's assignment required that his attention be concentrated upon

his end of the joist; and further, that with reasonable care the defendant crane operator could have brought the joist to plaintiff at a lower level "and thus have avoided any contact with the power line." Similar conclusions can reasonably be drawn from the evidence in this case.

Defendants strenuously argue that their motions should have been allowed because plaintiff offered in evidence the deposition of the individual defendant and that testimony in the deposition tended to show that plaintiff's intestate pulled the cable into the power line after the boom had stopped so as to leave the cable still 12 to 18 inches away from the line.

Where a person sees an electric wire and knows it is or may be highly dangerous, it is his duty to avoid contact with it. *Alford v. Washington, supra.* Defendants cite several cases which hold that a person working with or in close proximity to electric wires, which he knows to be dangerous, is negligent as a matter of law if his conduct results in contact being made with the wires. A similar result might be appropriate in this case if plaintiff's evidence permitted no inference contrary to the one which arises from the individual defendant's testimony, and if the evidence also conclusively established that plaintiff's intestate should have known that the crane's boom had been extended to a point where contact was possible. However, the evidence here permits other inferences. Couch was explicit in stating that when he heard the buzzing noise the boom, as well as the cable, was "right straight up over the wire." Samet testified that he saw the boom moving very close to the power lines, that there seemed to be only a slight hesitation as it got very near the power line and "then it [the boom] moved closer to the power line, the next thing I knew there was an electrical buzzing and arcing noise. . . . "

A clear inference arises from this evidence that it was the movement of the boom by Wilson, and not the movement of the cable by plaintiff's intestate, that caused the cable to make contact with the power pines. Contradictions, conflicts and inconsistencies in the evidence, and opposing inferences arising therefrom, must be resolved in plaintiff's favor. *Bowen v. Gardner,* 275 N.C. 363, 168 S.E. 2d 47.

Defendants bring forward an assignment of error to the court's charge to the jury on the issue of negligence. This

assignment of error has been reviewed and is overruled. Other assignments of error relating to the issue of damages are not discussed since that issue was set aside and must be retried.

Plaintiff's appeal—affirmed.

Defendants' appeal—no error.

Judge MORRIS concurs.

Judge VAUGHN concurs in part and dissents in part.

Judge VAUGHN:

I concur in the opinion of the majority which concludes that there were errors in the charge of the court. I dissent from the opinion of the majority which finds no error on defendants' appeal. In my opinion, a review of the entire record discloses that plaintiff's intestate was negligent as a matter of law and that such negligence was a proximate cause of his death.

ALLEN D. JONES v. SATTERFIELD DEVELOPMENT COMPANY AND BILLY R. SATTERFIELD

No. 7221SC576

(Filed 20 September 1972)

1. **Rules of Civil Procedure § 12— failure to state claim for relief — motion to dismiss made on appeal**

A motion to dismiss an action for failure to state a claim upon which relief can be granted may not be raised for the first time on appeal.

2. **Trial § 21— directed verdict — consideration of evidence**

In ruling on defendant's motion for directed verdict, the trial court must take all plaintiff's evidence as true and must consider it in the light most favorable to him, giving to plaintiff the benefit of all reasonable inferences and resolving all inconsistencies in his favor.

3. **Negligence § 30— sufficiency of plaintiff's evidence to withstand motions for directed verdict, judgment NOV and to set judgment aside**

In an action for personal injuries sustained when plaintiff fell on an approach lane in defendant's bowling alley, the trial court

properly denied defendant's motions for directed verdict, for judgment NOV, and to set the judgment aside where the facts were in dispute in that plaintiff contended that defendant was negligent in allowing a foreign substance to remain on the approach lane after its presence was reported and that such negligence proximately caused plaintiff's injury, while defendant denied the presence of the foreign substance and said that if its presence was reported, it was removed immediately.

4. **Trial § 33— jury charge — no prejudicial error**

Where the jury charge considered as a whole presents the law of the case in such manner as to leave no reasonable cause to believe the jury was misled or misinformed, an exception will not be sustained for that the instruction might have been better stated, hence, the trial court's charge failing to limit the jury determination of negligence to the absence or presence of oil on an approach lane of defendant's bowling alley, though semantically incorrect, did not constitute prejudicial error.

5. **Damages § 3— permanent disability as element of damages — sufficiency of evidence to require instruction**

Where there is evidence from which a conclusion of permanent injury proximately resulting from the wrongful act may properly be drawn, the court should instruct the jury so as to permit its inclusion in an award of damages; therefore, the trial court properly permitted the jury to consider permanent disability on the issue of damages where plaintiff's evidence tended to show that his leg was one-half inch shorter as a result of his injury, despite the fact that there was opinion testimony that the shortening should be neither disabling nor inconveniencing.

APPEAL by the individual defendant from *Long, Judge,* at the January 1972 Civil Session of FORSYTH Superior Court.

Plaintiff instituted this civil action against the corporate defendant to recover for personal injuries sustained when he slipped and fell on an approach to a lane in defendant's bowling alley. The individual defendant (herein referred to as defendant) was made a party later.

The evidence for plaintiff tended to show:

On 16 September 1967 at about 1:30 p.m., plaintiff, a young Navy man home on weekend liberty, took his sister and her friend to defendant's bowling lanes in Statesville, N. C., for the purpose of bowling. Plaintiff, an experienced bowler, was to bowl first because the girls knew little about the game. After picking up his ball and stepping on the approach on

lane 10, plaintiff pursued his normal bowling procedure and released the ball at the same time he began his slide. After releasing the ball, plaintiff hit a wet substance on the floor approximately 18 inches from the foul line which caused him to lose his balance. In attempting to regain his balance, plaintiff slipped and fell sustaining a fracture to the femur of his right leg. Plaintiff saw no foreign substance on the approach area before nor after his fall.

Plaintiff had previously (on 26 December 1966) sustained a fracture to the femur of his right leg in the same general area as the fracture herein complained of. He was released from hospitalization resulting from the first fracture six to eight weeks prior to the time he sustained the second fracture. Subsequent to the convalescence period after the second fracture, a military review board certified that plaintiff was fit to return to full military duty and upon his discharge from the Navy in 1969, plaintiff worked full time as a dock worker, a fork lift operator and as a welder and at the time of trial maintained a stand-up job. He testified that his leg still bothers him; at the end of an 8-hour work day, he limps and suffers dull aches.

Dr. T. V. Goode, III, who treated plaintiff for the fracture complained of, testified, among other things, that plaintiff's injury is termed a "comminuted fracture," meaning broken into several pieces or fragments which is often impossible to heal without overlapping with some resultant shortening of the limb; that plaintiff had less than one-half inch shortening; and that in his opinion up to one-half inch shortening is neither disabling nor inconveniencing.

On the morning of 16 September 1967 Mr. Harry Fortner, Secretary of the Bowling Association, accompanied by his wife, inspected defendant's lanes. The Fortners found drops of oil on the approach area of four or five lanes including lane 10. They reported this finding to the manager at approximately 10:30 a.m. and again before noon upon completion of the inspection. The lanes are regularly treated with oil but excess oil must be removed by the use of a linter duster to prevent bowlers from sliding and falling on it. Mr. Fortner found footprints where oil was tracked from the lanes onto the approaches.

The defendant's evidence tended to show:

On 16 September 1967 Pla-Mor Lanes was owned by Billy Satterfield and managed by Mr. Shadroui. On the afternoon of 15 September 1967, the lanes were lightly coated with oil to lubricate the lacquer and all the lanes were used that night. On the morning of 16 September 1967 the janitor ran a mop over the approaches to remove any foreign substance that might be there. The lanes were not given another oil coating prior to plaintiff's accident.

Plaintiff told Mr. Shadroui, "You know I shouldn't be bowling. I'm still under doctor's orders from an accident that I had." Mr. Shadroui advised plaintiff not to bowl.

The manager had no recollection as to whether the Fortners inspected the lanes on 16 September 1967 and did not recall anything about being told that oil was on the approaches.

At the conclusion of all evidence, defendants moved pursuant to G.S. 1A-1, Rule 50, for directed verdict on grounds that plaintiff had failed to show actionable negligence and that plaintiff's evidence showed contributory negligence as a matter of law. The motion was allowed as to the corporate defendant but denied as to the individual defendant.

The jury answered issues of negligence, contributory negligence and damage in plaintiff's favor and awarded him the sum of thirty thousand dollars. Plaintiff agreed to remit from the jury verdict the sum of twenty thousand dollars and from judgment against the individual defendant for ten thousand dollars, he appealed.

Billings and Graham by Donald R. Billings for defendant appellant.

White & Crumpler by James G. White and Michael J. Lewis for plaintiff appellee.

BRITT, Judge.

[1] Defendant's first assignment of error is addressed to the pleadings. Defendant contends that since the original complaint served in this action named only Satterfield Development Company as defendant and no new complaint or amendment was filed after Billy R. Satterfield was made a party defendant, that the complaint as originally filed fails to state

a claim upon which relief can be granted against the individual defendant and since the trial court dismissed the action as to the corporate defendant, the entire action should now be dismissed. Defendant moves this court to dismiss the action under G.S. 1A-1, Rule 12(b)(6), for failure to state a claim upon which relief can be granted. The record does not show that a Rule 12(b)(6) motion was made by the individual defendant at trial.

The question of whether a motion to dismiss an action for failure to state a claim upon which relief can be granted can for the first time be raised on appeal was answered in the negative by Morris, Judge, speaking for this court in the recent case of *Dale v. Lattimore*, 12 N.C. App. 348, 183 S.E. 2d 417 (1971), cert. den. 279 N.C. 619, 184 S.E. 2d 113. No useful purpose would be served by repeating what was said there. The assignment of error is overruled.

[2] Defendant next assigns as error the failure of the trial judge to direct a verdict for defendant at the conclusion of all the evidence for that plaintiff failed to show actionable negligence, and failure to enter judgment for the defendant notwithstanding the verdict or to set the verdict aside.

In deciding whether a plaintiff's evidence is sufficient to withstand a defendant's motion for a directed verdict in a jury case, both the trial and appellate courts must adhere to the same principles that governed under our former procedure with regard to sufficiency of evidence to withstand a motion for nonsuit under former G.S. 1-183. *Pergerson v. Williams*, 9 N.C. App. 512, 176 S.E. 2d 885 (1970); *Sawyer v. Shackleford*, 8 N.C. App. 631, 175 S.E. 2d 305 (1970); *Musgrave v. Savings & Loan Assoc.*, 8 N.C. App. 385, 174 S.E. 2d 820 (1970). All of plaintiff's evidence must be taken as true and considered in the light most favorable to him giving to plaintiff the benefit of all reasonable inferences and resolving all inconsistencies in his favor. *Bowen v. Gardner*, 275 N.C. 363, 168 S.E. 2d 47 (1969); *Pergerson v. Williams, supra.*

The issue submitted by this assignment of error is whether plaintiff's evidence in this case, when considered in the light most favorable to plaintiff, is sufficient to support the jury finding. We agree with the trial judge that it is.

[3] Plaintiff introduced evidence which, if believed, tended to show that a foreign substance, oil, was present on the approach area of the lane on which plaintiff tried to bowl, that the presence of this foreign substance was reported to defendant's manager prior to the time plaintiff arrived to bowl, and that plaintiff without knowledge of its presence slipped and fell on this slippery substance sustaining personal injury. Considered in the light most favorable to plaintiff, the evidence tended to establish negligence on the part of the defendant with injury to plaintiff proximately resulting therefrom. "Where the slippery substance is placed on or negligently applied to the floor by the proprietor or his servants or employees, the proprietor is liable if injury to an invitee proximately results." *Forrest v. Kress & Co.*, 1 N.C. App. 305, 308, 161 S.E. 2d 225, 227 (1968). Further, defendant denied the presence of a foreign substance on the approach area and said that if the presence of oil was reported, it was removed immediately. The facts were in dispute and as Sharp, Justice, said in *Cutts v. Casey*, 278 N.C. 390, 418, 180 S.E. 2d 297, 312 (1971) : " 'A verdict may never be directed when the facts are in dispute. The judge may direct a verdict only when the issue submitted presents a question of law based on admitted facts.' "

We hold that the trial court did not err in denying defendant's motions for directed verdict, for judgment n.o.v., and to set the verdict aside. G.S. 1A-1, Rule 50.

[4] Defendant's third assignment of error relates to that portion of the trial judge's instruction to the jury that charged as follows:

> "So now, members of the jury, as to this first issue, I instruct you that if you find from the evidence and by its greater weight that the defendant, Billy Satterfield, or his agent or employee, negligently created a dangerous condition on the player approach to bowling alley lane No. 10 by putting oil or *some other slippery substance* there when he knew, or should have known, a bowler was likely to go there and to slip on it, or if you find by the greater weight of the evidence that a *foreign substance* was on the floor at this place where the plaintiff was injured . . . . " (Emphasis added.)

Defendant contends that the trial court failed to declare and explain the law arising on the evidence in conformity with

G.S. 1A-1, Rule 51(a), by failing to limit the jury determination of negligence to the absence or presence of *oil* on the approach.

Here, plaintiff was an invitee of defendant—an invitee being a person who goes upon premises for the mutual benefit of himself and the possessor. 6 Strong, N. C. Index 2d, Negligence, § 52; *Pafford v. Constr. Co.*, 217 N.C. 730, 9 S.E. 2d 408 (1940); *Quinn v. Supermarket, Inc.*, 6 N.C. App. 696, 171 S.E. 2d 70 (1969). The fact that plaintiff was an invitee did not make defendant an insurer of his safety while he was a customer on the premises; defendant is liable to plaintiff only for injuries sustained as a result of defendant's actionable negligence. *Farmer v. Drug Corp.*, 7 N.C. App. 538, 173 S.E. 2d 64 (1970).

Since plaintiff was an invitee, it was defendant's duty to exercise ordinary care to maintain the premises intended for plaintiff's use in a reasonably safe condition and thus not expose him unnecessarily to danger; and, further, to warn plaintiff of hidden defects and dangers of which defendant had knowledge, or in the exercise of reasonable diligence in supervision and inspection should have had knowledge and of which plaintiff did not have knowledge. *Wrenn v. Convalescent Home*, 270 N.C. 447, 154 S.E. 2d 483 (1967); *Wegner v. Delicatessen*, 270 N.C. 62, 153 S.E. 2d 804 (1967); *Routh v. Hudson-Belk Co.*, 263 N.C. 112, 139 S.E. 2d 1 (1964); *Sanders v. Anchor Co.*, 12 N.C. App. 362, 183 S.E. 2d 312 (1971); *Farmer v. Drug Corp.*, *supra; Quinn v. Supermarket, Inc.*, *supra.*

Certainly, defendant would be liable to plaintiff as an invitee should plaintiff be injured due to the presence of any foreign substance on the approach of which defendant had knowledge or which defendant through the exercise of reasonable diligence should have had knowledge and of which plaintiff did not have knowledge. Although there was direct testimony that oil was found on the approach on which plaintiff was injured, plaintiff himself did not limit the substance upon which he slipped to oil but testified that he hit a "wet" or "slick" substance. Therefore, we believe that while the trial judge erred, semantically speaking, by instructing the jury that they might consider oil or "some other slippery substance," that the error was not prejudicial to defendant.

It is well settled that the jury charge must be considered contextually as a whole, and when so considered if it presents

the law of the case in such manner as to leave no reasonable cause to believe the jury was misled or misinformed, we will not sustain an exception for that the instruction might have been better stated. 7 Strong, N.C. Index 2d, Trial, § 33; *Gregory v. Lynch,* 271 N.C. 198, 155 S.E. 2d 488 (1967). The assignment of error is overruled.

[5] In his next assignment of error defendant contends that although the medical testimony showed plaintiff's leg to be approximately one-half inch shorter as a result of his injury, that in light of Dr. Goode's testimony that in his opinion this shortening should not be either disabling or inconveniencing to plaintiff, the judge was not justified in permitting the jury to consider permanent disability on the issue of damages.

Several courts have either termed the shortening of a leg a permanent injury or stated that evidence of the shortening of a leg would justify a jury determination of permanent injury. See *Teesdale v. Anschutz Drilling Company,* 138 Mont. 427, 357 P. 2d 4 (1960), leg shortened two inches; *Peagler v. Atlantic Coast Line Railroad Company,* 234 S.C. 140, 107 S.E. 2d 15 (1959), leg shortened two inches; *New York Life Insurance Co. v. Williamson,* 53 Ga. App. 28, 184 S.E. 755 (1936), leg shortened; *Heil v. Seidel,* 249 Ky. 314, 60 S.W. 2d 626 (1933), leg shortened one-half inch; *O'Dell v. James Stewart & Co.,* 96 Neb. 147, 147 N.W. 121 (1914), leg shortened three-fourths inch.

Our Supreme Court has held that where there is evidence from which a conclusion of permanent injury proximately resulting from the wrongful act may properly be drawn, the court should instruct the jury so as to permit its inclusion in an award of damages. *Short v. Chapman,* 261 N.C. 674, 682, 136 S.E. 2d 40, 46 (1964). We hold that the instruction was proper in this case.

We have considered defendant's other assignments of error and find them to be without merit.

No error.

Chief Judge MALLARD and Judge CAMPBELL concur.

GARY KENT ORMOND, A MINOR BY HIS NEXT FRIEND, VIRGINIA BELL ORMOND v. DONALD CRAMPTON AND THE YOUNG MEN'S CHRISTIAN ASSOCIATION OF RALEIGH, INC.

No. 723SC533

(Filed 20 September 1972)

1. **Appeal and Error § 22— failure to docket in time — petition for certiorari**

Though the record on appeal was not docketed within the time allowed, the court on appeal treated it as a petition for certiorari, allowed it, and considered the appeal on its merits.

2. **Appeal and Error § 49— exclusion of evidence — harmless error**

In an action to recover for injuries alleged to have been intentionally inflicted, exclusion of plaintiff's evidence tending to show hostile feelings of defendant toward plaintiff would not entitle plaintiff to a new trial where the probative value of the evidence was so trivial that its exclusion could not have affected the result of the trial.

3. **Criminal Law § 88; Witnesses § 8— time served by witness for convictions — admissibility**

It is proper to bring out on cross-examination the fact of prior criminal conviction and the length of time served on such conviction since the sentence imposed bears a relation to the gravity of the offense and has relevance to the credibility of the witness.

4. **Negligence §§ 3, 37— failure to instruct on negligence — no error**

The trial court was not required to instruct the jury on issues of negligence where plaintiff's complaint alleged intentional infliction of harm since an intentional infliction of harm is not a negligent act.

5. **Assault and Battery § 15— jury instruction on battery — issue of assault — no error**

Where the court's charge adequately apprised the jury of its duty to find that the defendant acted intentionally in the series of events which led to plaintiff's injury, plaintiff could not complain that the instruction was based on an issue of battery, while the tendered issue in the case was an assault.

APPEAL by plaintiff from *Peel, Judge,* 31 January 1972 Session of the CRAVEN Superior Court.

This is a civil action to recover for injuries alleged to have been intentionally inflicted. A directed verdit was entered as to the defendant, Raleigh Young Men's Christian Association, and the jury found in favor of the defendant, Donald Crampton.

Plaintiff Ormond and several friends entered the property of Camp Seagull, owned by the Raleigh YMCA, at about 2:00 a.m. the morning of 2 August 1968 after having been drinking and driving around Craven and Pamlico Counties. According to their testimony they had no express purpose in entering the camp other than to entertain themselves by "messing around." Some of their group cut convertible tops on automobiles located in the parking lot and scratched obscene writings in the paint.

Four of the boys proceeded to the camp dock intending to race the boats located there; however, they failed to get the outboard engines started and decided to leave. At that time, they were discovered by a night watchman, who alerted several camp counselors.

Plaintiff and the other boys attempted to escape by hiding in the water; the others were apprehended by the camp staff near the dock area, but the plaintiff got out into the river.

Defendant's testimony showed that many of the camp's boats had been freed from their moorings, and that plaintiff was walking one of the boats down river in waist-deep water. Defendant started an inboard power boat with the intention of rescuing the boats drifting in the river, picked up a companion with a six-cell flashlight, and traveled along the channel leading from the dock to the river. About 10 or 15 feet ahead of the bow of the boat plaintiff suddenly surfaced from the water and was hit by the boat defendant was operating.

Plaintiff's testimony showed that he was standing in waist-deep water, alternately swimming and running to escape, that defendant shined the flashlight in plaintiff's direction, and intentionally ran the boat into him. Plaintiff's contentions were corroborated by witness Broadway, who testified that he had a clear view of the plaintiff at all times up until the moment of impact. The night watchman testified, however, that Broadway was apprehended and taken to a cabin before the plaintiff was injured.

Wilkinson, Vosburg & Thompson by John A. Wilkinson; and Leroy Scott for plaintiff appellant.

Barden, Stith, McCotter & Sugg by James R. Sugg; Teague, Johnson, Patterson, Dilthey & Clay by I. Edward Johnson for defendant appellees.

CAMPBELL, Judge.

[1] The record on appeal was not docketed within the time prescribed by the rules of this Court. However, rather than dismissing the appeal, we have elected to treat it as a petition for certiorari, allow it, and consider the appeal on its merits. *Insurance Co. v. Webb,* 10 N.C. App. 672, 179 S.E. 2d 803 (1971).

[2] Plaintiff's first assignment of error concerns exclusion of testimony by plaintiff and witness Broadway as to statements made by defendant, which, plaintiff argues, tend to show hostile feelings of the defendant toward the plaintiff. Ormond's testimony that one of the two men in the boat that hit him told him, "If you don't hush, I'll take this boat paddle and knock your damn head off" was excluded.

The evidence, however, was heard by the jury. On direct examination, defendant Crampton testified: "As for it being testified that I threatened to hit him with a boat paddle, I did not have a boat paddle. The boat Chum has never had a boat paddle in it and didn't then." On cross-examination, Crampton testified that he did tell Ormond to be quiet, but not in a gentle tone of voice, and he admitted that he did not remember exactly what he said.

Similarly, the following testimony of witness Broadway, in spite of objections, was ultimately admitted: That when Ormond was taken to the camp infirmary, Broadway followed along with him and was thrown against the wall by the defendant when he attempted to talk with Ormond and that witness Broadway had a clear view of the boat when it struck plaintiff, which testimony was included in the court's summary of the evidence.

The exclusion of evidence is harmless when subsequently evidence of the same import is admitted. *Branch v. Seitz,* 262 N.C. 727, 138 S.E. 2d 493 (1964). Even assuming it was error

to exclude this evidence, which it is not here necessary to determine, it is felt that the probative value of this evidence is so trivial that its exclusion could not have affected the result of the trial. A new trial will not be granted for mere technical error which could not have affected the result of the trial. *McLamb v. Construction Co.*, 10 N.C. App. 688, 179 S.E. 2d 895 (1971).

[3] Plaintiff next assigned as error the questions asked over objection, to impeach his witness. In addition to questions specifically concerning the witness's criminal convictions, the witness was asked, "In connection with the breaking and entering conviction on November 4, 1970, were you not sentenced to eighteen months active sentence by the Department of Correction?" The witness's answer was affirmative. The witness was also asked if he served the sentence, to which he replied affirmatively. These questions were objected to and assigned as error.

While plaintiff concedes that a witness may be asked specific questions concerning prior criminal convictions, it is urged that questions about the sentence imposed are improper, and that the witness may not be asked if he has served time in confinement.

A survey of the law on this point reveals that there is much confusion among very few cases. See Annot., 20 A.L.R. 2d 1421 (1950); 98 C.J.S., Witnesses, § 507. Although there is a difference of opinion as to whether punishment or term of service after conviction may be shown, it is generally improper to show imprisonment before or apart from conviction. It has been held, however, that for the purpose of affecting the credibility of the witness the State may show that he has been convicted of a particular crime and the punishment inflicted. But a witness may not be impeached merely by showing that he has been in jail; there must first be shown a conviction. *People v. Howard*, 150 Cal. App. 2d 428, 310 P. 2d 120 (1957); *Brown v. Commonwealth*, 357 S.W. 2d 681 (Ky. 1962); *White v. Commonwealth*, 312 Ky. 543, 228 S.W. 2d 426 (1950); *State v. Washington*, 383 S.W. 2d 518 (Mo. 1964); *Smith v. State*, 123 S.W. 2d 655 (Tex. 1939); *Lankford v. Tombari*, 35 Wash. 2d 412, 213 P. 2d 627 (1950). This rule applies as well to the accused as to an ordinary witness. *Nichols v. Commonwealth*, 283 S.W. 2d 184 (Ky. 1955).

In *U.S. v. Ramsey,* 315 F. 2d 199 (2d Cir.) *cert. denied,* 375 U.S. 883, 11 L.Ed. 2d 113, 84 S.Ct. 153 (1963), it was held that since it is proper to bring out on cross-examination the fact of prior criminal conviction it is equally proper to bring out how long a time was served on each conviction. The court felt that the length of sentence may often bear relation to the gravity of the offense, all of which has relevance to the witness's credibility.

In *State v. Cox,* 272 N.C. 140, 157 S.E. 2d 717 (1967), the court held that a question about a sentence upon conviction *may* have been error since *the sentence itself was unlawful* (banishment), although it was not held prejudicial in this case. The court did not consider whether such a question may not be asked under any circumstances.

The law in North Carolina is that it is permissible, for purposes of impeachment, to cross-examine a witness, including the defendant in a criminal case, by asking disparaging questions concerning collateral matters relating to his criminal and degrading conduct. Such questions relate to matters within the knowledge of the witness, not to accusations of any kind made by others. Generally the scope of such cross-examination is subject to the discretion of the trial judge, and the questions must be asked in good faith. *State v. Williams,* 279 N.C. 663, 185 S.E. 2d 174 (1971). Likewise, see *State v. Gainey,* 280 N.C. 366, 185 S.E. 2d 874 (1972).

We find no controlling authority in North Carolina on this point. In a *Per Curiam* opinion in *State v. McNair,* 272 N.C. 130, 157 S.E. 2d 660 (1967) we find: " . . . Ordinarily the *quantum* of punishment imposed upon conviction or a plea of guilty of another criminal offense is not admissible for purposes of impeachment. . . . " Despite the intimation contained in this case, we think the sentence imposed bears a relation to the gravity of the offense and has relevance to the credibility of the witness. We find no merit in this assignment of error.

[4] Plaintiff assigned as error the failure of the trial court to charge the jury on issues of negligence and intentional infliction of harm.

Rule 8(a)(1) requires that any pleading which sets forth a claim for relief shall contain (1) a short and plain statement of the claim sufficiently particular to give the court and the

parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved showing that the pleader is entitled to relief, and (2) a demand for judgment for the relief to which he deems himself entitled. North Carolina Illustrative Forms 3 and 4, Rule 84, illustrate the sufficient form of a complaint for negligence; they contain much more than the corresponding federal forms, by requiring the pleader to allege the specific acts which constitute the defendant's negligence. This North Carolina requirement was the result of compromise between the drafting committee and practicing lawyers on the General Statutes Commission who wanted more specificity, especially in automobile cases. 5 W.F. Intra. L. Rev. 1 (1969). See also North Carolina Rules of Civil Procedure, § 1A-1, Rule 8, Comment.—Section (a)3: "By specifically requiring a degree of particularity the Commission sought to put at rest any notion that the mere assertion of a grievance will be sufficient under these rules. . . . "

To plead that defendant was "negligent, malicious, reckless and improper for the reason that the defendant Crampton saw the plaintiff standing in said river and knew his whereabouts, yet intentionally and without any reason directed the said boat into, over and upon the plaintiff in the manner hereinabove alleged" is a conclusion on the part of the pleader which, although it alleges an intentional infliction of harm, fails to allege negligence and proximate cause.

The mere showing of an injury does not show negligence. An intentional infliction of harm is not a negligent act. If the operator of an automobile operates his car in violation of the speed law and in so doing inflicts injury as a proximate result, his liability is based on his negligent conduct. But if the driver intentionally runs over a person, it makes no difference whether the speed is excessive or not; the driver is guilty of an assault. Such wilful conduct is beyond and outside the realm of negligence. *Jenkins v. N. C. Department of Motor Vehicles,* 244 N.C. 560, 94 S.E. 2d 577 (1956).

[5] Plaintiff's final assertion of error concerned the charge on the issue of assault. The first issue submitted was, "Did the defendant Donald R. Crampton assault the plaintiff Gary Kent Ormond as alleged in the complaint?" The court then instructed on the first issue that the jury must find that the defendant acted intentionally, and that he intentionally ran the motor

boat into the plaintiff. Plaintiff excepts to this instruction as being based on an issue of battery, while the tendered issue in the case was an assault.

An assault is an offer to show violence to another without striking him, and a battery is the carrying of the threat into effect by the infliction of the blow, it being without the consent of the person on whom the offer of violence was made or who actually received the blow. *Hayes v. Lancaster,* 200 N.C. 293, 156 S.E. 530 (1930).

Both torts have the requirement of intentional conduct on the part of the defendant. A battery is made out when the person of the plaintiff is offensively touched against his will; the tort of assault, however, does not require a touching, but requires that the plaintiff was in reasonable apprehension or fear of a battery as a result of the show of violence. An assault, then, has as an element the subjective state of mind of the plaintiff. If a battery has been committed—if the plaintiff has been personally injured—the plaintiff's fear of imminent harm is no longer an issue. The only question remaining is the intention and wilfulness of the defendant's conduct which brought about the injury.

The uncontroverted evidence presented by both plaintiff and defendant shows that Ormond suffered an injury—that he was struck by the boat driven by Crampton. The allegation in the complaint set out an intentional striking of the plaintiff, and plaintiff's evidence was clearly directed toward proof of that allegation. The court's charge adequately apprised the jury of its duty to find that the defendant acted intentionally in the series of events which led to plaintiff's injury.

In view of the finding that the case was properly submitted to the jury on proper instructions, it is not necessary to consider whether the court erred in its dismissal as to defendant YMCA or the instructions concerning evidence of permanent injuries for which damages could be assessed.

No error.

Judges BRITT and PARKER concur.

STATE OF NORTH CAROLINA v. ANDREW WORTH ALEXANDER

No. 7221SC628

(Filed 20 September 1972)

1. **Homicide § 21— manslaughter — sufficiency of State's evidence to withstand motion for nonsuit**

In a prosecution for manslaughter, defendant's motion for nonsuit was properly denied where there was ample evidence that defendant operated his vehicle at the time in question at a speed in excess of the posted speed limit in a careless and reckless manner while under the influence of intoxicating beverages, and that the death of the victim was proximately caused by the culpable negligence of defendant.

2. **Homicide § 17— evidence with respect to motive — admissibility**

The trial court properly admitted into evidence testimony that defendant was driving on a restricted license prohibiting operation of his vehicle after 8:00 p.m. when he was involved in an accident at 7:15 p.m. where such evidence was relevant and competent on the issue of criminal negligence as indicating defendant's motive for speeding.

3. **Homicide § 15— opinion evidence — admissibility**

The trial court committed no error in permitting a State's witness who observed defendant three and one-half hours after his arrest to give an opinion as to defendant's intoxicated condition where other evidence of the State tended to show that defendant had consumed no food or drink during the interval between the arrest and observation of defendant by the witness.

4. **Automobiles § 126— breathalyzer test results — admissibility**

In a manslaughter prosecution evidence of results of a breathalyzer test given four hours after an automobile collision was relevant and of probative value.

5. **Criminal Law § 95— admission of evidence competent for restricted purpose — request for instructions**

The trial court's failure to instruct that admissions as to convictions of unrelated prior criminal offenses were not competent as substantive evidence but were competent as bearing upon defendant's credibility as a witness did not constitute error, absent a request for such instruction.

6. **Automobiles § 110— violation of safety statute — culpable negligence**

In a manslaughter prosecution, the judge's charge properly instructed the jury that an unintentional violation of a safety statute, without more, is not culpable negligence.

7. **Criminal Law § 43— motion picture — corroborative evidence — instructions on purpose of admission**

The defendant, by stating he had no objections, agreed to the introduction of a motion picture of himself for the purpose of cor-

roborating two state's witnesses, and he cannot complain because the trial judge instructed the jury as to the purpose for which he agreed it might be received.

APPEAL by defendant from *Armstrong, Judge,* 3 April 1972 Session of Superior Court held in FORSYTH County for the trial of criminal cases.

Defendant was charged in a bill of indictment, proper in form, with the felony of manslaughter arising out of a collision between an automobile operated by the defendant and two other automobiles, one of which was operated by the deceased, Walter Alton McLaughlin.

The State's evidence tended to show that on 31 July 1971, the defendant, a resident of Raleigh, North Carolina, flew on a commercial airline to Knoxville, Tennessee, where he picked up and paid for his recently overhauled 1966 Buick Electra automobile, and at approximately 2:30 p.m., defendant proceeded to drive the Buick automobile east out of Tennessee, returning to North Carolina. Later on the same day, at about 7:15 p.m., defendant was driving east through Winston-Salem, North Carolina, on Interstate Highway 40 in the vicinity of the Peters Creek Parkway bridge. At that point, I-40 was a four-lane highway with two lanes running east and two lanes running west. The maximum posted speed limit in that area was 45 miles per hour. In the vicinity of the Peters Creek Parkway bridge, I-40 was straight and graded. At the time of the collision there was intermittent light and heavy rain and the road was wet.

Witnesses for the State testified that they saw the defendant operating his automobile at speeds of more than 45 miles per hour, and that defendant's car was weaving back and forth in the two eastbound lanes of I-40 for a quarter of a mile before defendant's car suddenly began to slide sideways toward the north. The defendant's car bounced off the highway median sailing ten feet into the air and landing in the westbound lane of I-40, where it collided with an orange 1969 Mustang automobile being operated by deceased and traveling at about 40 miles per hour in the outside lane for westbound traffic. Witness James Boyd Hart, operating a 1968 Ford station wagon in the inside lane for westbound traffic and just behind the deceased's car, collided with the rear of defendant's Buick automobile immediately after the collision between the Buick and

the Mustang automobiles. Defendant stipulated that deceased's death was a proximate result of injuries received in the collision.

Witnesses for the State testified that they observed defendant after the accident, that he was under the influence of intoxicating beverage, his speech was slurred, his tongue was thick, his breath had a terrible odor of alcohol, there were broken bottles of whiskey in the car with defendant, defendant used profane language, and in the ambulance on the way to the hospital defendant bragged that "[t]hat thing would do eighty in no time flat until I hit that thing." At 11:10 p.m., approximately four hours after the accident had occurred, defendant was administered a breathalyzer test which resulted in a reading of .21 percent alcohol blood content.

Defendant's evidence tended to show that on the plane trip to Knoxville, defendant had two drinks from one and one-half ounce whiskey bottles, and that defendant consumed no other alcohol on 31 July, 1971. Returning toward Raleigh, defendant stopped in Asheville, North Carolina, and purchased a fifth of whiskey, but the bottle remained sealed and defendant drank none of that whiskey that day. On I-40 in Winston-Salem, defendant was traveling east, moving with traffic at about 45 miles per hour, when the driver of the vehicle in front of him applied his brakes and defendant also applied his. Defendant's car suddenly slid sideways, jumped the median and defendant remembered nothing after hitting the median until he awoke in Forsyth Memorial Hospital. At the hospital defendant was treated for lacerations on his head and arms and broken ribs. A laceration on defendant's lip was sutured and bandaged with gauze and cotton containing a fluid that smelled like alcohol, and this bandage was on defendant's lip at the time the breathalyzer test was administered.

In rebuttal, the State offered the testimony of Dr. George Podgorny, who testified that he had treated defendant at Forsyth Memorial Hospital at about 7:53 p.m., on 31 July 1971, and that in his opinion, based on his observations of defendant, defendant was intoxicated at that time. Dr. Podgorny also testified that he had applied a liquid solution to defendant's lip after suturing it but that the liquid was Aqueous Zephiran which contains no alcohol.

The jury returned a verdict of guilty of involuntary manslaughter. Judgment of imprisonment for a period of not less

than three years nor more than five years was imposed. Defendant appealed.

Attorney General Morgan by Assistant Attorney General Melvin and Associate Attorney Conely for the State.

Powell & Powell by Harrell Powell, Jr., for defendant appellant.

MALLARD, Chief Judge.

Defendant has twenty-six assignments of error. Three of these assignments of error are not brought forward in defendant's brief, numbers 2, 9 and 21, and are therefore deemed abandoned. See Rule 28 of the Rules of Practice in the Court of Appeals.

[1] Defendant assigns as error the denial of his motion for judgment as of nonsuit at the close of all the evidence. There was ample evidence that the defendant was operating his automobile on this occasion at a speed in excess of the posted speed limit, in a careless and reckless manner, while under the influence of intoxicating beverages, and that the death of the deceased victim was proximately caused by the culpable negligence of the defendant. Culpable negligence in criminal cases has been defined by our Supreme Court in many cases, among which are: *State v. Gurley,* 253 N.C. 55, 116 S.E. 2d 143 (1960); *State v. Hancock,* 248 N.C. 432, 103 S.E. 2d 491 (1958); and *State v. Cope,* 204 N.C. 28, 167 S.E. 456 (1933). When the law of culpable negligence is applied to the evidence in this case, we hold that defendant's motion for judgment as of nonsuit was properly overruled.

[2] Defendant assigns as error the admission into evidence of the testimony of arresting Officer Lloyd Kenneth Nelson that defendant was driving on a restricted driver's license. Defendant contends such evidence was irrelevant and incompetent. However, evidence that defendant was driving on a restricted driver's permit which prevented him from legally operating his vehicle after 8:00 p.m. until 5:00 a.m. the next day was relevant and competent on the issue of criminal negligence, as indicating that defendant's motive for speeding was to ensure his arrival home in Raleigh before the 8:00 p.m. deadline. Stansbury, N. C. Evidence 2d, § 83, n. 72.

[3] Defendant also contends that the court erred in permitting State's witness Harmon to give his opinion as to the intoxicated condition of the defendant when he first saw the defendant on that date at approximately 10:45 p.m. Mr. Harmon testified he gave the defendant a breathalyzer test on this occasion. In view of the testimony of the arresting officer, Nelson, that the defendant was under his observation all of the time from the arrest until after the breathalyzer test and that during that time he did not see the defendant eat or drink anything, it was not error to permit Mr. Harmon to give his opinion as to the intoxicated condition of the defendant approximately three and a half hours after the defendant was arrested.

[4] Defendant assigns as error the admission into evidence of the results of a breathalyzer test given defendant almost four hours after the collision, which test gave a reading of .21 percent by weight of alcohol in his blood. "Obviously, the breathalyzer can measure only the amount of alcohol which is in a person's blood *at the time* the test is given. . . . [I]t is undoubtedly true that the sooner after the event the test is made, the more accurate will be the estimate of blood-alcohol concentration at the time of the act in issue." *State v. Cooke,* 270 N.C. 644, 155 S.E. 2d 165 (1967). The question whether the existence of intoxication at a particular time is competent to show the existence of that condition at another time is a question of materiality, to be determined upon the facts of each particular case, including the length of time intervening and the showing, if any, whether the condition remained unchanged. *State v. Davis,* 265 N.C. 720, 145 S.E. 2d 7 (1965); *State v. Oldham,* 10 N.C. App. 172, 177 S.E. 2d 769 (1970). The testimony of Officer Nelson was that defendant had consumed no alcohol during the interval between his arrest at the scene of the collision and the test. We hold that a breathalyzer test given under the facts of this case four hours after the collision was relevant and of probative value.

Defendant contends it was error to admit into evidence testimony that on 7 December 1970 defendant had refused to take a breathalyzer test. Although incompetent even for the purpose of impeachment of defendant's testimony, we hold that such evidence was not prejudicial in view of defendant's subsequent admission that he was arrested for driving under the influence of intoxicating liquor in December 1970 and was convicted of that crime in February 1971.

[5] Defendant assigns as error the failure of the court to give instructions to the jury limiting consideration of the evidence of commissions of prior crimes to impreachment purposes only. When cross-examining the defendant, the solicitor, without objection, questioned defendant as to whether he had been convicted of specific prior criminal offenses. In the court's charge to the jury, the judge restated as a portion of the State's evidence that on cross-examination defendant admitted having been convicted of certain specific crimes. Admissions as to convictions of unrelated prior criminal offenses are not competent as substantive evidence, but are competent as bearing upon defendant's credibility as a witness. Stansbury, N. C. Evidence 2d, § 112; *State v. Goodson,* 273 N.C. 128, 159 S.E. 2d 310 (1968). Absent a request, the failure of the court to give such an instruction was not error. *State v. Goodson, supra; State v. McKinnon,* 223 N.C. 160, 25 S.E. 2d 606 (1943).

[6] Defendant assigns as error a portion of the judge's charge to the jury concerning culpable or criminal negligence. Defendant contends the judge failed to properly instruct the jury that an unintentional violation of a safety statute, without more, is not culpable negligence and cited *State v. Gurley,* 253 N.C. 55, 116 S.E. 2d 143 (1960). We do not agree. Judge Armstrong instructed the jury as follows:

> "Members of the jury, I further instruct you that an unintentional violation of a statute . . . unaccompanied by recklessness or probable consequences of a dangerous nature when tested by the rule of reasonable foresight is not such negligence as imports criminal responsibility. However, . . . if the inadvertent, that is, or the unintentional violation of a prohibitory statute . . . be accompanied by recklessness or probable consequences of a dangerous nature when tested by the rule of reasonable foresight, amounting altogether to a thoughtless disregard of consequences, or a heedless indifference to the rights and safety of others, then such negligence, if death proximately ensues, would be criminal negligence, and the actor would be guilty of involuntary manslaughter."

The above-quoted portion of the judge's charge to the jury complies with the requirements of *State v. Gurley, supra.*

[7] The defendant assigns as error the instructions of the court that a motion picture of the defendant was offered by

the State to corroborate two of the State's witnesses, Dr. Podgorny and Officer Nelson, or to illustrate their testimony. In his brief the defendant cites no authority in support of his position, and the State cites no authority supporting its contention that the motion picture was competent to "corroborate" the witnesses. However, immediately prior to the challenged instructions, the solicitor had, in offering the motion picture, stated that he was offering it "for the purpose of corroborating" the two witnesses, and the defendant not only failed to object but stated, "We have no objections." The defendant, by stating he had no objections, agreed to the introduction of the motion picture for the purpose of "corroborating" the two witnesses, and he cannot complain because the trial judge instructed the jury as to the purpose for which he agreed it might be received. We do not think that limiting the consideration of the photograph to corroborative purposes (as well as illustrative) was prejudicial error in this case. See *State v. McKissick,* 271 N.C. 500, 157 S.E. 2d 112 (1967).

The defendant has other assignments of error relating to the charge, but when it is read contextually, we are of the opinion and so hold that no prejudicial error appears in the charge. The defendant has had a fair trial, free from prejudicial error.

No error.

Judges CAMPBELL and BRITT concur.

STATE OF NORTH CAROLINA v. JERRY ALONZO YOUNG, ALIAS JERRY ALLEN

No. 7218SC631

(Filed 20 September 1972)

1. Criminal Law § 66— in-court identification — independent origin

There was competent, clear and convincing evidence presented on *voir dire* to support the trial court's findings that an assault victim's identification of defendant as her assailant was based solely on what she observed during the assault and did not result from any out-of-court confrontation or from any pre-trial identification procedure suggestive of and conducive to mistaken identification.

2. **Criminal Law § 42— rings taken from assault victim — evidence of offer to sell**

In a prosecution for assault with intent to commit rape and common law robbery, the trial court properly permitted a witness to testify that defendant offered to sell her two rings which the victim had identified as having been taken from her by defendant.

3. **Constitutional Law § 31— reliability of informant — failure to hold voir dire**

Where a police officer testified that he called a State's witness as a result of information he received from a confidential informant, it was not necessary for the trial court to conduct a *voir dire* hearing as to the reliability of the informant.

4. **Indictment and Warrant § 6— probable cause for issuance of warrant — voir dire — absence of prejudice**

Defendant was not prejudiced by a *voir dire* hearing conducted out of the jury's presence to determine whether probable cause existed for the issuance of a warrant to arrest defendant for common law robbery or by the trial court's findings and conclusion that such probable cause did exist.

5. **Criminal Law § 76— admissibility of confession — court's findings**

The *voir dire* evidence supported the trial court's determination that defendant freely, understandingly and knowingly waived his constitutional rights before confessing to a police officer, and the confession was properly admitted in evidence.

6. **Robbery § 5— instructions on common law robbery**

The trial court adequately declared and explained the law as it relates to a charge of common law robbery.

7. **Rape § 18— assault with intent to rape — instructions defining rape**

The trial court did not err in describing the elements of the crime of rape in defining the crime of assault with intent to commit rape, the offense for which defendant was being tried.

APPEAL by defendant from *Fountain, Judge,* 6 March 1972 Session of Superior Court held in GUILFORD County.

Defendant, Jerry Alonzo Young, was charged in separate bills of indictment, proper in form, with common law robbery and assault with intent to commit rape.

Upon defendant's plea of not guilty, the State offered evidence tending to show the following:

On Thursday, 28 October 1971 at approximately 8:30 p.m., Mrs. Fran Kaufman left a movie theatre in the City of High Point, North Carolina, and walked to her automobile which

was parked in a nearby parking lot. As Mrs. Kaufman prepared to enter her automobile, a man approached her from behind. The evidence shows that there was sufficient lighting from the street to enable Mrs. Kaufman to identify her assailant as the defendant.

Mrs. Kaufman was thrown to the ground and told that she would be killed unless she stopped screaming. She was also told to close her eyes. A substance was sprayed into her face.

Defendant then removed two rings from Mrs. Kaufman's fingers and proceeded to have sexual intercourse with her forcibly and against her will. Defendant then took Mrs. Kaufman's pocketbook and fled; whereupon, Mrs. Kaufman ran into the street, hailed a taxicab, and immediately went to the police station where she reported this assault and gave a description of her assailant.

Defendant offered no evidence. The jury found the defendant guilty as charged of common law robbery and assault with intent to commit rape.

From judgments imposing active prison sentences, defendant appealed.

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

D. Lamar Dowda, Assistant Public Defender, for defendant appellant.

HEDRICK, Judge.

Defendant first contends that the court erred "in finding as fact and concluding as law that the prosecuting witness's identification of defendant was not tainted and independent of any influence other than her observations on the night of the alleged crime." This contention is without merit.

[1] When the defendant challenged the testimony of Mrs. Kaufman, identifying the defendant as her assailant, 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 Mrs. Kaufman, the court made detailed findings of fact as to any out of court confrontation between the witness and the

defendant, and as to what the witness observed during and immediately after the assault. There was competent, clear and convincing evidence to support the court's positive findings that the in-court identification of the defendant by Mrs. Kaufman was of independent origin, based solely on what she observed during and immediately after the assault, and did not result from any out of court confrontation or from any pretrial identification procedure suggestive of 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, cert. denied 400 U.S. 946, 27 L.Ed. 2d 252, 91 S.Ct. 253 (1970); *State v. Hinton,* 14 N.C. App. 253, 188 S.E. 2d 17 (1972); *State v. Sneed,* 14 N.C. App. 468, 188 S.E. 2d 537 (1972).

[2] Defendant's second contention is that the court erred in allowing the State to examine State's witness, Jenny Ferree, about two rings (State's exhibits 2 and 3) when the court had earlier sustained an objection to their introduction into evidence.

The record reveals that Mrs. Kaufman identified at the trial exhibits 2 and 3 as being the rings taken from her by the defendant. After Mrs. Kaufman had identified exhibits 2 and 3, Jenny Ferree was allowed to testify over defendant's objection, that the defendant had offered to sell to her exhibits 2 and 3 for $100. After Jenny Ferree's testimony, exhibits 2 and 3 were admitted into evidence.

In North Carolina, any object which has a relevant connection with a case is admissible. Stansbury, North Carolina Evidence 265 § 118 (2d ed. 1963). Clearly exhibits 2 and 3 have a relevant connection with the case and after Mrs. Kaufman had identified the rings, it was not error to allow Mrs. Ferree to testify that the defendant offered to sell her these rings. This assignment of error is overruled.

[3] Defendant next contends that the court erred in not conducting a *voir dire* examination as to the "reliability of a confidential informant." This assignment of error is based on an exception to the court's allowing police officer Lawrence Graves to testify, over defendant's objection, that ". . . as a result of information I received from a confidential informer I called

Mrs. Ferree." There was no reason for the court to conduct a *voir dire* examination as to reliability of the informant. The officer merely testified that he called Mrs. Ferree as a result of information he received from the informant. This assignment of error is overruled.

[4] Defendant's next assignment of error challenges the court's findings and conclusion that probable cause existed for the arrest of the defendant for common law robbery. This assignment of error does not relate to the admission or exclusion of any evidence at defendant's trial. The trial court, on its own initiative, conducted a *voir dire* examination to determine whether probable cause existed for the issuance of the arrest warrant. The *voir dire* hearing was conducted out of the presence of the jury and we cannot perceive how the defendant could have been prejudiced by either the hearing or the court's findings and conclusions made thereafter. This assignment of error has no merit.

[5] Defendant's fifth assignment of error is based on the court's allowing the State to offer into evidence, over defendant's objection, defendant's purported confession to Officer Collins. Upon defendant's objection, the court held a *voir dire* examination as to the facts and circumstances surrounding defendant's purported confession to Officer Collins, wherein Officer Graves, Officer Collins and the defendant, all testified that the defendant had been advised of his constitutional rights. After the *voir dire* examination, the court made findings and concluded that "the defendant fully understood and freely, knowingly, voluntarily, and affirmatively waived each of those rights before making any statement to Officer Collins about the case against him." We have reviewed all of the evidence on *voir dire* examination and find that the evidence supports the court's findings and conclusions. Findings on *voir dire,* when supported by competent evidence, are conclusive on appeal. This assignment of error is overruled.

The defendant next assigns as error the court's denial of his motion for judgment as of nonsuit. There was plenary, competent evidence to require the submission of this case to the jury and to support the verdict. This assignment of error is overruled.

[6] The defendant, by his seventh assignment of error, contends that the court failed "to adequately define the crime of

common law robbery." In *State v. Bailey,* 278 N.C. 80, 85, 178 S.E. 2d 809, 812 (1971), it is stated, "Robbery is the taking, with intent to steal, of personal property of another, from his person or in his presence, without his consent or against his will, by violence or intimidation." We have carefully reviewed the court's instructions as they relate to this assignment of error and find that the court correctly, fairly and adequately declared and explained the law as it relates to the charge of common law robbery. This assignment of error is without merit.

Defendant's eighth assignment of error alleges that the court erred "in reviewing for the jury the elements of the capital crime of rape, when defendant was not charged with rape."

[7] It was not prejudicial error for the court to describe elements of the crime of rape in defining the crime with which defendant was charged, assault with intent to commit rape. The trial judge has great discretion in the manner in which he charges the jury, but he must explain every essential element of the offense charged. *State v. Mundy,* 265 N.C. 528, 144 S.E. 2d 572 (1965). To constitute an assault with intent to commit rape, there must be both an assault and an intent on the part of the defendant to gratify his passion notwithstanding any resistance by the victim. *State v. Gammons,* 260 N.C. 753, 133 S.E. 2d 649 (1963). Rape is the carnal knowledge of a female forcibly and against her will. *State v. Crawford,* 260 N.C. 548, 133 S.E. 2d 232 (1963). Thus, assault with intent to commit rape is a lesser included offense of the crime of rape, *State v. Birckhead,* 256 N.C. 494, 124 S.E. 2d 838 (1962), and a definition of rape aids in the explanation of the offense of assault with intent to commit rape. This assignment of error is overruled.

We have carefully considered all of defendant's assignments of error and find that defendant had a fair trial free from prejudicial error.

No error.

Judges BROCK and MORRIS concur.

AMERICAN PERSONNEL, INC. v. PAUL M. HARBOLICK AND J. C. WHEAT AND CO., INC.

No. 7210DC44

(Filed 20 September 1972)

1. **Contracts § 27— employment agency fee — liability of employer — insufficiency of evidence**

In an action in which it was stipulated that the third party defendant is liable for plaintiff employment agency's fee if defendant was employed by the third party defendant for 90 days, defendant's evidence was insufficient to permit a finding that he was employed by the third party defendant in excess of 73 days, and a directed verdict was properly entered in favor of the third party defendant.

2. **Contracts § 12— employment agency fee — fee paid position — leaving of employment — liability for fee**

The phrase "I will accept a fee paid position only" added by defendant to the printed form in a contract with an employment agency did not relieve defendant of an obligation to pay the employment agency the stipulated fee in the event defendant left the employment secured for him by the agency.

APPEAL by defendant Paul M. Harbolick from *Preston, District Judge,* 23 July 1971 Session of WAKE District Court.

Action to recover a fee under the terms of a contract calling for the plaintiff American Personnel, Inc. (American) to act as agent for defendant Paul M. Harbolick (Harbolick) in securing employment for Harbolick. American alleged that, in compliance with the terms of that contract, it secured a "fee paid" position for Harbolick with J. C. Wheat and Co., Inc., Richmond, Virginia (Wheat), but by reason of Harbolick either failing to report for work or by reason of Harbolick leaving said employment, American had to refund the fee paid by Wheat and, by the terms of the contract, Harbolick is indebted to American for the full fee of $2,880.00. In an Answer and Third Party Complaint naming Wheat as third party defendant, Harbolick alleged, in pertinent part:

> "6. That defendant accepted a position with J. C. Wheat and Co., Inc., on or about July 14, 1969, in good faith and remained in their employment until October 19, 1969, so that he was permanently employed and was not a temporary employee as defined by said contract.
>
> * * *

8. That any fee earned by the plaintiff was only earned at the time of J. C. Wheat and Co., Inc., expressing complete satisfaction with plaintiff's services and paying them; that said J. C. Wheat and Co., Inc., did make such payment, and therefore, if defendant is liable to defendant (sic) in any amount, which defendant expressly denies, then and in that event, J. C. Wheat and Co., Inc., is liable over to defendant in the same amount."

Prior to trial the parties stipulated to the following facts, among others:

"a. The defendant Harbolick executed a written contract dated June 6, 1969, which was annexed as Exhibit 'A' to plaintiff's complaint and as Exhibit 'A' to defendant Harbolick's answer.

b. The plaintiff secured employment for the defendant with third party defendant on July 14, 1969.

c. If it is determined that a fee is due plaintiff by defendant or third party defendant such fee is $2,880.00.

d. The amount of $2,880.00 was paid to plaintiff by the third party defendant and such amount has been refunded by plaintiff to the third party defendant.

e. If defendant was employed by third party defendant for 90 days, third party defendant owes plaintiff the fee of $2,880.00."

Exhibit "A" annexed to plaintiff's complaint and Exhibit "A" annexed to defendant Harbolick's answer are identical copies of the contract. The contract consisted of a printed form to which penciled notations were added. In pertinent part, that contract provides:

". . . You are not obligated to accept any position to which you are referred by American Personnel, Inc.; however, if you do accept any position to which you are referred by American Personnel, Inc., either verbally or in writing, you are legally obligated for payment of service charges listed below, as stipulated in this contract.

A. I hereby engage American Personnel, Inc. as my agent to assist me in securing employment. * * * (2) If any referral is accepted by me to any firm whatsoever (re-

gardless of previous negotiations) (PENCILED NOTE—except companies noted on reverse side) and I accept employment with said firm, whether or not it is the same job to which I was referred, I am obligated for my fee in the event of employment within one year of said referral. * * * (4) In the event I accept employment and fail to report to work, or in the event I leave said employment, or my employment is terminated, your fee shall be the full amount under the schedule below, even though the employer has paid all or part of my fee. For services rendered in obtaining employment, I agree to pay your fee as below: (SCHEDULE OMITTED HERE).

* * *

D. I HAVE READ THIS CONTRACT CAREFULLY AND I AGREE TO ALL THE TERMS THEREIN. I WILL ACCEPT FEE PAID POSITION ONLY.

DATE 6/6/69 SIGNED *Paul M. Harbolick* (SEAL)
126 Beechwood Drive
Jamestown, N. C. (ADDRESS)"

Defendant Harbolick testified in pertinent part as follows:

"I went over the contract. That is my writing on the contract that says, 'I will accept fee paid position only.' That is my writing on the contract that says, 'Except companies noted on the reverse side.' This refers to paragraph A-2 of the contract. I did not make any notation beside paragraph A-4 . . . .

* * *

I went to Richmond . . . and discussed the possibility of working for J. C. Wheat and Company. . . . With respect to my location if employed. . . we discussed the possibility of moving to Richmond, Virginia to work there. . . . I felt that it was best for my long-range goals to be in the main office rather than a regional office. I accepted the job and went to work on July 14.

* * *

(I was told) from the very start of the job that the job was to be in Richmond. I knew that one of the conditions of the job was that I would have to go to Richmond. I

accepted the job knowing that the services would have to be rendered in Richmond. No one ever told me different. . . . Although I accepted the job on July 14th, I did not move to Richmond until September the 9th or 10th of 1969. Eleven days later I told Mr. Fekety (Director of Research) I could no longer live in Richmond and that I was moving back to North Carolina. That was eleven days after I had arrived in Richmond. . . . .

. . . . It was on my own volition that I made the decision to go back to the Greensboro, North Carolina area and I moved back to a house that I had never sold. I moved back to Greensboro on September the 24th. I never went back to Richmond after I moved back to Greensboro. I rendered no further services out of Richmond whatsoever. I received no further pay from J. C. Wheat & Company after September 24, 1969. We were discussing the idea of continuing in North Carolina. We were talking about an entirely different job. My discussion with Wheat & Company after September 24, 1969 concerned a job somewhere else. I could no longer render the services of this job out of the Richmond office.

* * *

. . . . The last pay which I received was on September 30, 1969 and was for the last two full weeks of work. I suggested that they not pay me and that they cut off my pay until we resolved what I was doing in North Carolina. . . . . The last day for which I was paid by J. C. Wheat & Company was September the 23rd or 24th, the day before I came back home to Greensboro.

* * *

Going back to the beginning date of July 14, 1969, I made 18 days in July. I made 31 days in August. I was paid for 23 or 24 days in September. That totals to 72 or 73 days."

The parties stipulated that the only issues for the jury were as follows:

"1. Was the defendant, Paul M. Harbolick employed by the third party defendant, J. C. Wheat and Co., Inc., for a period of 90 days or more?

2. Did the language 'I will accept a fee paid position only' alter the contract between plaintiff, American Personnel, Inc., and defendant, Paul M. Harbolick, whereby such defendant was not obligated to the plaintiff for the employment fee if the defendant, Paul M. Harbolick, left the employment of J. C. Wheat and Co., Inc., or such employment was terminated?"

At the close of all the evidence the court concluded that no question of fact existed, entered a directed verdict answering each issue "no" and entered judgment for plaintiff in the amount of $2,880.00.

Poyner, Geraghty, Hartsfield & Townsend by Marvin D. Musselwhite, Jr., and John L. Shaw for plaintiff appellee American Personnel, Inc.

Alspaugh, Rivenbark & Lively by Kent Lively for defendant appellant Harbolick.

Wolff and Harrell by Bernard A. Harrell for defendant appellee Wheat & Company, Inc.

VAUGHN, Judge.

In jury trials in North Carolina the motion for nonsuit has been replaced by the motion for a directed verdict. G.S. 1A-1, Rule 50(a). "The motion for a directed verdict presents substantially the same question formerly presented by the motion for nonsuit, that is, whether the evidence considered in the light most favorable to the claimant will justify a verdict in his favor." *Cutts v. Casey*, 278 N.C. 390, 411, 180 S.E. 2d 297.

[1] As to granting a directed verdict in favor of Wheat on the issue of whether Harbolick was employed by them for a period of 90 days or more, we first observe that the burden of proof on this issue rested upon the defendant Harbolick. It was he who raised the issue in his answer and third party complaint. The word "employ" is defined:

"1a: to make use of. . . b: to use or occupy (as time) advantageously. . . c: to use or engage the services of . . . *also:* to provide with a job that pays wages or a salary or with a means of earning a living. . . d: to devote to or direct toward a particular activity or person. . . e: oc-

> cupy, busy . . . ." p. 743. Webster's Third New International Dictionary (1968).

Harbolick's evidence, considered in the light most favorable to him, was insufficient to permit a finding that Harbolick was "employed" by J. C. Wheat and Co., Inc., for anything in excess of 72 or 73 days. The judgment granting a directed verdict in favor of third party defendant J. C. Wheat and Company, Inc., is affirmed.

We now consider the assignments of error directed to entry of a directed verdict in favor of plaintiff on the second issue. Although Rule 50(a) provides that all parties may move for directed verdict, it is generally true that the court cannot direct a verdict in favor of a party having the burden of proof. *Cutts v. Casey, supra.* Here, however, in view of the facts which were stipulated before trial and admitted by defendant at trial, the second issue presented only a question of law for the court.

[2] The issue presented the question of whether the phrase "I will accept a fee paid position only" added to the printed form by Harbolick had the effect of relieving Harbolick of any obligation to the plaintiff for the stipulated fee in the event Harbolick left the employment secured for him by the plaintiff. The parties have referred to this phrase as an alteration to the contract, but this is misleading. The contract was the entire document as written when it was signed on 6 June 1969. The parties have stipulated that this was the contract which controls their relationship.

> "It is settled law that where the terms of a written instrument or contract are explicit, the court determines their effect by declaring their legal meaning." *Howland v. Stitzer,* 240 N.C. 689, 696, 84 S.E. 2d 167.

Section A(4) of the contract between American and Harbolick speaks explicitly to the situation admitted to exist in this case. Harbolick accepted a fee paid position. He then left that employment. Section A(4) of the contract states that under those conditions, American's ". . . fee shall be the full amount under the schedule below, even though the employer has paid all or part of my fee." The parties have stipulated that the fee paid by Wheat to American has been refunded by American.

The facts as stipulated and admitted by defendant Harbolick presented only a question of law. It was, therefore, proper for the court to direct a verdict in favor of plaintiff.

Affirmed.

Judges PARKER and GRAHAM concur.

STATE OF NORTH CAROLINA v. LARRY TANT

No. 727SC570

(Filed 20 September 1972)

Jury § 5— jury selection process — disproportionate male-female ratio — no discrimination

The fact that the jury commission used names from the county tax list, which list may have contained a disproportionate male-female ratio, in drawing up a list of prospective jurors for the county did not render the jury selection process arbitrarily, systematically and intentionally discriminatory as contended by defendant in a prosecution for selling a narcotic drug; therefore, the court did not err in denying defendant's motions to quash the bill of indictment and to quash the venire of petit jurors.

APPEAL by defendant from *Blount, Judge,* 4 October 1971 Session of Superior Court held in NASH County.

Defendant, Larry Tant, was charged in a bill of indictment, proper in form, with the felony of selling a narcotic drug, to wit: lysergic acid diethylamide (L.S.D.). Prior to pleading, defendant made motions to quash the indictment and to quash the petit jury venire on the grounds that neither the grand jury which indicted him nor the petit jury venire selected to try him, were composed of the constitutionally required cross-section of the community because the Nash County jury commission, in compiling the jury list, systematically "excluded large numbers of blacks, women, daily wage earners and younger persons in the community."

The trial court, after hearing evidence offered by the defendant and the State made findings of fact summarized as follows:

A three member jury commission met in the fall of 1969 for the purpose of selecting prospective jurors for Nash County for the years 1970 and 1971. Acting pursuant to Chapter 9-2 of the General Statutes of North Carolina, the jury commission utilized both voter registration and tax lists in compiling the list. Prospective jurors were alphabetically selected from the voter registration lists for Nash County at a ratio of every tenth name. Prospective jurors were selected from the tax lists by skipping the name of every other taxpayer, with certain exceptions not here relevant.

As the names of prospective jurors were selected, these names were typed onto cards. A total of 7,500 cards were prepared; after removing duplicates and screening, a total of 5,702 cards remained, representing prospective jurors for the years 1970 and 1971.

Based on its findings, the trial court made conclusions in pertinent part as follows:

"3. That there was no discriminatory, systematic or arbitrary exclusion from jury service in Nash County of any person because of race or sex by the Jury Commission.

4. That the Grand Jury was selected from a group of names which did compose a cross-section of the community (Nash County), and that the Grand Jury which indicted the defendant, Larry Tant, was properly constituted and the bill of indictment returned by the Grand Jury is valid and proper in all respects.

. . . .

7. That the system of selection of jurors in Nash County presently being used does not tend to exclude black inindividuals, females, and daily workers and that the members of the present panel do constitute a cross-section of the residents of Nash County."

Based on its findings of fact and conclusions, the court denied defendant's motions to quash the bill of indictment and the petit jury venire. The jury found the defendant guilty as charged and from a judgment imposing a prison sentence of three to five years, defendant appealed.

Attorney General Robert Morgan and Assistant Attorney General Henry T. Rosser for the State.

Biggs, Meadows & Batts by Charles B. Winberry for the defendant appellant.

HEDRICK, Judge.

Defendant challenges the validity of the jury selection procedure employed by the jury commission of Nash County in compiling the list of prospective jurors for 1970 and 1971. It is defendant's contention that the system utilized discriminated against female jurors, thus depriving him of his right to indictment and trial by juries which represent a true cross-section of the community. We have carefully reviewed these contentions and find them to be without merit.

The list of prospective jurors for Nash County for the years 1970 and 1971 was compiled in the fall of 1969. The procedure employed by the jury commission in compiling this list is prescribed by G.S. 9-2, ". . . In preparing the list, the jury commission shall use the tax lists of the county and voter registration records." Names of prospective jurors were selected from the tax lists by taking every other name and from the voter registration lists by selecting every tenth name.

G.S. 105-301(a), in effect when taxes were listed in 1969, provided, "Except as hereinafter specified, real property shall be listed in the name of its owner; and it shall be the duty of the owner to list the same." Mr. Justice Lake, writing for the court in *Duplin County v. Jones,* 267 N.C. 68, 73, 147 S.E. 2d 603, 606 (1966) stated:

> "The wife is the 'taxpayer' with reference to taxes levied on account of property owned by her alone. The husband is the 'taxpayer' with reference to taxes levied on account of property owned by him alone. The husband and wife are, in contemplation of the law, a separate person from either with reference to land owned by them as tenants by the entirety."

In his brief defendant asserts:

> "The failure of the . . . Tax Supervisor's Office to comply with the holding of *Duplin County v. Jones, supra,* by failing to list property owned by a husband and wife as

tenants by the entirety in the name of both the husband and wife . . . resulted in men's names being on the tax lists . . . more than should have been the case had the law been complied with."

The burden of establishing a prima facie case of discrimination against prospective jurors rests with defendant. *State v. Cornell,* 281 N.C. 20, 187 S.E. 2d 768 (1972). In support of his contention that prospective female jurors were excluded from jury service in Nash County, defendant introduced evidence tending to show that the tax list for Nash County was improperly composed in that property held in tenancy by the entirety was frequently listed in the name of the husband alone. This resulted in a significant reduction in the number of females available for jury service in proportion to the total female population eligible for jury service in Nash County. Defendant has failed, however, to produce evidence that the jury commission intentionally, systematically or arbitrarily discriminated against females when it utilized the tax records in compiling the list of prospective jurors. To hold that a jury commission must ascertain the validity of the procedures used by independent bodies in compiling tax and voter registration lists before using such lists as sources of names of prospective jurors would be to impose an impossible burden. Any disparity in representation of the sexes on juries in Nash County did not result from discrimination in compilation of the jury list. The tax lists were compiled for purposes of taxation and were not maintained for the purpose of providing a source of names of prospective jurors. Thus, even if the tax lists contained a disproportionate male-female ratio, clearly such disproportion did not result from a systematic, arbitrary and intentionally discriminatory process on the part of the jury commission of Nash County.

To constitute unlawful discrimination, defendant must establish that the mode of jury selection is arbitrarily, systematically and intentionally discriminatory. *State v. Cornell, supra; State v. Yoes,* 271 N.C. 616, 157 S.E. 2d 386 (1967); *State v. Wilson,* 262 N.C. 419, 137 S.E. 2d 109 (1964); *Swain v. Alabama,* 380 U.S. 202, 13 L.Ed. 2d 759, 85 S.Ct. 824 (1965); *Thiel v. Southern Pacific Co.,* 328 U.S. 217, 90 L.Ed. 1181, 66 S.Ct. 984 (1945). It has been held that mere irregularity on the part of the jury commissioners in preparing the jury list, unless obviously, designedly or intentionally discriminatory, will

not vitiate the list or afford a basis for a challenge to the array. *State v. Koritz,* 227 N.C. 552, 43 S.E. 2d 77 (1947); *State v. Daniels,* 134 N.C. 641, 46 S.E. 743 (1904).

Defendant has not satisfied his burden of establishing a prima facie case of intentional, arbitrary and systematic discrimination in compilation of the jury list for Nash County for the years 1970-1971. Accordingly, the court did not commit error in denying the defendant's motions to quash the bill of indictment and to quash the venire of petit jurors.

We hold the defendant had a fair trial free from prejudicial error.

No error.

Judges BROCK and MORRIS concur.

GREGG F. TAYLOR AND GEORGE J. TAYLOR v. WAKE FOREST UNIVERSITY

No. 7221SC644

(Filed 20 September 1972)

Contracts § 27— football scholarship contract — refusal of plaintiff to play — summary judgment proper

Plaintiff failed to comply with his contractual obligations where he had agreed, in consideration of a scholarship award by defendant university, to maintain his athletic and scholastic eligibility for playing football, but refused to attend practice sessions in order to devote more time to his studies; since defendant university fully complied with its agreement, but plaintiff failed to do so, there was no genuine issue of material fact and summary judgment was properly entered.

APPEAL by plaintiffs from *Gambill, Judge,* 17 April 1972 Session, FORSYTH County Superior Court.

This action was instituted for the recovery of educational expenses incurred by George J. Taylor, father, and Gregg F. Taylor, son, after alleged wrongful termination of an athletic scholarship issued to Gregg F. Taylor by Wake Forest University.

As early as December 1965, football coaches at Wake Forest were in communication with Gregg Taylor soliciting his

enrollment at Wake Forest. This interest was engendered by the football playing ability of Gregg Taylor. Not only was Wake Forest interested in him, but other colleges and universities were likewise showing an interest. As a result of this interest and negotiations, Gregg Taylor and his father, George Taylor, on 27 February 1967, submitted an application entitled, "Atlantic Coast Conference Application For A Football Grant-In-Aid Or A Scholarship."

This application was accepted by Wake Forest on 24 May 1967. It provided in part:

> "This Grant, if awarded, will be for 4 years provided I conduct myself in accordance with the rules of the Conference, the NCAA, and the Institution. I agree to maintain eligibility for intercollegiate athletics under both Conference and Institutional rules. Training rules for intercollegiate athletics are considered rules of the Institution, and I agree to abide by them.
>
> If injured while participating in athletics supervised by a member of the coaching staff, the Grant or Scholarship will be honored; and the medical expenses will be paid by the Athletic Department.
>
> * * * *
>
> This grant, when approved, is awarded for academic and athletic achievement and is not to be interpreted as employment in any manner whatsoever."

At the time of the execution of the agreement between the Taylors and Wake Forest, some of the rules of the NCAA prohibited:

> "(a) Gradation or cancellation of institutional aid during the period of its award on the basis of a student-athlete's prowess or his contribution to a team's success.
>
> (b) Gradation or cancellation of institutional aid during the period of its award because of an injury which prevents the recipient from participating in athletics.
>
> (c) Gradation or cancellation of institutional aid during the period of its award for any other athletic reason, except that such aid may be gradated or cancelled if the recipient (1) voluntarily renders himself ineligible for

intercollegiate competition, or (2) fraudulently misrepresents any information on his application, letter-of-intent or tender, or (3) engages in serious misconduct warranting substantial disciplinary penalty.

Any such gradation or cancellation of aid is permissible only if (1) such action is taken by the regular disciplinary and/or scholarship awards authorities of the institution, (2) the student has had an opportunity for a hearing, and (3) the action is based on institutional policy applicable to the general student body."

At the time the contract was entered into, Wake Forest did not have a written Grant-In-Aid policy. This policy was not put in writing until January 1969. One of the written policy provisions was to the effect that financial aid could be terminated for "[r]efusal to attend practice sessions or scheduled work-out that are a part of the athletic program or to act in such a manner as to disrupt these sessions." The Wake Forest Athletic Director set out in an affidavit:

"[T]he policy of requiring student athletes to regularly attend practice sessions was in effect at the defendant University when the first scholarship was granted more than 30 years ago."

In compliance with the contract entered into, Gregg Taylor enrolled and became a student at Wake Forest at the beginning of the Fall Session 1967. He participated in the football program during the Fall of 1967.

At the end of that semester, his grade average was 1.0 out of a possible 4.0. Wake Forest required a 1.35 grade average after freshman year, a 1.65 grade average after sophomore year, and a 1.85 grade average after junior year. The 1.0 grade average received by Gregg Taylor for the first semester of his freshman year in the Fall of 1967 was thus below the grade average required by Wake Forest. Gregg Taylor notified the football coach on 6 February 1968 that he would not participate in regular practice sessions of the football team during the Spring of 1968 until his grades had improved. For the second semester of his freshman year, which was the Spring of 1968, Gregg Taylor obtained a 1.9 grade average. This brought his grade average above what Wake Forest required even after junior year. Despite this improvement in his grade average,

Gregg Taylor decided that he would not further participate in the football program, and in the Fall of his sophomore year, which was the Fall of 1968, Gregg Taylor attained a 2.4 grade average. Gregg Taylor continued in his refusal to participate in the football program.

Wake Forest notified Gregg Taylor on or about 1 May 1969 that a hearing would be held on 14 May 1969 before the Faculty Athletic Committee as to whether his scholarship should be terminated. At this hearing Gregg Taylor was notified that the Faculty Athletic Committee would recommend to the Scholarship Committee that his scholarship be terminated because of his failure to participate in the football program at Wake Forest. Thereafter, the Scholarship Committee of Wake Forest accepted the recommendation of the Faculty Athletic Commitee, and on 10 July 1969, the Scholarship Committee notified Gregg Taylor that his scholarship had been terminated as of the end of the 1968-1969 academic year, which was the end of Gregg Taylor's sophomore year.

Gregg Taylor continued to attend Wake Forest during the 1969-1970 academic year, which was his junior year, and likewise, the academic year of 1970-1971, which was his senior year; and he received an undergraduate degree from Wake Forest in June 1971.

As a result of the termination of the scholarship, expenses in the amount of $5500 were incurred during those two academic years. It is for this sum of $5500 that this action was instituted.

The defendant Wake Forest moved for summary judgment pursuant to Rule 56 of the Rules of Civil Procedure on the ground that there was no genuine issue as to any material fact and that the defendant was entitled to judgment as a matter of law. This motion was allowed, and the plaintiffs appealed.

Smith, Patterson, Follin & Curtis by Norman B. Smith for plaintiff appellants.

Womble, Carlyle, Sandridge & Rice by Leslie E. Browder and Allan R. Gitter for defendant appellee.

CAMPBELL, Judge.

Plaintiffs contend that there was a genuine issue as to a material fact and that a jury should determine whether Gregg Taylor acted reasonably and in good faith in refusing to participate in the football program at Wake Forest when such participation interfered with reasonable academic progress.

The plaintiffs' position depends upon a construction of the contractual agreement between plaintiffs and Wake Forest. As stated in the affidavit of George J. Taylor, the position of the plaintiffs is that it was orally agreed between plaintiffs and the representative of Wake Forest that:

> "[I]n the event of any conflict between educational achievement and athletic involvement, participation in athletic activities could be limited or eliminated to the extent necessary to assure reasonable academic progress."

And plaintiffs were to be the judge as to what "reasonable academic progress" constituted.

We do not agree with the position taken by plaintiffs. The scholarship application filed by Gregg Taylor provided:

> ". . . I agree to maintain eligibility for intercollegiate athletics under both Conference and Institutional rules. Training rules for intercollegiate athletics are considered rules of the Institution, and I agree to abide by them."

Both Gregg Taylor and his father knew that the application was for "Football Grant-In-Aid Or A Scholarship," and that the scholarship was "awarded for academic and athletic achievement." It would be a strained construction of the contract that would enable the plaintiffs to determine the "reasonable academic progress" of Gregg Taylor. Gregg Taylor, in consideration of the scholarship award, agreed to maintain his athletic eligibility and this meant both physically and scholastically. As long as his grade average equaled or exceeded the requirements of Wake Forest, he was maintaining his scholastic eligibility for athletics. Participation in and attendance at practice were required to maintain his physical eligibility. When he refused to do so in the absence of any injury or excuse other than to devote more time to studies, he was not complying with his contractual obligations.

The record disclosed that Wake Forest fully complied with its agreement and that Gregg Taylor failed to do so. There was no "genuine issue as to any material fact" and summary judgment was proper. *Kessing v. Mortgage Corp.*, 278 N.C. 523, 180 S.E. 2d 823 (1971).

We find

No error.

Chief Judge MALLARD and Judge MORRIS concur.

STATE OF NORTH CAROLINA v. LARRY HAMBY

STATE OF NORTH CAROLINA v. WILLIAM DAVID TAYLOR

No. 7216SC63

(Filed 20 September 1972)

Criminal Law § 155.5— failure to docket appeal in time — ineffective order of extension — consideration of appeal on its merits

Where a judge other than the trial judge extended the time for service of the case on appeal and the extension provided for a time longer than that allowed by the Rules of Practice, the appeal of defendant in a prosecution for conspiracy to murder was subject to dismissal; however, the court did consider the appeal on its merits and found no error in either the admission of evidence or the charge to the jury. Court of Appeals rules 50, 5.

APPEAL by defendants from *Canaday, Judge,* 1 June 1971 Session of Superior Court held in ROBESON County.

The defendant Taylor was charged in a bill of indictment, proper in form, together with Nellie Richardson, Larry Hamby and William Edward Powers, with a conspiracy to kill and murder Floyd Ray Richardson.

Only Hamby and Taylor were tried. The record does not reveal what disposition was made as to Nellie Richardson and William Edward Powers.

We are concerned on this appeal solely with the defendant Taylor. The defendant Hamby was permitted by this court to

withdraw his appeal after Judge Clark had made certain factual findings as to the voluntariness of his desire to withdraw it.

The evidence for the State tended to show that Taylor and Nellie Mae Richardson had gone to school together, that for two years "she and he became very personally involved." In 1958, he stopped seeing her and in 1959 she married Floyd Ray Richardson (Floyd). In 1964, Taylor began seeing Nellie again. Nellie and Floyd had separated on at least three occasions, and during the year 1970, Taylor and Nellie decided they would hire somebody to kill Floyd. Taylor mentioned this to a fellow employee, James Edward Powers. Shortly thereafter, Taylor went to Powers' apartment and there met Larry Hamby. Taylor told Hamby that he wanted to have Floyd killed and Hamby told Taylor he could get the job done for six thousand dollars. Taylor agreed to pay the six thousand dollars and paid Hamby eleven hundred dollars at that time. Thereafter, on several different occasions Taylor made additional payments to Hamby, totaling thirty-one hundred dollars. Hamby stated he had given Jack Gibson, a State's witness, the sum of three hundred and fifty dollars after Gibson had gone with Hamby to see Taylor on two occasions. In September 1970, Hamby called Taylor and told him that "someone had squealed" and that he, Hamby, would return his money but that it would take him a while to raise the thirty-one hundred dollars and get it back to him. Hamby also told S.B.I. Agent Johnson, a State's witness, that he "saw an easy way to make some money and that he had no intentions at any time of killing anyone."

The defendant Taylor offered evidence tending to show that he had a good reputation in the community in which he lived.

Defendant Hamby offered evidence tending to show that Taylor told him that he, Taylor, was going with this girl and wanted to get rid of her husband. Hamby told Taylor that he would try to find somebody who would do the job. Hamby testified that he did not intend to kill anybody and that "(m)y purpose in taking the money from Mr. Taylor to start with was that it was there to be gotten. I was up tight for some money and saw an opportunity to make it, so I did. My intent to take the money was just wholesale. He was putting up money to get somebody killed and I knew no way to get the man. If he would keep turning over money, I was for it." Hamby stated

he introduced State's witness Jack Gibson to Taylor as the man who was going to do the killing, and saw Taylor give Gibson two hundred and fifty dollars, which Gibson later divided with Hamby. About two weeks later, Hamby and Gibson divided an additional four hundred and fifty dollars that had been given to them by Taylor. About one week prior to their arrest, Hamby met with Taylor and Taylor told him he wanted to call the whole thing off, and Hamby replied, "O.K., I'll try to get your money back to you."

The jury returned verdicts of guilty as to both defendants, Hamby and Taylor, and from the judgment of imprisonment for not less than five nor more than seven years, the defendant Taylor appealed. L. J. Britt, Sr., represented the defendant Taylor at the trial in superior court, and W. Earl Britt represented the defendant Taylor on this appeal.

Attorney General Morgan and Associate Attorney Ricks for the State.

W. Earl Britt for defendant appellant.

MALLARD, Chief Judge.

Judge Canaday tried the case and signed appeal entries including an order extending the time for service of the case on appeal and countercase. The case on appeal was apparently not served within the time allowed in Judge Canaday's order, and the defendant sought and obtained an order from Judge Peel extending the time in which to serve the case on appeal. Although Judge Peel allowed this order, under Rule 50 of the Rules of Practice in the Court of Appeals, only the trial judge may extend the time for service of the case on appeal, and this order of Judge Peel was therefore ineffective.

The appeal is subject to be dismissed for failure to docket the record on appeal in this court within the time required by the rules. The judgment appealed from was entered on 3 June 1971. The appeal was docketed on 3 November 1971. Under Rule 5 of the Rules of Practice in this court, it is provided that if the appeal is not docketed within ninety days after the date of the judgment, the trial tribunal may, for good cause, "extend the time not exceeding sixty days, for docketing the record on appeal." On 2 August 1971, Judge Peel entered an order in which he extended the time for docketing this appeal to "sixty days

after 3 September 1971." This exceeded the authority of Judge Peel. By the rules he was authorized to extend the order for sixty days after the expiration of ninety days from the date of the judgment appealed from. It should be noted that the time for docketing is stated in "days," not "months." From 3 June, the date of the judgment appealed from, to 3 November, the date of the docketing, there are three months that have thirty-one days, to-wit: July, August and October. While Wednesday, 3 November 1971, was five "months" after 3 June 1971, it was 153 days after the date of the judgment appealed from and the docketing of the appeal on that date was too late under the rules of this court. However, we do not dismiss the appeal but consider it on the merits.

The evidence for the State revealed that Taylor and Floyd's wife, Nellie, a co-defendant, first conspired with each other to kill and murder Floyd. After that, the defendant Hamby entered the conspiracy. Taylor paid out thirty-one hundred dollars to have Floyd killed, but before the murder was accomplished, the authorities learned of the conspiracy.

We have carefully considered the defendant's assignments of error and find no prejudicial error either in the admission of evidence or the charge of the court to the jury. We hold that the defendant Taylor has received a fair trial, free from prejudicial error.

No error.

Judges MORRIS and PARKER concur.

JAMES O. BRAWLEY v. DR. ROBERT C. HEYMANN

No. 7221SC491

(Filed 20 September 1972)

Physicians and Surgeons § 16— injury sustained in fall — degree of care required of physicians — summary judgment improper

Where the evidence would permit a jury to find that defendant unnecessarily left plaintiff unsecured and unattended on a narrow examining table at a time when plaintiff had not fully regained consciousness after fainting and that it was reasonably foreseeable that a person in plaintiff's condition was likely to fall from the table

unless secured or attended and that plaintiff did fall and sustain injuries, a jury could reasonably conclude that defendant failed to give plaintiff such care as a reasonably prudent physician in the same or similar circumstances would have provided and that such negligence was a proximate cause of plaintiff's injuries; therefore, the trial court erred in granting summary judgment for defendant physician.

APPEAL by plaintiff from summary judgment entered for defendant by *Gambill, Judge,* 21 February 1972 Session of Superior Court held in FORSYTH County.

Negligence action against defendant, a licensed physician specializing in dermatology, to recover for injuries sustained by plaintiff when he fell from an examining table while a patient in defendant's office.

The following appears from depositions of the parties and various affidavits.

On 24 September 1968, plaintiff fainted while defendant was performing a biopsy on a lesion on plaintiff's back. At that time plaintiff and defendant were alone in a small room in defendant's office and plaintiff was seated on the examining table with his back to defendant. The table was from 24 to 30 inches wide and extended about 30 inches from the floor. It had "something like a three-inch pad" on top of it. Defendant caught plaintiff as he fainted, lowered him onto the table flat on his back, and permitted him to take several whiffs of ammonia. Defendant then walked about two steps to his left and replaced the ammonia in the bottom drawer of a cabinet located near the foot of the examining table. He closed the drawer and turned around to remove an instrument from a tray nearby in order to continue the biopsy. At this point plaintiff rolled off the other side of the table, fell to the floor, and sustained serious injury. Defendant tried to "grab him" but was not in a position to catch him.

Defendant did not call for the assistance of any office personnel until after plaintiff's fall. Other personnel were available.

Defendant testified at his adverse examination that in his opinion plaintiff fainted as a result of "neurogenic shock based on motor reaction." He also said that after plaintiff received the ammonia, his color returned and he stated he felt better.

However, in defendant's opinion, plaintiff was not "a hundred per cent back to normal" at that time. Plaintiff testified at his adverse examination that he remembers nothing from the time he fainted until he regained consciousness sometime later in a hospital emergency room.

Jerry West stated in an affidavit that he talked with the defendant on the day of plaintiff's fall and that defendant told him and plaintiff's wife that "he was doing a biopsy facing Mr. Brawley's back; that Mr. Brawley felt faint and that he laid him down on the examining table; that, while Mr. Brawley was apparently unconscious, Dr. Heymann turned away from him to get some additional equipment and that there was no other attendant in the examining room; that Mr. Brawley fell off on a hard floor striking a stool and a foot-step on the way to the floor."

Affidavits were received from two physicians specializing in the field of neurosurgery. Each physician stated that he had read the transcript of defendant's deposition and was of the opinion that the procedures which defendant testified he used before and after plaintiff's fainting spell were reasonable and in accordance with approved and accepted practice in the community.

White and Crumpler by James G. White and Michael J. Lewis for plaintiff appellant.

Hudson, Petree, Stockton, Stockton & Robinson by R. M. Stockton, Jr., and Womble, Carlyle, Sandridge & Rice by Allan R. Gitter for defendant appellee.

GRAHAM, Judge.

The party moving for summary judgment has the burden of positively and clearly showing that there is no genuine issue as to any material fact. *Singleton v. Stewart,* 280 N.C. 460, 186 S.E. 2d 400. The court must view 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, and any doubt as to whether a triable issue exists must be resolved in his favor. *Miller v. Snipes,* 12 N.C. App. 342, 183 S.E. 2d 270, *cert. denied,* 279 N.C. 619. Summary judgment will not usually be feasible in a negligence case where the standard of the prudent man must

be applied. *Robinson v. McMahan,* 11 N.C. App. 275, 181 S.E. 2d 147, *cert. denied,* 279 N.C. 395.

Upon considering the record in this case in the light most favorable to plaintiff, we are of the opinion, and so hold, that a genuine issue exists as to defendant's actionable negligence. It is true that plaintiff offered no evidence to rebut defendant's affirmative showing that he possesses the degree of professional learning, skill and ability which others similarly situated possess and that he exercised care and diligence in performing the biopsy, which is a simple surgical procedure. Defendant's duty to plaintiff did not end, however, with the successful performance of the surgical procedure. He remained under a duty to give, or see that plaintiff was given, such care as the necessity of the case required. *Starnes v. Taylor,* 272 N.C. 386, 158 S.E. 2d 339; *Nash v. Royster,* 189 N.C. 408, 127 S.E. 356.

The evidence would permit a jury to find that defendant unnecessarily left plaintiff unsecured and unattended on a narrow examining table at a time when plaintiff had not fully regained consciousness after suffering neurogenic shock and fainting; that it was reasonably foreseeable that a person in plaintiff's condition was likely to fall from the table unless secured or attended, and that plaintiff did fall and sustain injuries. A jury could reasonably conclude from such findings that defendant failed to give, or see that plaintiff was given, such care as a reasonably prudent physician in the same or similar circumstances would have provided, and that this negligence was a proximate cause of plaintiff's injuries.

Defendant points to the affidavits of the neurosurgeons and calls attention to plaintiff's failure to offer testimony of any physician to rebut the opinions expressed in these affidavits. In doing so, defendant treats this as the type of medical malpractice case which involves matters peculiarly within the domain of expert scientific knowledge. We do not view it as such. Laymen are not so lacking in common knowledge and experience as to be unable to pass upon the questions of reasonable care and proximate cause which arise from the facts here involved. See *Groce v. Myers,* 224 N.C. 165, 29 S.E. 2d 553.

Reversed.

Judges PARKER and VAUGHN concur.

STATE OF NORTH CAROLINA v. CHARLIE LEE LAWS

No. 7219SC577

(Filed 20 September 1972)

1. **Criminal Law § 99— leading question — expression of opinion by trial judge**

The trial court's question asked of the victim of an alleged armed robbery as to the victim's being afraid at the time of the offense was not a leading question and therefore an expression of opinion by the judge, nor did the question aid the solicitor in making out a case of armed robbery, as placing the victim in fear is not an element of that offense.

2. **Criminal Law § 168— jury charge read as whole**

The jury charge must be read as a whole and construed contextually, and isolated portions will not be held prejudicial when the charge as a whole is correct.

3. **Criminal Law § 89— corroborative testimony — question for jury — no error**

The admission of the testimony of a witness accompanied by the court's admonition to the jury that they consider the evidence only for the purpose of corroboration if it did in fact corroborate the victim's testimony was not error, since the question as to whether the witness's testimony was corroborative was one for the jury.

APPEAL by defendant from *McConnell, Judge,* March 1972 Session, CABARRUS Superior Court.

An indictment proper in form was returned at the 20 August 1962 Session of Cabarrus Superior Court charging defendant with armed robbery on 2 July 1962. The case was originally tried at said 20 August 1962 session of the court, the jury returned a verdict of guilty of armed robbery and judgment was entered sentencing defendant to prison for a period of 12 years, the sentence to commence at the expiration of a 22 to 26 years sentence he was then serving. On 5 January 1972 defendant filed application for a post-conviction hearing; a hearing was allowed and following the hearing an order was entered on 28 January 1972 granting defendant a new trial.

Following a retrial, the jury returned a verdict of guilty to the charge of armed robbery and from judgment imposing a 12 years prison sentence to begin at expiration of another sentence being served, defendant appealed.

Attorney General Robert Morgan by Thomas E. Kane, Associate Attorney, for the State.

Clarence E. Horton, Jr., for defendant appellant.

BRITT, Judge.

[1] By his first assignment of error defendant contends that the court violated G.S. 1-180 by expressing an opinion to the jury as to defendant's guilt. Specifically, defendant contends that by asking leading questions of witnesses the court expressed an opinion.

The record indicates that only one of the questions covered by this assignment of error was asked in the presence of the jury, the remaining questions being asked during a *voir dire* examination in the absence of the jury. The questions asked in the absence of the jury clearly were not error. *State v. Robbins,* 275 N.C. 537, 169 S.E. 2d 858 (1969).

The question asked by the court in the presence of the jury was directed to the victim of the alleged robbery and was as follows: "At the time the gun was pulled out, were you afraid?" The answer to the question was "Sure."

It is well settled that the trial judge is permitted to ask questions of a witness in the presence of a jury for the purpose of clarifying matters that are unclear or not understood. *State v. Kirby,* 273 N.C. 306, 160 S.E. 2d 24 (1968); *State v. Kimrey,* 236 N.C. 313, 72 S.E. 2d 677 (1952). Defendant's argument that the question was error for the reason that it was leading has no merit. *State v. Humbles,* 241 N.C. 47, 84 S.E. 2d 264 (1954). His argument that the question aided the solicitor in making out a case of armed robbery is also without merit as placing the victim in fear is not one of the elements of armed robbery set forth in G.S. 14-87. Prior to the challenged question, the victim had testified that defendant held a sawed-off shotgun on her and threatened to blow her to pieces. This evidence was sufficient to show the use or threatened use of a firearm whereby the life of a person was endangered or threatened. *State v. Green,* 2 N.C. App. 170, 162 S.E. 2d 641 (1968). The assignment of error is overruled.

[2] Defendant assigns as error the court's instructions to the jury as to what the State was required to show in order for the

jury to return a verdict of guilty of armed robbery. It is settled law that the jury charge must be read as a whole and construed contextually, and isolated portions will not be held prejudicial when the charge as a whole is correct. *State v. Lee,* 277 N.C. 205, 176 S.E. 2d 765 (1970). Assuming that the portion of the charge challenged here was erroneous, we hold that there was no prejudice in view of the clear and proper instruction given prior to and subsequent to the challenged portion.

[3] Finally, by his assignments of error 4, 5 and 7 defendant contends the court erred in allowing the witness McCree to testify to a damaging statement allegedly made by the victim at the time of the robbery, purportedly in corroboration of the victim when she had not testified to any such statement, and the court then emphasizing said statement by repeating it in the charge.

The record discloses: On direct examination the victim, Mrs. Sloan, testified that while she was working in the supermarket which she and her husband operated she saw the defendant, Charlie Laws; that defendant came in, asked for a pack of Camel cigarettes, and after she turned around from getting the cigarettes, defendant had a sawed-off shotgun on the counter pointed towards her. Following defendant's threat to blow her to pieces she surrendered $130 to defendant. Mrs. Sloan testified, "I was pretty sure it was him from the picture that I had been seeing in the paper. I know this is the man." On cross-examination defense counsel referred to Mrs. Sloan's statement that she was "pretty sure it was him" and asked her, "You were not absolutely sure?" Mrs. Sloan replied, "When they brought a real picture, you know, I knew it was him then." The witness McCree testified that he was in the store at the time, witnessed the robbery, and that as soon as defendant left the store Mrs. Sloan stated that the robber was Charlie Laws. Immediately thereafter the court asked McCree, "She told you it was Charlie Laws right after he went out?" The witness answered in the affirmative. The court allowed the testimony of McCree as to what Mrs. Sloan said for purpose of corroboration, if in fact it did corroborate Mrs. Sloan's testimony.

Evidence which tends to corroborate a witness is competent, and is properly admitted for that purpose, even though otherwise incompetent. 7 Strong, N. C. Index 2d, Witnesses,

§ 5, p. 696. Slight variances in corroborating testimony do not render such testimony inadmissible. *State v. Case,* 253 N.C. 130, 116 S.E. 2d 429 (1960); *State v. Crawford,* 3 N.C. App. 337, 164 S.E. 2d 625 (1968).

We hold that the admission of the testimony of McCree, accompanied with the court's admonition to the jury that they would consider the evidence only for the purpose of corroboration "if it does so corroborate her" was not error. The question as to whether McCree's testimony corroborated Mrs. Sloan was one for the jury and not the trial judge. *State v. Case, supra.*

Defendant received a fair trial, free from prejudicial error and the sentence imposed was within statutory limits.

No error.

Chief Judge MALLARD and Judge CAMPBELL concur.

WILLIAM HARRY TATE v. HELEN DAVENPORT BRYANT

No. 7217DC677

(Filed 20 September 1972)

1. **Automobiles § 23— defective brakes — negligence per se — sudden failure**

Violation of the statute requiring motorists to maintain automobile brakes in good working order and requiring that all automobiles have two systems of brakes is negligence *per se;* a motorist may excuse a violation of the statute by showing a sudden and unexpected brake failure not the result of his failure reasonably to inspect the vehicle. G.S. 20-124.

2. **Automobiles § 68— defective brakes — sufficiency of evidence of negligence**

Plaintiff's evidence was sufficient to be submitted to the jury on the issue of defendant's negligence where it tended to show that defendant backed her car out of a driveway into the path of plaintiff's car, that defendant had had repair work performed on the brakes two days before the accident, that subsequent to the repair work defendant noticed that more pedal pressure was required to activate the brakes than before, that after the accident the brake pedal descended all the way to the floor and there was an odor of brake fluid in the car, that defendant did not test the brake pedal

prior to backing the car, and that defendant made no attempt to stop the vehicle by use of the emergency brake.

APPEAL by defendant from *van Noppen, Judge,* 18 May 1972 Session of SURRY County District Court.

This is a civil action for property damage. Plaintiff asserts his automobile was damaged by the negligence of the defendant when she backed from her driveway onto a rural highway without yielding the right of way. Defendant denies negligence and claims unavoidable accident due to brake failure on defendant's automobile.

Plaintiff's evidence showed that the driveway was about 100 feet long, and that he first saw defendant's brake lights flash on two times immediately before the collision, and that the car's back glass was foggy, it being a rainy day.

Inspection of the automobile after the accident showed that the pedal brake did not work and that there was an odor of brake fluid inside the car. Prior to backing, the car was held stationary in the driveway by use of the mechanical emergency brake which operated independently of the hydraulic brake system. Defendant did not test her brake pedal prior to moving the automobile, and did not attempt to use the emergency brake or give warning when she discovered that the pedal brake was inoperative. Defendant, however, did attempt to turn the car to the left.

The defendant testified that just two days before the accident, she had noticed a noise in the wheels when the brakes were applied, and that she had had the brakes repaired by a garage. She also testified that after the repair and before the accident she had not had difficulty with the brakes. She had noticed that more pedal pressure was required to activate the brakes than before.

Testimony by an insurance appraiser, who was tendered and accepted by the court as an expert in the operation of hydraulic brake systems, was to the effect that the right rear wheel cylinder was defective, causing the brake fluid to leak out of the brake system.

Gardner and Gardner by Carl E. Bell for plaintiff appellee.

Hudson, Petree, Stockton, Stockton & Robinson by James H. Kelly, Jr., for defendant appellant.

CAMPBELL, Judge.

Defendant assigned as error the failure of the trial court to grant its motion for directed verdict and judgment N.O.V.

Upon motion for directed verdict or judgment N.O.V., in determining the sufficiency of the evidence, the court is guided by the same principles that prevailed under former procedure with respect to the sufficiency of the evidence to withstand a motion for nonsuit. *Musgrave v. Savings & Loan Assoc.*, 8 N.C. App. 385, 174 S.E. 2d 820 (1970). All the evidence which supports plaintiff's claim must be taken as true and considered in the light most favorable to the plaintiff, giving him the benefit of every reasonable inference which may legitimately be drawn therefrom, and with contradictions, conflicts and inconsistencies being resolved in the plaintiff's favor. *Bowen v. Gardner*, 275 N.C. 363, 168 S.E. 2d 47 (1969). Defendant's evidence may not be considered unless it is favorable to the plaintiff or unless it is not in conflict with the plaintiff's evidence and explains or makes clear that which has been offered by the plaintiff. *Godwin v. Cotton Co.*, 238 N.C. 627, 78 S.E. 2d 772 (1953); *Gregory v. Insurance Co.*, 223 N.C. 124, 25 S.E. 2d 398 (1943).

[1] Violation of G.S. 20-124, a safety statute requiring all motorists to maintain automobile brakes in a safe working order, and requiring that all automobiles have two systems of brakes, each working independently of the other, is negligence *per se*, and is actionable negligence if such violation is the proximate cause of injury. *Tysinger v. Dairy Products*, 225 N.C. 717, 36 S.E. 2d 246 (1945). The defendant, however, may excuse violation of the statute by showing a sudden and unexpected brake failure not the result of his failure to reasonably inspect the vehicle. *Stephens v. Oil Co.*, 259 N.C. 456, 131 S.E. 2d 39 (1963).

[2] We are of the opinion that all the evidence, viewed in the light most favorable to the plaintiff, creates a case which was properly submitted to the jury. The evidence shows that defendant backed her car out of a driveway into the path of an automobile traveling on a dominant highway; that two days prior thereto defendant had noticed a noise when braking and had had the brakes repaired; that, between the time of repair and the time of the accident, defendant had noticed that more pedal pressure was required to activate the brakes than before;

that upon inspection of the automobile after the accident by a police officer it was found that the brake pedal descended all the way to the floor and that there was an odor of brake fluid in the car; that defendant did not test the pedal brake prior to backing the car; and that defendant made no attempt to stop the vehicle by use of the mechanical emergency brake or to warn the plaintiff of her inability to stop, although she did attempt to turn her car to avoid the collision. Defendant's claim of sudden brake failure, creating an emergency situation, does not explain the plaintiff's evidence, but raises a defense of due care under the circumstances of the emergency. This presents a jury question.

Defendant cites in support of motion for directed verdict *Hudson v. Drive It Yourself,* 236 N.C. 503, 73 S.E. 2d 4 (1952), which case is distinguishable on its facts. In *Hudson* the driver of the automobile which caused the injury was the bailee of the defendant; he had driven the car several miles prior to the accident without any notice of defective brakes; and there was no evidence that the defendant bailor had notice of the defective brakes. In the case at bar defendant's brakes failed on the very first attempt at applying them and defendant did not test the brake pedal before putting the car in motion. "[H]e would not be responsible for a defect subsequently discovered which was not discernible by reasonable inspection at the time." *Hudson v. Drive It Yourself, supra.* Whether defendant Bryant had sufficient prior notice of the defect and whether a reasonable inspection at the time would have revealed the defect were questions for the jury to answer.

In *Stone v. Mitchell,* 5 N.C. App. 373, 168 S.E. 2d 668 (1969), the court held where there was failure of defendant's brakes and an injury occurred to the plaintiff, the evidence was sufficient for a jury to find that defendant's automobile was not equipped with two sets of brakes in good working order as required by statute; that the defective brake contributed to cause the collision; and that defendant's failure to observe the duty of care prescribed by statute constituted negligence. The defendant, however, could offer proof of legal excuse or avoidance of her failure to have observed the statutory duty and thus a jury question as to whether defendant was negligent for failure to have provided a footbrake in good working order.

Defendant assigns as error several portions of the trial court's instruction to the jury. When considered contextually, we think the trial judge applied proper rules for the guidance of the jury and no prejudicial error has been shown.

Affirmed.

Chief Judge MALLARD and Judge BRITT concur.

BETTY COLEY McCLELLAN v. THE CITY OF CONCORD, NORTH CAROLINA, AND THE BOARD OF LIGHT AND WATER COMMISSIONERS OF THE CITY OF CONCORD, NORTH CAROLINA

No. 7219SC587

(Filed 20 September 1972)

1. **Municipal Corporations § 14— failure to maintain streets in safe condition**

Municipalities may be held liable in tort for failure to maintain their streets in a reasonably safe condition. G.S. 160-54.

2. **Municipal Corporations § 14— street maintenance — negligence — burden of proof**

Municipal corporations do not insure that the condition of their streets shall at all times be absolutely safe, but are responsible only for negligent breach of duty upon a showing that (1) a defect existed, (2) an injury was caused thereby, (3) the city officers knew, or should have known from ordinary supervision, the existence of the defect, and (4) the character of the defect was such that injury to travelers therefrom might reasonably be anticipated.

3. **Municipal Corporations § 17— fall over street light base being constructed — contributory negligence**

Plaintiff's evidence disclosed that she was contributorily negligent as a matter of law in falling over a cement street light base being constructed beside a city street where it showed that plaintiff got out of a car on the passenger side during a heavy rain, that she opened the back door to get two drink cartons, turned, and upon stepping toward the sidewalk tripped and fell over the cement base, and that plaintiff could have seen the base if she had looked, but that she did not see it because she was hurrying to get out of the rain.

4. **Municipal Corporations § 17— obvious defects — duty to avoid**

One must discover and avoid defects which are visible, obvious and discoverable with exercise of due care.

APPEAL by plaintiff from *McConnell, Judge,* 7 February 1972 Session, CABARRUS County Superior Court.

This is a civil action commenced to recover for personal injury sustained when plaintiff fell over a cement street light base being constructed along a street within the City of Concord, North Carolina. At the close of plaintiff's evidence, defendants moved "for a directed verdict on the grounds that the plaintiff's evidence failed to show that either of the defendants was guilty of negligence which proximately caused injury and damage to the plaintiff, and on the further grounds that the plaintiff's evidence conclusively showed that the plaintiff was guilty of contributory negligence as a matter of law which was a proximate cause of her injury and damage." This motion was allowed and judgment was entered dismissing the action of the plaintiff.

Wesley B. Grant and Adam Grant for plaintiff appellant.

Hartsell, Hartsell & Mills by W. Erwin Spainhour for defendant appellees.

CAMPBELL, Judge.

On the morning of 5 April 1968 at about 8:30 a.m. plaintiff's husband drove her to a Stop and Shop store in Concord and stopped the car in a no parking zone alongside the store. The passenger side of the car was twelve inches from the curb. It was raining heavily on that day, and plaintiff said that she was in a hurry. She got out of the right front of the car, opened the back door to get two soft drink cartons, turned, and upon stepping toward the sidewalk tripped and fell over a cement base being constructed to support a street light pole. The base was located on the sidewalk about one inch from the street curb. It was twenty inches square at the bottom, twelve inches square at the top, and twelve inches high. There was a black pipe extending from the top of the base to a total height of two and one half feet. Plaintiff further testified that she was aware of the fact that the City was replacing all of the light poles and that she had seen these concrete bases numerous times around Concord, although she had never before seen the one on which she fell.

[1] The construction and maintenance of city streets is a governmental function, but it has been uniformly held that municipalities may be liable in tort for failure to maintain their

streets in a reasonably safe condition, and they are now required to do so by statute. G.S. 160-54; *Glenn v. City of Raleigh,* 246 N.C. 469, 98 S.E. 2d 913 (1957); *Bunch v. Edenton,* 90 N.C. 431 (1884).

[2] Municipalities, however, do not insure that the condition of the streets shall at all times be absolutely safe. They are responsible only for negligent breach of duty, which is made out by showing that (1) a defect existed, (2) an injury was caused thereby, (3) the City officers knew, or should have known from ordinary supervision, the existence of the defect, and (4) that the character of the defect was such that injury to travelers therefrom might reasonably be anticipated. *Fitzgerald v. Concord,* 140 N.C. 110, 52 S.E. 309 (1905).

It makes no difference if the defect was in the grass plot between the sidewalk and the street, since that area is considered part of the street system. *Gettys v. Marion,* 218 N.C. 266, 10 S.E. 2d 799 (1940).

Whether the defect is characterized as being a surface defect (excavation), a defective structure (meter covers, covered stairwells, coal shutes, etc.), or an obstruction (water hydrants, telephone poles) the effect of contributory negligence is the same—plaintiffs are usually "nonsuited" for contributory negligence when the defect is plainly visible in daylight, and even at night when the area is well lighted. Pedestrians must keep a reasonable lookout for their own safety. *Gower v. Raleigh,* 270 N.C. 149, 153 S.E. 2d 857 (1967); *Burns v. Charlotte,* 210 N.C. 48, 185 S.E. 443 (1936); *Hedrick v. Akers,* 244 N.C. 274, 93 S.E. 2d 160 (1956); *Blake v. Concord,* 233 N.C. 480, 64 S.E. 2d 408 (1951); *Beaver v. China Grove,* 222 N.C. 234, 22 S.E. 2d 434 (1942); *Walker v. Wilson,* 222 N.C. 66, 21 S.E. 2d 817 (1942) (injury at night on a lighted street); *Watkins v. Raleigh,* 214 N.C. 644, 200 S.E. 424 (1939); *Ovens v. City of Charlotte,* 159 N.C. 332, 74 S.E. 748 (1912) (injury at night on a lighted street).

[3] Plaintiff testified that the accident occurred during daylight. Although it was raining at the time and she was in a hurry to get out of the rain, there was nothing obstructing her view of the structure. She said that she *could have* seen it, but did not see it although she did take "a quick glance." On being asked why she did not see the base, plaintiff testified, "[W]hen

it's pouring rain and the wind is blowing in your face you're not going to just constantly stand there and look—you're going to take a quick glance and go on and get out of the rain."

Not all structures are barriers constituting obstructions upon which liability may be based. It has been held that fire hydrants, telephone poles, street lights and trees are useful obstructions and that it is not negligence to allow them to remain in the street or sidewalk unless they are negligently constructed or maintained, or are in an improper place. The area between the street and sidewalk is a proper location for these objects, and persons using the sidewalk are required to take notice of these conditions and of the uses to which the sidewalk may legitimately be put. *Rollins v. Winston-Salem,* 176 N.C. 411, 97 S.E. 211 (1918); *Gettys v. Marion, supra.*

[4] A person is under a duty to discover and avoid defects and obstructions which she should see in the exercise of due diligence for her own safety. An increase in the hazard because of dirt and rain calls for a corresponding increase in vigilance. *Hedrick v. Akers, supra.* One must discover and avoid defects which are visible, obvious and discoverable with exercise of due care. *Watkins v. Raleigh, supra.* In its present state the law is not able to protect those who have eyes and will not see. *Harrison v. R.R.,* 194 N.C. 656, 140 S.E. 598 (1927).

The evidence clearly shows that plaintiff could have seen the base if she had looked, but that she did not see it because she was hurrying to get out of the rain.

No error.

Chief Judge MALLARD and Judge BRITT concur.

STATE OF NORTH CAROLINA v. LAWRENCE J. BIGGERSTAFF

No. 7225SC613

(Filed 20 September 1972)

1. **Constitutional Law § 31; Criminal Law § 40— testimony from preliminary hearing — unavailability of witness — finding of good faith effort by State**

It was not necessary for the trial judge to make a direct finding that the State had exerted good faith efforts to secure the presence of a witness at defendant's trial for first-degree murder where the judge's order finding facts after the *voir dire* hearing and evidence upon which the order was based did disclose a good faith effort; hence, it was not error for the trial court to allow into evidence the witness's transcribed testimony given at defendant's preliminary hearing.

2. **Criminal Law § 88— cross-examination of State's witness — bias of witness — improper exclusion of testimony**

Where a witness was unavailable for cross-examination at trial, but a transcript of her testimony at defendant's preliminary hearing was read into evidence, the trial court improperly sustained objections to questions asked the sheriff, a State's witness, by defendant's counsel in an attempt to show that the witness was biased in that she was in custody on a felony charge at the time she testified and hence in such a position that she might have felt it advisable to curry favor with the State.

3. **Criminal Law § 88— cross-examination — bias of witness in favor of State — exclusion of testimony within discretion of court**

The rule which recognizes the propriety of cross-examination to establish a witness's bias in favor of the State because of his hope for leniency must be applied in connection with the equally well recognized rule that 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.

4. **Criminal Law § 87— leading questions — discretion of trial judge**

The allowance of leading questions is a matter within the discretion of the trial judge, and his rulings will not be disturbed on appeal in the absence of abuse of discretion.

5. **Criminal Law § 169— exclusion of testimony — harmless error**

Testimony of a witness that the deceased was "very mad" was improperly excluded; however, defendant was not prejudiced where the witness had already testified without objection that the deceased "was mad really."

State v. Biggerstaff

ON *Certiorari* to review judgment of *Martin (Robert M.), Judge,* at the 16 August 1971 Session of Superior Court held in CALDWELL County.

On the night of 21 January 1971 defendant shot and killed Jerry Ray Bryant. He was indicted for first-degree murder, was placed on trial for second-degree murder or manslaughter, pleaded not guilty, was found guilty of manslaughter, and from judgment imposing a prison sentence, gave notice of appeal to the Court of Appeals. This Court subsequently allowed his petition for certiorari.

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

West & Groome by Ted G. West and J. Laird Jacob, Jr. for defendant appellant.

PARKER, Judge.

[1] At defendant's preliminary hearing in the district court held on 15 March 1971 the State presented testimony of Mrs. Peggy Story, an eyewitness to the shooting. At that hearing defendant was present and was represented by the same counsel who subsequently represented him at his trial, and defendant's counsel cross-examined the witness. Mrs. Story's testimony given at the preliminary hearing on direct and cross-examination was transcribed by the court reporter. At defendant's trial in the superior court held in August 1971, Mrs. Story was not present, and the trial court permitted the court reporter, over defendant's timely objections made on constitutional grounds, to read to the jury the transcript of her testimony as given at defendant's preliminary hearing. Defendant contends this resulted in violation of his rights to be confronted with the witnesses against him as secured to him by Art. I, § 23 of the Constitution of North Carolina and by the Sixth Amendment to the Constitution of the United States, made obligatory on the States by the Fourteenth Amendment under the decision in *Pointer v. Texas,* 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed. 2d 923. More specifically, defendant contends that the State in this case failed to show a sufficient good faith effort to secure the witness's presence at his trial, as required by *Barber v. Page,* 390 U.S. 719, 88 S.Ct. 1318, 20 L.Ed. 2d 255 and *Berger v. California,* 393 U.S. 314, 89 S.Ct. 540, 21 L.Ed.

2d 508, to justify the use at trial of her preliminary hearing testimony. We do not agree.

In *State v. Prince,* 270 N.C. 769, 154 S.E. 2d 897, in opinion filed 20 June 1967, Sharp, J., speaking for the North Carolina Supreme Court, said:

> "Always in a criminal action, 'the witness himself, if available, must be produced and testify *de novo.*' *State v. Cope,* 240 N.C. 244, 249, 81 S.E. 2d 773, 777. The constitutional right of confrontation, however, is not denied an accused by the introduction at a subsequent trial of the transcribed testimony given at a former trial of the same action by a witness who has since died, become insane, left the State permanently or for an indefinite absence, become incapacitated to testify in court as a result of a permanent or indefinite illness, or absented himself by procurement of, or connivance with, the accused. The accuracy of the transcription, of course, must be attested and it must appear that the defendant had a reasonable opportunity to cross-examine the witness."

Subsequent to the decision of *State v. Prince, supra,* and on 23 April 1968, the United States Supreme Court decided *Barber v. Page, supra,* in which the Court held that the absence of a witness from the jurisdiction would not justify use at trial of preliminary hearing testimony unless the state had made a good faith effort to secure the witness's presence at trial. In *Berger v. California, supra,* decided 13 January 1969, the Court held that the principle of *Barber* should be given retroactive application. In both cases, on the facts disclosed by the records before the Court, the United States Supreme Court found that the prosecution had failed to show a sufficient good faith effort to obtain the witness's presence at the trial to justify use of his prior testimony. The principal question before us on the present appeal is whether the record in the present case does disclose such a sufficient good faith effort on the part of the prosecution. We hold that it does.

Prior to permitting the transcript of the testimony given by Mrs. Story at the preliminary hearing to be read to the jury, the trial court conducted a *voir dire* examination concerning the circumstances under which her presence at the preliminary hearing had been obtained and concerning the efforts which the State had made to obtain her presence at defendant's trial.

Evidence presented at the *voir dire* examination disclosed that Peggy Story was a young woman 23 years old who for the past three or four years had worked at various locations as a dancer. She had been married but for over two years had been divorced from her husband. At the time of the shooting she and her three children lived with her mother in Caldwell County, N. C. In March of 1971, after the shooting but before defendant's preliminary hearing, she went to Florida with one Roger Mills and was charged with aiding and abetting Mills in larceny of an automobile. She was arrested on this charge at Myrtle Beach, S. C., and about 12 March 1971 was brought back by the officers to Caldwell County, N. C., where she appeared as a State's witness at defendant's preliminary hearing on 15 March 1971. Subsequently the charges against her of aiding and abetting Roger Mills in larceny of an auotmobile, which had been brought by Mills' mother, were dropped. She was last seen in North Carolina on 5 May 1971, on which date she and her three children were still living with her mother. About 7:30 p.m. on that date she left home to go to a filling station to have a battery checked on her girl friend's automobile, telling her mother she would be back in a few minutes. Since that time her mother had not seen her and at the time of defendant's trial in August of 1971 her mother did not know where she was. Her mother had heard from her once, on 24 June 1971, when she telephoned about 2:30 in the morning to ask about her children. At that time her mother asked where she was, but she did not say. The last information which her mother had was from a girl friend of Peggy's, who told her that she was in San Juan, Puerto Rico. Her father testified that on previous occasions Peggy had left her children with her mother and on such occasions he had not known where she was; that since 5 May 1971 he had not seen her, she had not even called him, and he did not know her whereabouts; that "[t]hey (without specifying to whom he referred) heard she was in Reno here a week or two ago." The Sheriff of Caldwell County testified he had been unable to serve subpoenas on Peggy Story issued for the May and August sessions of superior court; that he and his deputies had talked to members of her family and friends and with other witnesses in the case and had no information concerning her whereabouts; that he and his deputies had made "a diligent effort to ascertain the whereabouts of Peggy Green Story both in Caldwell County and in the State

of North Carolina," and it was his opinion she had left "the jurisdiction of this Court."

On the evidence presented at the *voir dire* hearing the trial judge entered an order finding facts substantially as follows: That the sheriff had made diligent inquiry as to the whereabouts of the witness and had found no evidence as to where she may be residing, if she be living; that the witness was a necessary witness for the prosecution, having been an eyewitness to the shooting; that the proceeding at which the witness testified was a preliminary stage of the same trial; that the witness had removed herself from the jurisdiction of the court and was unavailable to testify at the trial; and that the court reporter had accurately taken and transcribed her testimony given at the preliminary hearing. While the trial judge did not make a direct finding that the State had exerted good faith efforts to secure the presence of the witness at the trial, we are of the opinion, and so hold, that his order and the evidence upon which it was based do disclose such a good faith effort in this case. Accordingly, we find no error in the trial court's ruling that the witness's transcribed testimony given at the preliminary hearing was admissible at defendant's trial. We note, in passing, that the witness, Peggy Story, was not the only eyewitness to the shooting. Three other witnesses, one for the State and two for the defendant, had been present in the room when the fatal shots were fired and testified to the shooting and to the events which led to it. Defendant's assignments of error directed to the admission in evidence of Peggy Story's transcribed testimony are overruled.

[2, 3] At the trial, defendant's counsel in cross-examination of the sheriff, who was a State's witness, asked questions designed to place before the jury the fact, which had been previously disclosed on cross-examination of the same witness during the *voir dire* examination, that at the time Peggy Story testified at the preliminary hearing she was in custody of the sheriff's department on a felony charge for which a deputy had brought her back to Caldwell County from Myrtle Beach, S. C. The court sustained the solicitor's objections to these questions, which action is the subject of defendant's exceptions 10, 11, 12 and 13, brought forward on this appeal in assignment of error number 4. In our opinion the evidence sought was admissible, since defendant had a right to attempt to impeach Peggy Story, whose preliminary hearing testimony had been admitted against

him, but its exclusion in this case was nonprejudicial error. This is not a case in which it was sought to impeach a witness by cross-examination as to whether he had been indicted or was under indictment for an unrelated criminal offense, which the Court held in *State v. Williams,* 279 N.C. 663, 185 S.E. 2d 174, may not be done on the grounds that an indictment is a mere accusation and raises no presumption of guilt. Here, the excluded evidence was not sought by defendant for the purpose of showing that Peggy Story may have been guilty of a felony and was therefore a person of bad character who was unworthy of belief. Rather, the evidence was sought in order to disclose to the jury the fact that at the time Peggy Story testified at the preliminary hearing she was in such a position that she might have felt it advisable to curry favor with the State. See, e.g., *State v. Roberson,* 215 N.C. 784, 3 S.E. 2d 277; Annot., 62 A.L.R. 2d 610. True, defendant's counsel had an opportunity to develop this evidence by cross-examination of Peggy Story at the preliminary hearing, but it would be unrealistic not to recognize that cross-examination of State's witnesses at a preliminary hearing is usually conducted for a very different purpose than is cross-examination of the same witnesses at the trial before a jury, and here defendant's counsel had no way of knowing at the time of the preliminary hearing that the witness would not be available for a more searching cross-examination before the jury. Since Peggy Story was not subject to cross-examination before the jury, it would have been proper for defendant in this case to have been permitted to develop by cross-examination of another witness for the State facts bearing on Peggy Story's possible motive for testifying favorably to the State's case. The rule, however, which recognizes the propriety of cross-examination to establish a witness's bias in favor of the State because of his hope for leniency, "must be applied in connection with the equally well recognized rule that 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, 185 S.E. 2d 227. In the present case there was no such showing, and defendant's exceptions 10, 11, 12 and 13 are overruled.

The only other exception included under assignment of error number 4 which is brought forward in defendant's brief

is exception number 22, relating to the court's action in sustaining the solicitor's objection to a question asked the sheriff on cross-examination concerning the description of an automatic pistol on which the S.B.I. had made certain ballistic tests. The sheriff had previously testified that this pistol, which had been found by deputies in Burke County, was not the weapon which fired the shot which killed the deceased. No evidence indicated any connection between this weapon and the homicide in this case, and the excluded evidence was clearly irrelevant. All of defendant's exceptions included under his assignment of error number 4 which are brought forward in his brief are accordingly overruled.

[4] Defendant assigns as error the court's permitting the solicitor to ask the sheriff certain questions which defendant contends were leading questions. "The allowance of leading questions is a matter entirely within the discretion of the trial judge, and his rulings will not be disturbed on appeal, at least in the absence of abuse of discretion." *State v. Painter,* 265 N.C. 277, 144 S.E. 2d 6. No abuse of discretion has been shown on the present record, and this assignment of error is overruled.

[5] Defendant's counsel asked a defense witness, who was present when the altercation between defendant and Jerry Bryant occurred, to describe the expression on Jerry Bryant's face and what he looked like. The witness answered that in his opinion Bryant was "very mad." The State's motion to strike the answer was allowed, to which action defendant assigns error. The answer was competent and should not have been stricken. *State v. Moore,* 276 N.C. 142, 171 S.E. 2d 453; *State v. Brown,* 204 N.C. 392, 168 S.E. 532. However, defendant suffered no prejudice; the witness had already testified without objection that Jerry Bryant "was mad really," and that he had threatened to kill the defendant. Accordingly, this assignment of error is also overruled.

No error.

Judges VAUGHN and GRAHAM concur.

Ingram v. Smith

HENRY L. INGRAM, JR., SUBSTITUTED TRUSTEE, EVERETT TROTTER, TRUSTEE AND REECE TROTTER, ASSIGNEES OF THE JUDGMENT IN THE CAUSE: "REECE TROTTER, PLAINTIFF vs. WILLIAM CURTIS GARNER AND HENRY FLETCHER GARNER, DEFENDANTS" v. DOCK G. SMITH, JR., ADMINISTRATOR OF THE ESTATE OF HENRY FLETCHER GARNER, DECEASED

No. 7219SC496

(Filed 20 September 1972)

1. **Limitation of Actions § 9— claim against deceased debtor — G.S. 1-22**

If a claim is not barred at the time of the death of the debtor, G.S. 1-22 allows an action on the claim to be brought within one year after the grant of letters to the personal representative in those cases in which the claim would otherwise have become barred in less than one year from such grant; however, the statute does not bar a claim after the lapse of a year from the grant of letters where the claim would otherwise not be barred until a later date.

2. **Limitation of Actions § 9— claim against deceased debtor — time between death and letters of administration**

Where a debtor is deceased, the time from his death until the appointment of the personal representative is not included in counting the time of the statute of limitations, provided the estate is administered within ten years after the death.

3. **Limitation of Actions § 9; Judgments § 49— action to preserve judgment lien — death of debtor — statute of limitations**

An action commenced on 20 February 1969 to preserve the lien of a judgment entered on 11 February 1959 was not barred by the ten-year statute of limitations where the judgment debtor died on 20 August 1965 and letters of administration were issued on 3 November 1966, since under G.S. 1-22 the time between the debtor's death and the issuance of letters of administration is not counted toward the statute of limitations.

4. **Torts § 3— joint tort-feasors — active and passive negligence — indemnity**

As an exception to the common law rule that one joint tort-feasor may not sue another for indemnity, a tort-feasor whose negligence is passive and who has paid the injured party may sue the one whose negligence is active for indemnity.

5. **Torts § 3— joint tort-feasors — contribution — indemnity**

The rights of contribution and indemnity are mutually inconsistent; the former assumes joint fault, the latter only derivative fault.

6. **Torts § 3— joint tort-feasors — statutory right of contribution — indemnity**

The statute giving joint tort-feasors the right to contribution and allowing one joint tort-feasor to preserve the judgment lien as against the other does not affect the common law right of indemnity arising from primary-secondary liability. Former G.S. 1-240.

7. Judgments § 49; Torts § 3— payment of judgment — assignment to trustee

When a judgment is paid in full or otherwise satisfied, it is absolutely discharged, notwithstanding an assignment is made to a trustee to keep it alive, if the payor is not, aside from the judgment, entitled to contribution, subrogation or indemnity; however, if the payor is independently entitled to contribution, subrogation or indemnity, the trustee may sue for such relief.

8. Negligence § 9— primary and secondary liability

Primary and secondary liability between defendants exists only when (1) they are jointly and severally liable to the plaintiff, and (2) either one has been passively negligent but is exposed to liability through the active negligence of the other, or one alone has done the act which produced the injury but the other is derivatively liable for the negligence of the former.

9. Torts § 3— primary-secondary liability — action for indemnity

A separate action for indemnity arising from primary-secondary liability may not be commenced until after payment and satisfaction of the debt.

10. Limitation of Actions § 4; Torts § 3— indemnity from joint tort-feasor — statute of limitations

Since indemnity arising from primary-secondary liability is a quasi contractual right, it is subject to the three-year statute of limitations under G.S. 1-52(1).

11. Limitation of Actions § 9; Torts § 3— joint tort-feasors — primary-secondary liability — action for indemnity — statute of limitations

Where a judgment against joint tort-feasors was satisfied by payment in March 1960, the right of the passively negligent tort-feasor who paid the judgment to sue the actively negligent tort-feasor for indemnity expired in March 1963, and where the actively negligent tort-feasor died after the statute of limitations had expired, G.S. 1-22 did not save an action for indemnity instituted by the passively negligent tort-feasor in 1969.

APPEAL by plaintiffs from *Johnston, Judge,* 13 December 1971 Civil Session, RANDOLPH County Superior Court.

This is a civil action on a judgment arising out of an automobile accident in 1958 causing injury to Reece Trotter, being another in a series of cases concerning that judgment, entered on 11 February 1959. *Ingram v. Insurance Co.,* 266 N.C. 404, 146 S.E. 2d 509 (1966); *Ingram v. Insurance Co.,* 258 N.C. 632, 129 S.E. 2d 222 (1963).

In the original action Trotter recovered judgment against both W. C. Garner, the owner of the automobile, and H. F. Garner, the driver of the automobile. On or about 8 March

1960, W. C. Garner paid $10,000 toward the $35,000 judgment and his insurance carrier paid another $10,000. Pursuant to G.S. 1-240, then in effect, the plaintiff Trotter assigned the judgment to a trustee for the benefit of W. C. Garner for the purpose of preserving the judgment lien for contribution against H. F. Garner. Through a series of assignments, Henry L. Ingram was made trustee, and W. C. Garner assigned his beneficial interest back to the original plaintiff, Reece Trotter.

This action was commenced on 20 February 1969 for the purpose of preserving the judgment and to have the liability of W. C. Garner declared secondary and that of H. F. Garner declared primary, which adjudication is the necessary precedent to recovery of full indemnity from H. F. Garner who had paid nothing in satisfaction of the judgment.

Upon plea of the statute of limitations by the defendant, administrator of the estate of Henry F. Garner, deceased, summary judgment was entered and the action dismissed on 16 December 1971. From this judgment, plaintiffs appealed.

John Randolph Ingram for plaintiff appellants.

Coltrane and Gavin by W. E. Gavin for defendant appellee.

CAMPBELL, Judge.

The judgment on which this action is based was entered on 11 February 1959; this action was commenced on 20 February 1969. Although in fact more than ten years have passed since the judgment was entered, whether the ten-year statute of limitations has run to bar suit depends upon the effect of G.S. 1-22, since the defendant, H. F. Garner is now deceased.

G.S. 1-22 provides in part that "[i]f a person against whom an action may be brought dies before the expiration of the time limited for the commencement thereof, and the cause of action survives, an action may be commenced against his personal representative after the expiration of that time, and within one year after the issuing of letters testamentary or of administration."

The statute makes a distinction between claims *in favor* of a decedent's estate and claims *against* a decedent's estate. The former must be brought within one year of death, while the latter within one year of letters testamentary or administra-

tion. The reason for this distinction is that the time during which there was no administration upon the estate of the claimant should be counted because the law does not encourage remissness in those entitled to administration. *Coppersmith v. Wilson,* 107 N.C. 31, 12 S.E. 77 (1890).

[1] G.S. 1-22 is an enabling not a disabling statute. It means that if at the time of the death of the debtor the claim is not barred, action may be brought within one year after the grant of letters to the personal representative in those cases which, in regular course, but for the interposition of this section, the claim would become barred in less time than one year from such grant. *Benson v. Bennett,* 112 N.C. 505, 17 S.E. 432 (1893).

G.S. 1-22 was not intended to be a restriction on the statute of limitations so that a claim should become barred by the lapse of a year from the grant of letters, where, in regular course, but for this section, it would not be barred until a later date. *Benson v. Bennett, supra.*

[2] In addition, in counting the time of the statute of limitations, where the debtor is deceased, the time from his death until the appointment of the personal representative is *not included,* provided that the estate is administered within ten years after the death. *Humphrey v. Stephens,* 191 N.C. 101, 131 S.E. 383 (1925); *Prentzas v. Prentzas,* 260 N.C. 101, 131 S.E. 2d 678 (1963).

[3] In the instant case the judgment was rendered 11 February 1959, and would have been barred on 11 February 1969, without application of G.S. 1-22. The judgment debtor died on 20 August 1965, and letters of administration were issued 3 November 1966. There remained more than one year from this date before the claim would have been barred by the lapse of ten years.

The complaint was filed 20 February 1969, nine days past the final statute of limitations date. However, the time between defendant's death and issuance of letters amounted to one year, two months, and fourteen days, which time is not counted. Although more than a year had elapsed in this case after the grant of letters of administration before suit was commenced, yet, excluding the time between death and administration, the time elapsing between the original judgment and this suit thereon only eight years, nine months and twenty-five days had passed.

The ten-year statute of limitations cannot apply to bar suit on the judgment. The ten years not having run, it is not necessary to consider whether plaintiff had filed a claim against the estate and whether the claim has been admitted by the personal representative.

[4, 5] As a general rule of common law one joint tort-feasor may not sue another for indemnity. An exception exists, however, where one is actively negligent, the other only passively negligent—the one whose negligence is passive may, upon payment of the judgment, sue the other for indemnity. This right is said to arise from a contract implied in law. *Hunsucker v. Chair Co.*, 237 N.C. 559, 75 S.E. 2d 768 (1953). At the time of Reece Trotter's judgment G.S. 1-240 allowed joint tort-feasors who were *in pari delicto*—in equal fault—to sue for contribution where one has paid more than his proportionate share of the judgment. This statute, G.S. 1-240, provided a new right of action wholly distinct from the common law right of indemnity. The rights of contribution and indemnity are mutually inconsistent; the former assumes joint fault, the latter only derivative fault. *Edwards v. Hamill,* 262 N.C. 528, 138 S.E. 2d 151 (1964).

[6, 7] The statute giving joint tort-feasors the right to contribution, and allowing one joint tort-feasor to preserve the judgment lien as against the other does not affect the common law right of indemnity arising from primary-secondary liability. When the judgment was assigned to a trustee for the benefit of W. C. Garner, such assignment worked only to subrogate the trustee to the rights of the judgment creditor with respect to the lien and other incidents of the judgment for the benefit of his *cestui que trust.* Where the judgment is paid in full or otherwise satisfied, it is absolutely discharged notwithstanding that an assignment is made to a trustee to keep it alive, if the payor is not, aside from the assignment, entitled to contribution, subrogation or indemnity. However, if the payor is independently entitled to contribution, subrogation, or indemnity, the trustee may sue for whatever relief entitled. *Ingram v. Insurance Co.*, 258 N.C. 632, 129 S.E. 2d 222 (1963).

The right to bring this action does not depend, then, upon W. C. Garner's assignment of the judgment to a trustee for his benefit. It depends upon his right to indemnity irrespective of the preservation of the judgment. Since there is no right

to sue for indemnity until after the judgment is paid or satisfied by settlement, it must be assumed that this judgment was satisfied by the payment in 1960, for otherwise there could have been no assignment to the trustee.

At the time this suit was begun, G.S. 1-240 had been repealed, and in its place the General Assembly enacted the Uniform Contribution Among Tort-Feasors Act, G.S. Chapter 1B, effective on 1 January 1968. G.S. 1B-1(f) provides: "This article does not impair any right of indemnity under existing law. Where one tort-feasor is entitled to indemnity from another, the right of the indemnity obligee is for indemnity and not contribution, and the indemnity obligor is not entitled to contribution from the obligee for any portion of his indemnity obligation."

[8] Primary and secondary liability between defendants exists only when (1) they are jointly and severally liable to the plaintiff, and (2) either (a) one has been passively negligent but is exposed to liability through the active negligence of the other, or (b) one alone has done the act which produced the injury but the other is derivatively liable for the negligence of the former. *Edwards v. Hamill, supra.*

The doctrine of primary-secondary liability is based upon a contract implied in law. Enforceable in assumpsit, a contract implied in law is a quasi contract, which may result either from a tortious wrong or from one that is contractual. *Cox v. Shaw,* 263 N.C. 361, 139 S.E. 2d 676 (1965).

[9] By proper allegations the Garners could have had determined in Trotter's original action the question of their primary and secondary liability. Having failed to do this, such liability could have been determined in a separate action between the Garners. However, a separate action for indemnity may not be commenced until after payment and satisfaction of the debt. *Ingram v. Insurance Co.,* 258 N.C. 632, 129 S.E. 2d 222 (1963); *Ingram v. Insurance Co.,* 266 N.C. 404, 146 S.E. 2d 509 (1966); *Hodges v. Armstrong,* 14 N.C. 253 (1831).

[10, 11] Since indemnity is a quasi contractual right it is subject to the three-year statute of limitations under G.S. 1-52(1): "Upon a contract, obligation or liability arising out of a contract, express or implied, . . ." A contract implied in law is subject to G.S. 1-52(1). *Fulp v. Fulp,* 264 N.C. 20, 140

S.E. 2d 708 (1965). Since payment was made on the judgment in March 1960, W. C. Garner's right to sue for indemnity expired in March 1963. And since the defendant, H. F. Garner died in 1965, G.S. 1-22 does not apply to save the action. The three-year statute of limitation was an effective bar to this action.

We do not pass on the interesting point as to the effect of the assignment of all beneficial interest in the judgment by W. C. Garner to Reece Trotter, the judgment creditor, and the consequent extinguishment of the judgment since Reece Trotter had been paid in 1960.

There was no dispute as to the facts involved. Since there was not presented any genuine issue as to any material fact and upon the facts established defendant is entitled to judgment as a matter of law, summary judgment for the defendant was proper. *Schoolfield v. Collins*, 12 N.C. App. 106, 182 S.E. 2d 648 (1971).

No error.

Chief Judge MALLARD and Judge BRITT concur in the result.

STATE OF NORTH CAROLINA v. HERMAN RUSSELL McLAWHORN

No. 7218SC618

(Filed 20 September 1972)

1. **Constitutional Law § 30— speedy trial — four month delay between offense and arrest**

In a prosecution for possessing, selling and transporting cocaine, defendant could not complain of an unreasonable and prejudicial delay where only four months elapsed between the commission of the offenses and the issuance of arrest warrants.

2. **Criminal Law § 113— jury charge on entrapment — no error**

Where it was doubtful that defendant was entitled to jury instructions on the question of entrapment, the trial court did not err in its jury charge where it fully submitted the legal principles with respect to entrapment and related the law to any possible contention as to entrapment raised by defendant.

3. **Constitutional Law § 31— confidential informer — necessity of disclosing identity**

The trial court did not err in refusing to require the State's witness to reveal the identity, whereabouts and present status of the confidential informer with whom an alleged sale of cocaine was actually negotiated and to whom the delivery was actually made where defendant failed to make a sufficient showing that the ends of justice required such disclosure.

4. **Criminal Law § 107— no fatal variance**

There was no fatal variance between the charge and the proof where the evidence was sufficient to support jury finding that defendant sold cocaine to police officer S. Daughtry as alleged in the indictment.

APPEAL by defendant from *Seay, Judge,* 10 April 1972 Session of GUILFORD Superior Court.

By indictments proper in form, defendant was charged with (1) possessing, (2) selling, and (3) transporting in an automobile the narcotic drug cocaine. The jury found defendant guilty as charged, the counts were consolidated for purpose of judgment and from judgment imposing a five years prison sentence, defendant appealed.

Attorney General Robert Morgan by (Miss) Ann Reed, Associate Attorney, and Locke T. Clifford, Assistant Solicitor Eighteenth District, for the State.

Smith, Moore, Smith, Schell & Hunter by Jack W. Floyd for defendant appellant.

BRITT, Judge.

[1] Defendant assigns as error the denial of his motions to dismiss all charges "based upon violations of his constitutional right to a speedy arrest and trial." The alleged offenses occurred on 7 August 1971, arrest warrants were issued and executed on 11 December 1971, indictments were returned at the 28 February 1972 Criminal Session of the court and trial was had at the 10 April 1972 session.

In support of this assignment of error defendant relies on *State v. Johnson,* 275 N.C. 264, 167 S.E. 2d 274 (1969) wherein the court said at page 277: "We here hold that when there has been an atypical delay in issuing a warrant or in securing an indictment and the defendant shows (1) that the prosecution deliberately and unnecessarily caused the delay for the conveni-

ence or supposed advantage of the State; and (2) that the length of the delay created a reasonable possibility of prejudice, defendant has been denied his right to a speedy trial and the prosecution must be dismissed."

We do not think the instant case is controlled by *Johnson* where there was a four years delay (as opposed to four months in this case) in securing an indictment and where the delay was the "purposeful choice of the prosecution, and it created the reasonable possibility that prejudice resulted to defendant." We think this case is similar to our case of *State v. Farris,* 13 N.C. App. 143, 185 S.E. 2d 275 (1971), cert. den., 280 N.C. 302, and apply here, by reference, the reasoning set forth in *Farris.* The assignment of error is overruled.

[2] Defendant assigns as error the failure of the trial court in its charge to the jury to declare and explain the law arising on substantial features of the case, and to relate the law to the contentions of defendant. In his brief defendant states that his primary contention was his defense of entrapment. Defendant did not testify and offered no evidence but attempted to assert his defense of entrapment by voir dire examination of a police detective and cross-examination of witnesses for the State.

It is doubtful that defendant was entitled to jury instructions on the question of entrapment. See *State v. Kilgore,* 246 N.C. 455, 98 S.E. 2d 346 (1957). Assuming, arguendo, that he was, we think the trial judge fully submitted the legal principles with respect to entrapment as set forth in *State v. Burnette,* 242 N.C. 164, 87 S.E. 2d 191 (1955) and related the law to any possible contention as to entrapment raised by defendant. We perceive no prejudice to defendant, therefore, the assignment of error is overruled.

[3] In his next assignment of error defendant contends that the court erred "in refusing to require the State's witness to reveal the identity, whereabouts and present status of the confidential informer with whom the alleged sale was actually negotiated, and to whom the delivery was actually made." In support of this contention defendant relies on *Roviaro v. United States,* 353 U.S. 53, 1 L.Ed. 2d 639, 77 S.Ct. 623 (1957). We think the cases are clearly distinguishable. In *Roviaro* defendant was charged with illegal transportation of heroin and selling heroin to one "John Doe" (the informer). A police officer was concealed in the trunk of Doe's car and testified to a

conversation between Doe and defendant. A second officer followed Doe's car in another car and testified as to what he saw transpire between defendant and Doe. In the instant case, defendant was charged with selling a narcotic drug to S. Daughtry, a police officer, who gave direct testimony regarding the alleged sale to him as well as the alleged possession and transportation.

The Supreme Court of North Carolina appears to hold consistently that the State is allowed the privilege of nondisclosure unless the defendant makes a sufficient showing that the ends of justice require disclosure. *State v. Swaney,* 277 N.C. 602, 178 S.E. 2d 399 (1971); *State v. Moore,* 275 N.C. 141, 166 S.E. 2d 53 (1969) and *State v. Boles,* 246 N.C. 83, 97 S.E. 2d 476 (1957). In *Roviaro, supra,* page 646, the U. S. Supreme Court said: "We believe that no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors."

We hold that defendant in the instant case did not make a sufficient showing that the ends of justice required disclosure of the identity, whereabout and present status of the informer. The assignment of error is overruled.

[4] Finally, defendant contends that the record discloses a fatal variance between the charge of sale to a police officer and evidence of sale to a confidential informer. The contention is without merit. The evidence was sufficient to support a jury finding that defendant sold cocaine to police officer S. Daughtry as alleged in the indictment.

For the reasons stated, we find

No error.

Chief Judge MALLARD and Judge CAMPBELL concur.

STATE OF NORTH CAROLINA v. ALLAN WAYNE CHRISCO

No. 7220SC693

(Filed 20 September 1972)

1. **Criminal Law § 23— guilty plea — voluntariness — plea bargaining**

During an examination to determine voluntariness of his guilty plea, defendant was not prejudiced by a question with respect to influence exerted over him to obtain such plea, though plea bargaining may have taken place, where there was nothing to show that defendant's guilty plea would not have been accepted even after full disclosure of any plea bargaining which may have occurred.

2. **Criminal Law § 138— severity of sentence — evidence of other offenses considered**

The trial court did not err in hearing testimony with respect to offenses committed by defendant as to which the solicitor entered a *nolle prosequi* where such testimony was heard only after defendant's guilty pleas as to other charges had been accepted and was heard solely to aid the court in determining what sentence should be imposed.

ON *Certiorari* to review judgment of *Collier, Judge,* 24 April 1972 Session of Superior Court held in MOORE County.

Represented by counsel, defendant pleaded guilty to two counts of felonious breaking and entering and two counts of felonious larceny. Before accepting the pleas, the court examined defendant under oath and defendant signed and swore to a written "Transcript of Plea" which contained, among other questions and answers, the following:

> "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 (guilty) in this case? Answer: No."

Thereupon the court signed an order making findings of fact and adjudicating that defendant's pleas of guilty were "freely, understandingly, and voluntarily made, without undue influence, compulsion or duress, and without promise of leniency," and ordered the pleas, the transcript of plea, and the adjudication to be filed and recorded. After this occurred, the solicitor made the following statement:

> "If your Honor, please, on the acceptance of those pleas, and with the understanding that all evidence will

be introduced, the State will take a nol pros in the other cases."

Before sentencing, the court heard testimony of a deputy sheriff, a police officer, and the defendant, concerning defendant's participation in the offenses to which he had pleaded guilty and concerning his involvement in other offenses as to which the solicitor entered a *nolle prosequi.* Judgment was then entered in the cases in which defendant had pleaded guilty, sentencing defendant to prison for a term of not less than five nor more than eight years. Defendant gave notice of appeal but failed to docket the record on appeal in apt time. This Court granted his petition for certiorari.

Attorney General Robert Morgan by Associate Attorney Benjamin H. Baxter, Jr., for the State.

Robert C. Powell for defendant appellant.

PARKER, Judge.

[1] Defendant contends it was implicit in the solicitor's statement that an understanding had been reached by which the State would drop other charges against him in return for his pleading guilty in the cases now before us, that this should have put the trial court on notice to inquire further into the nature of any plea bargaining which may have occurred, and that the court's failure to do so and to enter its findings on the record entitle him now to replead. We do not agree.

"The disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely called 'plea bargaining,' is an essential component of the administration of justice. Properly administered, it is to be encouraged." *Santobello v. New York,* 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed. 2d 427; See also: "Standards Relating To Pleas of Guilty," American Bar Association Project on Minimum Standards for Criminal Justice (Approved Draft, 1968).

Defendant does not contend that such plea bargaining as may have occurred in the cases before us was conducted unfairly or that he failed to obtain full benefits of any bargain which may have been made. His complaint seems to be that, in order to have his pleas accepted by the court, he was required to answer falsely question No. 11 on the transcript of plea. Nothing in the record, however, supports defendant's assumption

that his pleas would not have been accepted had he answered the question in the affirmative and had there been full disclosure in open court concerning the nature of any plea bargaining which may have occurred and concerning the terms of any bargain which may have been reached. On the present record, defendant has failed to show how he has been in any manner prejudiced by having been asked question No. 11.

[2] There is also no merit in defendant's further contention that the court erred in hearing testimony concerning the other offenses committed by him. This testimony was presented to the court only after defendant's guilty pleas had been accepted and was heard by the court solely to aid it in determining what sentence should be imposed. "In making a determination of this nature after a plea of guilty or *nolo contendere,* a court is not confined to evidence relating to the offense charged. It may look anywhere, within reasonable limits, for other facts calculated to enable it to act wisely in fixing punishment." *State v. Cooper,* 238 N.C. 241, 77 S.E. 2d 695. Moreover, in the present case it would appear from the solicitor's statement that it was part of "the understanding that all evidence (would) be introduced."

In the judgment appealed from and in the proceedings leading thereto we find

No error.

Judges VAUGHN and GRAHAM concur.

STATE OF NORTH CAROLINA v. JESSE EVERETT ALLEN

No. 7211SC473

(Filed 20 September 1972)

1. **Criminal Law § 26; Constitutional Law § 34— double jeopardy — when it attaches**

Jeopardy attaches in North Carolina when a defendant is placed on trial: (1) on a valid indictment or information, (2) before a court of competent jurisdiction, (3) after arraignment, (4) after plea, and (5) when a competent jury has been impaneled and sworn to make true deliverance in the case.

2. **Constitutional Law § 34— mistrial — second trial for same offense — double jeopardy**

The second trial of defendant for first degree murder after the first trial ended in mistrial when the State introduced evidence of the murder of one "Evin H. Parrish," the indictment having charged the murder of "Ervin H. Parrish," violated defendant's right against double jeopardy.

ON *certiorari* to review the judgment of *Clark, Judge,* 29 November 1971 Session of Superior Court held in JOHNSTON County.

On 3 November 1969, defendant was charged in a warrant with the crime of murder in the first degree of one "Evin H. Parrish." At the 1 December 1969 Session of the Superior Court of Johnston County the Grand Jury returned a true bill of indictment for murder in the first degree, charging the murder of a person whose name appeared in the indictment as "Ervin H. Parrish." The defendant was arraigned and the case continued one term session.

At the 7 December 1970 Session of Superior Court of Johnston County the defendant, represented by counsel, attempted to plead guilty to murder in the second degree; however, Judge Bailey disallowed the plea asserting the defendant was pleading not guilty by reason of self-defense. The defendant was placed in custody.

At the 15 February 1971 Session of Superior Court of Johnston County, the defendant was arraigned, pleaded not guilty and was placed on trial before a duly empaneled jury for the capital crime of murder. The Solicitor for the State called the first witness who was asked if he knew "Evin H. Parrish." Defendant objected on the ground that the victim of the crime of murder alleged in the bill of indictment was therein identified as "Ervin H. Parrish."

After colloquy between court and counsel the court, "in its discretion," ordered a juror withdrawn and declared a mistrial. Defendant excepted to the order. The State excepted to the order of mistrial and gave notice of appeal. The dismissal of the State's attempt to appeal is reported in *State v. Allen,* 279 N.C. 492, 183 S.E. 2d 659.

On 29 November 1971, the Solicitor obtained a new indictment charging defendant with the crime of murder in the second

degree of "Evin H. Parrish." The defendant entered a plea of former jeopardy which was denied by Judge Clark. Thereafter, defendant pleaded "not guilty" and the jury returned a verdict of guilty of voluntary manslaughter. Judgment was entered imposing an active prison sentence. Defendant's petition for certiorari to perfect his appeal was allowed.

Attorney General Robert Morgan, by Assistant Attorney General Christine Y. Denson for the State.

T. Yates Dobson, Jr. for defendant appellant.

VAUGHN, Judge.

Defendant assigns as error that his plea of former jeopardy was denied.

The common law principle that no person can be twice put in jeopardy of life or limb for the same offense is now guaranteed by both the federal and the state constitutions. *State v. Cutshall,* 278 N.C. 334, 180 S.E. 2d 745. *State v. Prince,* 63 N.C. 529.

[1] Jeopardy attaches in North Carolina when a defendant is placed on trial: (1) on a valid indictment or information, (2) before a court of competent jurisdiction, (3) after arraignment, (4) after plea, and (5) when a competent jury has been impaneled and sworn to make true deliverance in the case. *State v. Birckhead,* 256 N.C. 494, 124 S.E. 2d 838.

[2] If jeopardy attached during the proceedings before Judge Godwin on 15 February 1971, defendant could not again be placed on trial on a new bill of indictment for the same slaying and his plea of former jeopardy should have been sustained by Judge Clark. The proceedings before Judge Godwin are set out in some detail in *State v. Allen, supra.* In that opinion the court stated " . . . the order of mistrial stands albeit the record will not support the premise upon which it is based." It clearly appears that defendant was placed on trial for a capital offense before a court of competent jurisdiction, was arraigned and pleaded not guilty. A jury was duly impaneled and sworn and the State introduced evidence. The bill of indictment was valid and charged defendant with the murder of the same person for whose death he was tried in the present case. *State v. Gibson,* 221 N.C. 252, 20 S.E. 2d 51. *State v. Reynolds,* 212 N.C. 37, 192 S.E. 871. *State v. Drakeford,* 162 N.C. 667, 78 S.E. 308.

The mistrial was entered without the consent and over the objection of defendant. The category of circumstances under which the court in a capital case may, without proscribing defendant's opportunity to plead former jeopardy at a subsequent trial for the same offense appears to be well settled. See *State v. Birckhead, supra* and *State v. Crocker,* 239 N.C. 446, 80 S.E. 2d 243. The reason given in Judge Godwin's order does not fall within the category.

On the prior appeal the court was faced with an attempt by the State to appeal from the order of mistrial. Such an appeal is prohibited by G.S. 15-179 and the same was dismissed. The court stated: "The remaining question debated in the briefs, whether upon a retrial defendant will be entitled to his release upon a plea of former jeopardy, does not arise upon this record." The question does arise on the present record and in obedience to well-established precedent must be answered in the affirmative.

The Attorney General, although candidly conceding the dilemma faced by the State, valiantly argues alternative theories upon which the present judgment might be affirmed or a new trial allowed on the original bill of indictment. It suffices to say that neither theory affords this court such opportunity. The constitutions of the United States and of the State of North Carolina, as interpreted by a long line of decisions by the Supreme Court of North Carolina, compel a contrary result. Defendant's plea of former jeopardy should have been sustained. The judgment from which defendant appealed is reversed.

Reversed.

Judges MORRIS and GRAHAM concur.

STATE OF NORTH CAROLINA v. CARROLL DON HELMS

No. 7222SC630

(Filed 20 September 1972)

1. **Criminal Law § 91— denial of motion for continuance — no abuse of discretion**

The trial court did not abuse its discretion in denying defendant's motion for continuance where defendant was represented by counsel

employed some three weeks before the commencement of his trial and the counsel knew the date when defendant's cases were calendared for trial.

2. **Homicide § 21— manslaughter — sufficiency of evidence to withstand nonsuit**

In a prosecution for manslaughter and for operating a vehicle upon the highway while under the influence of intoxicating liquor, State's evidence was sufficient to withstand motion for nonsuit where it tended to show that defendant's automobile was traveling at a high speed at night on an 18-foot-wide road, that it crashed into an automobile and truck parked on the side of the road, that four persons were killed, including defendant's sister who was riding with him in his automobile, that both defendant and his sister were thrown from the vehicle, that analysis of defendant's blood sample taken after the crash showed an alcoholic content of .19% and that defendant stated that he was the driver of his vehicle.

3. **Homicide § 21— extra-judicial confession — independent proof of corpus delicti — sufficiency of evidence aliunde confession**

The rule that an extra-judicial confession, standing alone, cannot be used to prove the commission of a crime but that there must also be independent proof of the *corpus delicti* had no application in a manslaughter prosecution where there was ample evidence *aliunde* the statement made by defendant to a patrolman that he was the driver of his car at the time of the accident to establish the commission of the crime.

ON *Certiorari* to review judgment of *Kivett, Judge,* 31 January 1972 Session of Superior Court held in IREDELL County.

By four separate bills of indictment defendant was charged with four counts of involuntary manslaughter. By warrant defendant was also charged with driving a vehicle upon a highway within this State while he was under the influence of intoxicating liquor, this being a second offense. All cases arose out of the same automobile collision which occurred on the night of 2 April 1971 and which resulted in the deaths of four persons. Defendant was first tried and convicted in the district court of the misdemeanor charge contained in the warrant. He appealed to the superior court for trial *de novo.* In the superior court all cases were consolidated for trial and defendant pleaded not guilty to all charges. He was found guilty in all cases, which were then consolidated for purposes of judgment. Because of illness of the trial judge, prayer for judgment was continued until 27 March 1972, when judgment was entered sentencing defendant to prison for a term of not less than five nor more than ten years. Defendant gave notice

of appeal but failed to docket the record on appeal in apt time. This Court granted his petition for certiorari.

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

Sower, Avery & Crosswhite by William E. Crosswhite for defendant appellant.

PARKER, Judge.

[1] Defendant first assigns error to the overruling of his motion for a continuance. It is well settled that a motion for continuance is ordinarily addressed to the sound discretion of the trial judge and that his ruling thereon is not subject to review absent a showing of an abuse of discretion. *State v. Moses,* 272 N.C. 509, 158 S.E. 2d 617. No abuse of discretion has been shown in the present case, nor does the record support defendant's contention that by overruling the motion defendant was in any way deprived of effective assistance of counsel or that his constitutional right to a fair trial was in any way impaired. Defendant was represented at his trial by counsel of his own choosing employed by him some three weeks prior to the date his trial commenced, and the record discloses that the counsel understood at that time the date when defendant's cases were calendared for trial.

[2] There was ample evidence to sustain the jury's verdict, and defendant's motions for nonsuit were properly overruled. The State's evidence, taken in the light most favorable to it, tended to show: Defendant's automobile, traveling at a high speed at night on an 18-foot-wide road, crashed into an automobile and a truck which were parked along the side of the road while a flat tire on the automobile was being changed. The collision resulted in the deaths of four persons, including defendant's sister who was riding with him in his automobile. Immediately following the crash, defendant and his sister were found lying outside of his automobile. Analysis of a sample of blood taken from defendant at the hospital after the crash revealed an alcoholic content of .19 percent. When defendant regained consciousness some weeks following the crash, he stated to the investigating highway patrolman that he had been the driver of his automobile when the collision occurred. This statement was made by the defendant after he had been fully

advised by the patrolman of his constitutional rights and had voluntarily waived those rights.

[3] Defendant cites the rule, followed in this State, that an extrajudicial confession, standing alone, cannot be used to prove the commission of a crime but that there must also be independent proof of the *corpus delicti.* This rule has no application to the present case. "The *corpus delicti* in criminal homicide involves two elements: (1) The fact of the death. (2) The existence of the criminal agency of another as the cause of death." 41 C.J.S., Homicide, § 312, p. 5; *State v. Hamilton,* 1 N.C. App. 99, 160 S.E. 2d 79. There was here ample evidence *aliunde* the statement made by defendant to the patrolman to establish the *corpus delicti.*

The court's charge to the jury, considered as a whole, was free from prejudicial error. In defendant's trial and in the judgment appealed from we find

No error.

Judges VAUGHN and GRAHAM concur.

STATE OF NORTH CAROLINA v. QUINTON PARKER

No. 7211SC522

(Filed 20 September 1972)

1. **Criminal Law § 91— denial of motion for continuance — no error**

   Defendant failed to show prejudicial error resulting from the denial of his motion for continuance in an action for aiding and abetting three persons in an attempted robbery with the use of firearms.

2. **Criminal Law § 115— failure to instruct on lesser included offense — no error**

   Where there was no evidence to support a conviction of assault, the trial court did not err in refusing to give instructions on the lesser included offense of assault in a prosecution for aiding and abetting in an attempted robbery with the use of firearms.

APPEAL from *Brewer, Judge,* 7 February 1972 Session of Superior Court held in JOHNSTON County.

Defendant was charged in a valid indictment with aiding and abetting three named persons, Terry Miles Barnum, Elwood Mitchell and Herman Ray Lewis, in an attempt to rob John K. Lee with the use of firearms.

The State presented the testimony of John K. Lee that two men whom he identified as Mitchell and Lewis, came to his front door at night and, while standing outside of his latched glass storm door, first inquired about someone named Lassiter. After being told there was no Lassiter there, Lewis turned to Mitchell and asked, "Is this the man?" Mitchell answered, "yes," whereupon Lewis pulled a gun and pointed it at Mr. Lee through the closed storm door. Mr. Lee then shut the front door and called the police. Terry Miles Barnum then testified for the State that he had been approached by the defendant who suggested that Barnum and Lewis rob Mr. Lee. At a later meeting of Barnum, Lewis, Mitchell and the defendant, the defendant discussed what should be done and gave Lewis a revolver and Mitchell some rope with which to tie up the intended victims. The defendant also drove the trio past Mr. Lee's residence and pointed it out to them. Barnum further testified that the defendant waited at an old store along the highway while Barnum drove Lewis and Mitchell back to the Lee residence. After about one and one half hours of surveillance, they returned to the defendant and told him the Lees had not returned home. The defendant directed them to return and wait for Lee, which they did. Elwood Mitchell was then called by the State and his testimony corroborated the evidence already presented and added details of the defendant's participation both before and after the abortive robbery.

Defendant offered no evidence. The jury found the defendant guilty, judgment was entered and defendant was sentenced to not less than twenty nor more than thirty years.

Attorney General Robert Morgan by Assistant Attorney General Robert G. Webb for the State.

T. Yates Dobson, Jr., and J. R. Barefoot for defendant appellant.

VAUGHN, Judge.

[1] Defendant first contends that the denial of his motion for continuance was error. It is well settled that the granting or

denial of a motion for continuance rests in the discretion of the presiding judge and his decision will not be disturbed on appeal unless the defendant shows abuse of discretion or shows that he did not get a fair trial. *State v. Blackmon,* 280 N.C. 42, 185 S.E. 2d 123; *State v. Fidler,* 13 N.C. App. 626, 186 S.E. 2d 656. The presumption is in favor of the regularity of the trial below and the burden rests upon the defendant to show error which was prejudicial to him. *State v. Partlow,* 272 N.C. 60, 157 S.E. 2d 688; *State v. Watson,* 13 N.C. App. 189, 185 S.E. 2d 33. The defendant has failed to make any showing of prejudicial error resulting from denial of his motion for a continuance.

[2] Defendant also asserts error in the judge's failure to instruct the jury that it might return a verdict on the lesser included offense of assault. The record presents no evidence tending to show that defendant, if not guilty of the crime charged, was guilty of an assault. This and defendant's remaining assignments of error are found to be without merit.

No error.

Judges PARKER and GRAHAM concur.

STATE OF NORTH CAROLINA v. JESSE LANE BROADWAY

No. 7220SC604

(Filed 20 September 1972)

Constitutional Law § 36— punishment within statutory limits — no cruel or unusual punishment

When punishment does not exceed the limits fixed by statute it cannot be classified as cruel and unusual in a constitutional sense, unless the punishment provisions of the statute itself are unconstitutional; therefore, defendant in a prosecution for safecracking could not complain of a prison term for 15-25 years where such punishment was within statutory limits.

APPEAL by defendant from *Collier, Judge,* 27 March 1972 Session of Superior Court held in STANLY County.

Defendant was indicted for safecracking, a violation of G.S. 14-89.1. Represented by privately employed counsel, he pleaded guilty. Before accepting the plea, the trial judge examined defendant under oath concerning his understanding of the consequences of his plea and concerning his voluntary assent thereto, and defendant signed and swore to a written transcript of the plea. After this examination, the trial judge signed an order adjudging that defendant's plea of guilty was freely, understandingly and voluntarily made, without undue influence, compulsion or duress, and without promise of leniency, and upon this adjudication the trial judge ordered that defendant's plea of guilty, the transcript thereof, and the court's adjudication be filed and recorded. Before imposing sentence, the court heard the testimony of a police officer, who testified that on the night of 4 July 1971 he had apprehended defendant and another man in a hardware store while they were engaged in the act of rifling through the contents of a safe which had been forced open with screwdrivers and crow bars and in which money, watches, and records had been stored. This officer testified that at the time of his arrest defendant and his companion were armed with pistols and that defendant had previously been convicted of felonious breaking and entering and felonious larceny, and that in 1960 defendant had escaped from the State prison.

Judgment was imposed sentencing defendant to prison for a term of not less than 15 nor more than 25 years. Defendant appealed.

Attorney General Robert Morgan by Assistant Attorney General William F. O'Connell for the State.

Brown, Brown & Brown by Charles P. Brown for defendant appellant.

PARKER, Judge

Appellant's sole assignment of error is that the sentence imposed constituted cruel and unusual punishment prohibited by the Eighth Amendment of the Federal Constitution. In this there is no merit. Numerous decisions of our Supreme Court have established that when punishment does not exceed the limits fixed by statute it cannot be classified as cruel and unusual in a constitutional sense, unless the punishment pro-

visions of the statute itself are unconstitutional. *State v. Williams,* 279 N.C. 515, 184 S.E. 2d 282; *State v. Rogers,* 275 N.C. 411, 168 S.E. 2d 345; *State v. Bruce,* 268 N.C. 174, 150 S.E. 2d 216. The punishment imposed in the present case was within statutory limits. The record reveals no violation of any constitutional right of the defendant. In the judgment appealed from and in the proceedings leading thereto, we find

No error.

Judges VAUGHN and GRAHAM concur.

STATE OF NORTH CAROLINA v. CHARLIE LAWS

No. 7220SC607

(Filed 20 September 1972)

Escape § 1— prosecution for fourth escape — sufficiency of State's evidence to be submitted to jury

State's evidence in a prosecution for escape while in lawful custody was sufficient to be submitted to the jury though some of the testimony constituted hearsay evidence where it tended to show that defendant left his prison work squad without permission, that he was apprehended several hours later about three or four miles from the place he had been working, and that he had been convicted for escape three times before.

APPEAL by defendant from *Collier, Judge,* 27 March 1972 Session of Superior Court held in STANLY County.

Defendant was tried under a bill of indictment charging that he feloniously escaped from lawful custody while serving a sentence imposed in October of 1958 for the felonies of second degree murder and armed robbery, "this being the fourth offense of escape committed by the said Charlie Laws, he having been convicted of the first offense of escape at the October 1962 Term of Ashe County Superior Court, and he, the said Charlie Laws, having been convicted of the second offense of escape at the October 1963 Term of Ashe County Superior Court, and he, the said Charlie Laws, having been convicted of the third offense of escape at the November 1968 Term of Stanly County Superior Court. . . ."

The State presented evidence tending to show that around noon on 12 August 1971 defendant left his prison work squad without permission. He was apprehended two or three hours later after having been pursued by bloodhounds brought to the scene by prison authorities. When apprehended, defendant was about three to four miles from where he had been working. The State also offered evidence of defendant's previous convictions for escape at the times and places alleged in the bill of indictment.

Defendant testified that he did not escape but merely went into the woods to relieve himself.

The jury returned a verdict of guilty and judgment was entered imposing a prison sentence of six months to begin at the expiration of the sentences defendant is now serving.

Attorney General Morgan by Deputy Attorney General Vanore for the State.

S. Craig Hopkins for defendant appellant.

GRAHAM, Judge.

Defendant's sole contention is that the State's evidence was insufficient to be submitted to the jury. This contention is without merit. It is true, as defendant points out, that some of the testimony bearing upon some elements of the offense constituted hearsay evidence. However, defendant did not object to any of the testimony offered. When hearsay is admitted without objection, it may be considered and given any evidentiary value which it may possess. *State v. Fuqua,* 234 N.C. 168, 66 S.E. 2d 667. See also *In re Dunston,* 12 N.C. App. 33, 182 S.E. 2d 9; *State v. Davis,* 8 N.C. App. 589, 174 S.E. 2d 865.

It appears clear from the record that the evidence was plenary to support the verdict of the jury. In our opinion no error has been shown which is sufficiently prejudicial to require a new trial.

No error.

Judges PARKER and VAUGHN concur.

CHARLES A. REAP AND WIFE, MRS. CHARLES A. REAP; MRS. TITUS WHITLEY (WIDOW); R. J. RUSSELL AND WIFE, MRS. R. J. RUSSELL; J. H. HARTSELL AND WIFE, MRS. J. H. HARTSELL; R. C. LITTLE AND WIFE, MRS. R. C. LITTLE; W. F. HARTSELL AND WIFE, MRS. W. F. HARTSELL; GROVER A. LITTLE AND WIFE, MRS. GROVER A. LITTLE; CLAUDE BURLEYSON; CARRIE BURLEYSON; Q. A. FOREMAN; H. C. HUSSEY AND WIFE, MRS. H. C. HUSSEY; EDGAR C. MORTON AND WIFE, MRS. EDGAR C. MORTON; W. T. CARPENTER AND WIFE, MRS. W. T. CARPENTER; WILLIAM R. GREEN AND WIFE, MRS. WILLIAM R. GREEN; MRS. NADIE SIDES AUSTIN; CHARLIE B. McSWAIN AND WIFE, MRS. CHARLIE B. McSWAIN; R. N. MORGAN AND WIFE, MRS. R. N. MORGAN; JAMES A. TUCKER AND WIFE, MRS. JAMES A. TUCKER; LOWDER FARMS, INC.; J. R. HATHCOCK AND WIFE, MRS. J. R. HATHCOCK; I. M. DICK AND WIFE, MRS. I. M. DICK; FRANK SIDES AND WIFE, MRS. FRANK SIDES; D. L. HARTSELL AND WIFE, MRS. D. L. HARTSELL; DR. GEORGE EDDINS; ISAAC RUSSELL; MARVIN L. BURRIS AND WIFE, MARJORIE M. BURRIS; VERDIE R. HOLT; RUBY HAHN; GURNIE SMITH AND WIFE, DOROTHY SMITH v. CITY OF ALBEMARLE

No. 7220SC591

(Filed 20 September 1972)

1. **Appeal and Error § 39— docketing of record — extension of time after original time has expired**

After the time for docketing the record on appeal in the appellate court had expired, the trial judge could not then enter a valid order extending the time for docketing.

2. **Municipal Corporations § 21— discharge of sewage into creek — action to enjoin — summary judgment**

Defendant municipality was entitled to summary judgment in an action by landowners to enjoin the municipality from discharging sewage into a creek and to recover damages to their property allegedly caused by the sewage.

APPEAL by all plaintiffs, except Lowder Farms, Inc. and Isaac Russell, from summary judgment entered for defendant by *Collier, Judge*, 31 January 1972 Session of Superior Court held in STANLY County.

Plaintiffs are the owners of various tracts of land situated near Long Creek in Stanly County. In this action, instituted 10 December 1970, they allege that the City of Albemarle is discharging sewage into Long Creek and that the sewage pollutes the creek, causes foul odors to emit therefrom, and generally renders land along the creek unfit for useful pur-

poses. Plaintiffs contend in their complaint that this alleged conduct constitutes a nuisance and amounts to an unlawful appropriation of their property by the City. They ask that the alleged nuisance be abated by permanent injunction and that they be awarded damages.

The City filed answer and admitted that it discharges sewage from a sewage treatment plant into Long Creek. It denied, however, that the sewage has caused any harm to plaintiffs or their property. The City alleged as affirmative defenses against the claims of all plaintiffs, except those of Lowder Farms, Inc. and Isaac Russell, that it has the right under various easements to discharge sewage in the manner alleged in the complaint.

The parties entered individual stipulations which establish that the lands of all plaintiffs, except those of Lowder Farms, Inc. and Issac Russell, are encumbered by recorded easements which give the City the perpetual right to maintain a sewage system and to discharge over said lands all sewage "which may be, or which may hereafter be connected with the sewerage system." Each easement also provides in substance that the owner (or owners) of the lands, his (or their) heirs and assigns, or anyone claiming under them shall be perpetually barred from bringing an action against the City for past damages or damages that may accrue in the future by reason of sewage being discharged into Long Creek.

The City moved for summary judgment against all plaintiffs except Lowder Farms, Inc. and Isaac Russell and offered the stipulations in support of its motion. No evidence was offered in opposition to the motion and the motion was allowed.

Benjamin D. McCubbins and Graham M. Carlton for plaintiff appellants.

Henry C. Doby, Jr., for defendant appellee.

GRAHAM, Judge.

[1] The judgment appealed from is dated 2 February 1972. The record on appeal was docketed in the Court of Appeals on 16 June 1972. Absent a valid order extending the time to docket, the time for docketing the record on appeal in this case expired on 2 May 1972, or 90 days after 2 February 1972. Rule 5, Rules

of Practice in the Court of Appeals. On 14 May 1972, appellants obtained from Judge Collier an order purporting to extend the time for docketing the record on appeal until 15 June 1972. After the time for docketing the record on appeal in this Court had expired, the trial judge could not then enter a valid order extending the time. In *Roberts v. Stewart* and *Newton v. Stewart,* 3 N.C. App. 120, 164 S.E. 2d 58 (1968), *cert. denied,* 275 N.C. 137, the rule is stated as follows:

> " * * * The record on appeal must be docketed in the Court of Appeals within ninety days after the date of the judgment, order, decree or determination appealed from. Within this period of ninety days, *but not after the expiration thereof,* the trial tribunal may for good cause extend the time not exceeding sixty days for docketing the record on appeal. * * * " (Emphasis added.)

The order purporting to extend the time for docketing in this case is ineffective. Even so, appellants did not docket their case within the extension of time provided in the order. Moreover, their brief was not timely filed and defendant has moved that the appeal be dismissed pursuant to Rule 28, Rules of Practice in the Court of Appeals.

[2] For failure to comply with the Rules of Practice in this Court, appellants' appeal is dismissed. Before dismissing the appeal, however, we reviewed appellants' contentions. It is our opinion that, based upon the state of the record before the trial judge, defendant was entitled to summary judgment. *Waldrop v. Brevard,* 233 N.C. 26, 62 S.E. 2d 512.

Appeal dismissed.

Judges PARKER and VAUGHN concur.

STATE OF NORTH CAROLINA v. CLYBURN LEROY MOSES

No. 7220SC670

(Filed 20 September 1972)

1. **Constitutional Law § 32— failure to appoint counsel until after jury empaneled**

The trial court erred in failing to determine defendant's indigency and to appoint counsel for him until after he had entered his plea and the jury had been selected, sworn and empaneled. G.S. 7A-450 et seq.

2. **Constitutional Law § 32—duty to determine indigency**

Where a defendant is charged with a felony or a serious misdemeanor, it is the duty of the trial judge to (1) settle the question of indigency, and (2) if defendant is indigent, appoint counsel to represent him unless counsel is knowingly and understandingly waived.

3. **Constitutional Law § 32— waiver of counsel — silent record**

Waiver of counsel may not be presumed from a silent record.

APPEAL by defendant from *Collier, Judge,* 8 May 1972 Session of Superior Court held in STANLY County.

Defendant was convicted in District Court of assault with a deadly weapon. Judgment was entered imposing a six month prison sentence to be suspended upon the payment of a fine of $100.00 and the costs. Defendant appealed to Superior Court.

The case came on for trial in Superior Court on 9 May 1972. Defendant, who was not represented by counsel when the case was called for trial, entered a plea of not guilty on his own behalf. The record indicates that after the jury had been selected and was sworn and empaneled, the court stated: "I'm going to appoint Mr. E. H. Morton, Jr., to sit with Mr. Moses." Mr. Morton appeared as counsel for the defendant during the remainder of the trial. The jury returned a verdict of "guilty" and judgment was entered imposing an active prison sentence of not less than eighteen nor more than twenty-four months. Defendant gave notice of appeal, was adjudged an indigent in an order dated 11 May 1972, and Mr. Morton was appointed to represent him in his appeal.

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

Coble, Morton & Grigg by Ernest H. Morton, Jr., for defendant appellant.

GRAHAM, Judge.

[1] Defendant assigns as error the court's failure to determine his indigency and appoint counsel for him until after he had entered his plea and the jury had been selected, sworn and empaneled. The assignment of error must be sustained.

[2] Defendant was tried and convicted of a misdemeanor punishable by a fine, imprisonment for a maximum of two years, or both. G.S. 14-33(c)(2). If an indigent person, defendant was entitled to have counsel provided by the State to represent him during *any critical stage of the action or proceeding.* G.S. 7A-450 *et seq.* Where a defendant is charged with a felony or a serious misdemeanor, it is the duty of the trial judge to "(1) settle the question of indigency, and (2) if defendant is indigent, appoint counsel to represent him unless counsel is knowingly and understandingly waived." *State v. Morris,* 275 N.C. 50, 60, 165 S.E. 2d 245, 251-252.

[3] It does not appear from the record that defendant ever waived his right to counsel. Waiver of counsel may not be presumed from a silent record. *Carnley v. Cochran,* 369 U.S. 506, 8 L.Ed. 2d 70, 82 S.Ct. 884 (1962). Neither does it appear that the question of defendant's indigency was settled at any time before or during the trial. It does appear that defendant did not have the assistance of counsel during critical stages of the prosecution. The State argues that since defendant's plea was "not guilty," no prejudice could have resulted from his not being afforded counsel before the plea was entered. Assuming, without deciding, that this is true, the fact remains that defendant did not have the assistance of counsel in selecting the jury. It cannot be presumed that no prejudice resulted from his not having counsel provided him during this important stage of the proceeding.

New trial.

Judges PARKER and VAUGHN concur.

STATE OF NORTH CAROLINA v. THOMAS LEE DUNLAP

No. 7220SC694

(Filed 20 September 1972)

1. **Criminal Law § 169— hearsay — general objection after answer — same testimony admitted without objection**

Defendant was not prejudiced by the admission of hearsay testimony where he failed to object to the question asked the witness but entered a general objection only after the witness answered the question, and the witness was thereafter allowed to give the same testimony without objection.

2. **Robbery § 4— indictment for robbery with shotgun — evidence as to "a gun"**

There was no fatal variance between an indictment charging robbery with a shotgun and evidence that the robbery was committed with "a gun."

3. **Criminal Law § 75— in-custody statements — admission for impeachment — failure to hold voir dire**

The trial court did not err in the admission of defendant's in-custody statements for the purpose of impeaching defendant's trial testimony without holding a *voir dire* hearing to determine the voluntariness of the in-custody statements, as defendant failed to object to testimony of such statements, and such statements are admissible for impeachment purposes even if made under conditions rendering them inadmissible for purposes of establishing elements of the offense against defendant.

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

The trial court in an armed robbery prosecution did not err in failing to submit to the jury an issue of common law robbery.

APPEAL by defendant from *Collier, Judge,* 6 March 1972 Session of Superior Court held in RICHMOND County.

Defendant was tried on bills of indictment charging him with armed robbery and assault with a deadly weapon. The indictments specified the firearm and the deadly weapon employed in the respective offenses as a shotgun and the arrest warrant charged the use of "a dangerous weapon to wit a saw of shot gun (sic)."

The State produced the evidence of certain laundry employees that on 24 July 1971 defendant went to the Sanitary Laundry in Hamlet, North Carolina, near closing time at 6:00 p.m., that defendant produced a "gun" out of a paper bag which one employee had thought might have contained clothing,

and that defendant robbed one of the laundry employees of approximately $250.00. The employees further testified that the defendant had visited the laundry on two previous occasions and on one such occasion, 3 July 1971, one of the employees had taken down the license tag number of the automobile used by defendant and had given that number to her employer. Lt. Wise of the Hamlet Police Force testified that defendant was the owner of a green automobile with license tag number AK 4674.

Defendant's evidence was to the effect that he had been to the Sanitary Laundry on 3 July but he denied being there on the day of the robbery. Defendant testified that he was playing basketball at a family cookout at the time of the alleged robbery and several members of defendant's family corroborated his testimony.

In rebuttal, the State recalled Lt. Wise who testified that when he took defendant into custody on 26 July 1971 he advised defendant of his constitutional rights and defendant volunteered the information that he knew all about the reasons for his arrest and that he, the defendant, had gone to the laundry on 24 July 1971 at about 4:00 or 4:30 p.m. in order to have a pair of pants pressed, but denied having committed the robbery.

The jury returned verdicts of guilty as charged. Defendant was sentenced to a term of from twelve to fifteen years imprisonment and appealed.

Attorney General Robert Morgan by Associate Attorney Walter E. Ricks III for the State, appellee.

Joseph G. Davis, Jr. for defendant appellant.

VAUGHN, Judge.

[1] Defendant's court-appointed counsel brings forward four assignments of error. In his first assignment of error, defendant contends that hearsay evidence was admitted to his prejudice. Lt. Wise testified that defendant's automobile bore license plate No. AK 4674 and that prior to seeing the automobile and tag he was familiar with the number. He, without objection, was asked why he was familiar with the number. The witness responded that the manager of the laundry had given him the number. Defendant voiced a general objection which was over-

ruled. The laundry manager was tendered as a witness for the State but defendant declined to question him. Defendant failed to move to strike the answer. Moreover, the same witness immediately thereafter, without objection, testified to the same fact. We hold that no prejudicial error is shown. *State v. Battle,* 267 N.C. 513, 148 S.E. 2d 599. *State v. Tyson,* 242 N.C. 574, 89 S.E. 2d 138.

[2] Defendant's next contention is that there was a fatal variance between the bill of indictment and the evidence as to the type of weapon used. This assignment of error lacks merit. The indictment charged defendant with robbery with the use of firearms, to wit a shotgun. All the evidence tended to show a robbery with the use of a firearm, to wit a "gun." There is no variance between the allegation and the proof and, if the variance argued by defendant did exist, it would not constitute a material variance.

[3] Defendant next argues that it was error to admit the rebuttal testimony of Lt. Wise without a voir dire hearing to determine whether defendant voluntarily made the statements while in the Lieutenant's custody. The record discloses that defendant made no objection to either the question or Lt. Wise's answer which related defendant's prior inconsistent statement. Furthermore, the credibility of a defendant who testifies on his own behalf may be impeached by use of his earlier conflicting statements even if such statements were made under conditions rendering them inadmissible for purposes of establishing elements of the offense against the defendant. *Harris v. New York,* 401 U.S. 222, 28 L.Ed 2d 1, 91 S.Ct. 643; *State v. Bryant,* 280 N.C. 551, 187 S.E. 2d 111.

[4] The defendant's fourth assignment of error, that the court failed to instruct the jury that it might return a verdict of guilty of common law robbery, is likewise without merit. All the evidence tends to show robbery with firearms. *State v. Parker,* 262 N.C. 679, 138 S.E. 2d 496.

No error.

Judges PARKER and GRAHAM concur.

JOHN E. FORD v. ARNOLD V. MARSHALL

No. 7221DC664

(Filed 20 September 1972)

1. **Negligence § 40— instructions on proximate cause**

The trial court erred in failing properly to define negligence and proximate cause and in failing to mention foreseeability as a requisite of proximate cause.

2. **Rules of Civil Procedure § 51— failure to apply law to evidence**

The trial court erred in failing to instruct the jury as to what facts, if found, would constitute negligence and contributory negligence. G.S. 1A-1, Rule 51(a).

3. **Automobiles § 91— personal injury and property damage — separate issues**

In an action arising out of an automobile accident, the trial court should have separated the issue of damages into two parts—one related to personal injuries and the other related to property damages.

APPEAL by defendant from *Henderson, District Judge,* 15 May 1972 Session of District Court held in FORSYTH County.

Ira Julian and W. Warren Sparrow for plaintiff appellee.

Womble, Carlyle, Sandridge & Rice by Allan R. Gitter and Roddey Ligon, Jr., for defendant appellant.

MALLARD, Chief Judge.

Plaintiff alleged that his property was damaged and that he sustained personal injuries as a proximate result of the actionable negligence of the defendant in the operation of the defendant's automobile. Defendant denied negligence and alleged contributory negligence on the part of the plaintiff in the operation of his automobile.

The trial judge submitted only three issues to the jury which were answered as follows:

> "I. Was the plaintiff's automobile damaged and was the plaintiff injured by the negligence of the defendant as alleged in the complaint?
>
> ANSWER: Yes.

II. Did the plaintiff, by his negligence contribute to his own injury?

ANSWER: No.

III. What damage if any is the plaintiff entitled to recover?

ANSWER: $2,628.00."

Defendant assigns an error portions of the instructions to the jury and the failure of the trial judge to apply the law to the facts in the case.

[1, 2] The appellant contends, and we agree, that the trial judge committed error in the charge in that he failed to properly define negligence or proximate cause and failed to even mention foreseeability as a requisite of proximate cause. See *Regan v. Player,* 13 N.C. App. 593, 186 S.E. 2d 688 (1972), *cert. denied,* 281 N.C. 154; *Ward v. Worley,* 12 N.C. App. 555, 183 S.E. 2d 818 (1971); *Keener v. Litsinger,* 11 N.C. App. 590, 181 S.E. 2d 781 (1971). The trial judge also failed to instruct the jury as to what facts if found would constitute negligence and contributory negligence. G.S. 1A-1, Rule 51(a).

[3] There was also error in the charge on the measure of damages and the applicability of the law to the evidence relating to the issue of damages. The trial judge should have separated the issue as to damages into two parts — one related to personal injuries and the other related to property damage. The measure of damages is different as to each. The evidence as to the damages was different, and the applicability of the law to the evidence was therefore different. It is a most difficult undertaking to properly instruct the jury as to personal injury and property damage combined into one issue. Suffice it to say that the trial judge in this case did not do so.

Appellant has other assignments of error to the charge, but they may not recur upon a new trial. For errors in the charge, the defendant is entitled to a new trial and it is so ordered.

New Trial.

Judges CAMPBELL and BRITT concur.

STATE OF NORTH CAROLINA v. ROBERT ELIHU MOREHEAD

No. 7218SC608

(Filed 20 September 1972)

1. **Criminal Law § 162— admission of evidence over objection — failure of record to support contention**

Defendant's contention that the court admitted hearsay evidence over objection is untenable where the record shows the court sustained objections to the evidence and instructed the jury "not to consider what he said."

2. **Criminal Law § 96— withdrawal of evidence — instructions to jury — presumption**

Where the court instructs the jury at the time of the withdrawal of testimony not to consider it, there is a presumption on appeal that the jury followed such instruction unless prejudice appears or is shown by appellant.

3. **Criminal Law § 96— instruction to disregard testimony — sufficiency**

Trial court's instruction upon sustaining an objection to hearsay testimony, "And I will instruct the jury not to consider what he said," sufficiently informed the jury what it was to disregard.

4. **Criminal Law § 42— sufficiency of identification of exhibit**

A wire allegedly used to gain entry to a locked automobile was sufficiently identified for its admission in evidence where a witness testified, "It looks like the wire you got there," and a police officer testified that he was given the same wire at the scene of defendant's arrest, although he wasn't positive who handed it to him.

APPEAL by defendant from *Armstrong, Judge,* 27 March 1972 Criminal Session of GUILFORD County Superior Court.

The defendant was charged with breaking and entering and larceny from a motor vehicle and entered a plea of not guilty.

Evidence for the State tended to show that defendant gained entry to a locked automobile by the use of a wire and that defendant removed a tape player and one tape therefrom. The State's evidence also tended to show that defendant's activity was observed by one Eddie Fowler, who, after notifying the police, held defendant at the point of an unloaded shotgun until police arrived at the scene.

Defendant did not testify and offered no evidence in his behalf. The jury found him guilty on both counts, and from

a judgment imposing a prison sentence of not less than two nor more than five years, defendant appealed.

Attorney General Morgan, by Associate Attorney Boylan, for the State.

J. Dale Shepherd, Assistant Public Defender, Eighteenth Judicial District, for defendant appellant.

MORRIS, Judge.

[1] Defendant assigns as error the court's allowing into evidence hearsay testimony of a radio communication to a police officer after objection had been made and after the trial judge had warned the witness not to relate hearsay and failing properly to instruct the jury to disregard such testimony. The record reveals the following:

"MR. CLIFFORD:

Q. Go ahead and describe what you did when you got there, Mr. Fulcher?

A. (By the Witness) I was working the area close to A. & T. College, and I was on Sullivan Street this night around eight o'clock and heard Officer Hill in Car 23 receive a call.

MR. SHEPHERD: OBJECT

THE COURT: Don't say whatever—as a result of some call, did you go down there, Mr. Fulcher? That is all we want.

THE WITNESS: Right. I heard on the radio there was a larceny from an auto.

THE COURT: SUSTAINED. *And I will instruct the jury not to consider what he said.*

I have instructed you twice to just tell what you did after you got there." (Emphasis added.)

Defendant's contention that the court admitted hearsay evidence over objection is untenable. It is clear from the record that the court sustained defendant's objection in the first instance and, in the second, sustained an objection defendant had failed

to make. In the same breath the court instructed the jury "not to consider what he said."

[2, 3] Where a court definitely instructs a jury at the time of the withdrawal of testimony not to consider it, there is a presumption on appeal that the jury followed such instruction, unless prejudice appears or is shown by the appellant in some way. *State v. Vicks,* 223 N.C. 384, 26 S.E. 2d 873 (1943). Yet defendant contends that the court's instruction failed to specify what the jury was to disregard. On the face of the record this exception is untenable. In the context above what could be more specific than, "[a]nd I will instruct the jury not to consider what he said." In any event, the testimony was nonprejudicial to the defendant.

[4] Defendant's second assignment of error is that the court erred in admitting into evidence the wire believed to be the instrument used in the alleged crime absent a proper identification. State's witness Eddie Fowler testified, "[Y]es, I can identify State's Exhibit 3. It looks like the wire you got there—looks just like it." While the court at that point refused to admit the wire into evidence, the court later did so upon the testimony of Officer Davis, who stated that he was given the same wire on the night in question at the scene of defendant's arrest, even though he wasn't positive who handed it to him. State's Exhibit 3 was sufficiently identified by the witnesses, and any object which has a relevant connection to the case is admissible in evidence. *State v. Jarrett,* 271 N.C. 576, 157 S.E. 2d 4 (1967), cert. denied *Manning v. North Carolina,* 88 S.Ct. 128, 389 U.S. 865, 19 L.Ed. 2d 135 (1967).

Defendant's remaining assignments of error are to the failure of the court to dismiss the case as of nonsuit and to its refusal to set the verdict aside and arrest judgment. These assignments are all without merit. There was plenary evidence to warrant submission of the case to the jury and to substantiate the verdict.

No error.

Judges BROCK and HEDRICK concur.

EUGENE F. BRANT v. CALVIN E. COMPTON AND MRS. CALVIN E. COMPTON

No. 7219SC623

(Filed 20 September 1972)

1. **Trial § 40— form of issue submitted — waiver of objection**

Plaintiff waived his right to challenge the form of the issue submitted on contributory negligence by failing to object thereto at the trial.

2. **Appeal and Error § 50— erroneous instruction — issue answered in appellant's favor — harmless error**

Plaintiff was not prejudiced by an erroneous instruction relating to an issue that was answered in his favor.

APPEAL by plaintiff from *McConnell, Judge,* 7 February 1972 Civil Session of CABARRUS Superior Court.

In this civil action plaintiff seeks to recover for personal injuries and property damage sustained in a collision between an automobile owned and operated by plaintiff and an automobile owned by the feme defendant and operated at the time by the male defendant. In their answer defendants, among other things, pleaded contributory negligence and the feme defendant filed a counterclaim for damage to her automobile.

Issues 1 and 2 were submitted to and answered by the jury as follows:

(1) Was plaintiff injured or damaged by the negligence of defendants as alleged in the complaint?

ANSWER: Yes.

(2) If so, did the plaintiff contribute to such damage as alleged in the answer?

ANSWER: Yes.

From judgment denying either party any recovery and taxing plaintiff with the costs, plaintiff appealed.

Thomas K. Spence for plaintiff appellant.

Williams, Willeford and Boger by John Hugh Williams for defendants appellees.

BRITT, Judge.

Plaintiff assigns as error the form of the second issue submitted to the jury, contending that the issue "only inquired as to whether appellant had contributed to his damage without any reference to negligence."

G.S. 1A-1, Rule 49(b) and (c) provides:

"(b) *Framing of issues.*—Issues shall be framed in concise and direct terms, and prolixity and confusion must be avoided by not having too many issues. The issues, material to be tried, must be made up by the attorneys appearing in the action, or by the judge presiding, and reducing (sic) to writing, before or during the trial.

(c) *Waiver of jury trial on issue.*—If, in submitting the issues to the jury, the judge omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the judge may make a finding; or, if he fails to do so, he shall be deemed to have made a finding in accord with the judgment entered."

G.S. 1A-1, Rule 49(b) contains substantially the same language as former G.S. 1-200 which latter statute was in force prior to 1 January 1970, the effective date of G.S. 1A-1. It appears to be well settled that ordinarily it is within the sound discretion of the trial judge as to the form of the issues. *Griffin v. Insurance Co.*, 225 N.C. 684, 36 S.E. 2d 225 (1945); *East Coast Oil Co. v. Fair*, 3 N.C. App. 175, 164 S.E. 2d 482 (1968).

In *Baker v. Construction Corp.*, 255 N.C. 302, 307, 121 S.E. 2d 731, 735 (1961), opinion by Bobbitt, Justice (now Chief Justice), we find: "'If the parties consent to the issues submitted, or do not object at the time or ask for different or additional issues, the objection cannot be made later.' McIntosh, *opus* cited, § 510. If defendant had not tendered issues or otherwise objected to trial on the issue submitted, it could not do so on this appeal. (Citations.)"

[1] The record in the instant case fails to disclose that plaintiff objected to the form of the issue submitted. The record does disclose that the trial judge fully and properly charged on the

question of contributory negligence and plaintiff challenges no part of the charge relating to contributory negligence. Thus it appears that under the authorities construing former G.S. 1-200 that plaintiff waived his right to challenge the form of the second issue and we so hold. It also appears that plaintiff is further precluded by Rule 49(c) quoted above. The assignment of error is overruled.

[2] By his second assignment of error plaintiff contends that the court expressed an opinion on the evidence in violation of G.S. 1A-1, Rule 51(a) by "instructing the jury to disregard plaintiff's claim based upon the movement in safety statute in that the judge did not recall testimony as to the giving of a signal." The record discloses that the portion of the charge challenged here was given by the court in its instructions on the issue relating to the negligence of defendant. Assuming that the challenged portion was error, we can perceive no prejudice to plaintiff inasmuch as the issue was answered in favor of plaintiff. The assignment of error is overruled.

We have carefully considered the other assignments of error brought forward and argued in plaintiff's brief but finding them without merit they are all overruled.

No error.

Chief Judge MALLARD and Judge CAMPBELL concur.

W. J. REID v. CONSOLIDATED BUS LINES, INC., AND FRED H. NEWNAM

— AND —

MARY REID v. CONSOLIDATED BUS LINES, INC., AND FRED H. NEWNAM

No. 7218SC579

(Filed 20 September 1972)

Rules of Civil Procedure § 15— amendment of answer after jury arguments

The trial court did not err in permitting defendants to amend their answer to conform to the evidence after the evidence on both sides was in and after the parties had argued the case to the jury. G.S. 1A-1, Rule 15.

APPEAL by plaintiff from *Exum, Judge,* 4 January 1972 Civil Session of Superior Court held in GUILFORD County.

The two cases were consolidated by consent. The actions arose as a result of a collision between an automobile, owned by plaintiff W. J. Reid, being operated by his wife, plaintiff Mary Reid, and a bus owned by Consolidated Bus Lines, Inc., and operated by Fred H. Newnam. W. J. Reid claims property damage. Mary Reid claims personal injuries and damages. Defendants denied negligence and also alleged contributory negligence on the part of Mary Reid. The collision occurred in the City of High Point on 13 April 1970 on a paved street. The rear of the automobile was struck by the front portion of the bus.

Without objection, issues of negligence, contributory negligence and damages for personal injury as to Mary Reid and damages for property damage as to W. J. Reid were submitted to the jury. The jury answered the issues of negligence and contributory negligence in the affirmative. Plaintiffs appealed from the judgment entered holding that they were not entitled to recover of the defendants.

Clarence C. Boyan for plaintiff appellants.

Womble, Carlyle, Sandridge & Rice by Allan R. Gitter and William F. Womble, Jr., for defendant appellees.

MALLARD, Chief Judge.

The trial judge did not commit error, as plaintiff contends, in permitting the defendants to amend their answer to conform to the evidence after the evidence on both sides was in and after the parties had argued the case to the jury. *Roberts v. Memorial Park,* 281 N.C. 48, 187 S.E. 2d 721 (1972); G.S. 1A-1, Rule 15.

Plaintiff also contends that the trial judge committed error in the instructions given to the jury. After an examination of the charge as a whole, we are of the opinion that the trial judge did not commit prejudicial error therein.

In the trial we find no prejudicial error.

No error.

Judges CAMPBELL and BRITT concur.

STATE OF NORTH CAROLINA v. JOE MACELVIS GOODE

No. 7220SC606

(Filed 20 September 1972)

Criminal Law § 138— severity of sentence — evidence of other offenses considered

Since the character and the extent of the punishment imposed is within the discretion of the trial court, and it is not an abuse of discretion for the trial judge to inquire, within reason, into matters outside the evidence relating to the offense when determining what punishment should be imposed after accepting a plea of guilty, defendant cannot complain that the solicitor's announcement that a *nolle prosequi* was being entered in other cases may have resulted in the imposition of a more severe sentence than would have otherwise been imposed where the sentence imposed was within the limits authorized by law.

APPEAL by defendant from *Collier, Judge,* 27 March 1972 Session of Superior Court held in STANLY County.

Defendant pleaded guilty to felonious breaking and entering. The court duly found the plea to be freely, understandingly and voluntarily made and accepted the plea of guilty. After acceptance of that plea, the solicitor announced that the State would take a *nolle prosequi* in other, unspecified, cases against the defendant.

The State's evidence included that of the Sheriff of Stanly County who stated, among other things, that he was familiar with three other cases in which defendant was charged with larceny. Defendant's counsel objected to this evidence on the grounds that a *nolle prosequi* had been taken in those cases. The question referring to those cases was withdrawn by the solicitor. The Sheriff then read the defendant's criminal record to the court.

Defendant offered no evidence. Judgment was entered sentencing defendant to prison for a term of not less than four nor more than six years.

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

S. Craig Hopkins for defendant appellant.

VAUGHN, Judge.

Defendant contends that the solicitor's announcement that a *nolle prosequi* was being entered in other cases may have resulted in the imposition of a more severe sentence than would have otherwise been imposed.

It has long been the accepted rule in North Carolina that within the limits of the sentence authorized by law, the character and the extent of the punishment imposed is within the discretion of the trial court and is subject to review only in cases of gross abuse. *State v. Sudderth,* 184 N.C. 753, 114 S.E. 828. It is not an abuse of discretion for the trial judge to inquire, within reason, into matters outside the evidence relating to the offense when determining what punishment should be imposed after accepting a plea of guilty. The court may inquire into, among other things, the habits, the propensities and the record of the person about to be sentenced. *State v. Cooper,* 238 N.C. 241, 77 S.E. 2d 695; *State v. Hullender,* 8 N.C. App. 41, 173 S.E. 2d 581.

Defendant pleaded guilty to an offense codified under G.S. 14-54, for which punishment by a fine or by imprisonment for a period up to ten years or by both is authorized by G.S. 14-2. The sentence he received is considerably less than that authorized by statute. The record in this case reveals no abuse of discretion. The judgment is affirmed.

Affirmed.

Judges PARKER and GRAHAM concur.

STATE OF NORTH CAROLINA v. ROBERT LEE HOOVER, JR.

No. 7218SC597

(Filed 20 September 1972)

APPEAL by defendant from *Seay, Judge,* 31 January 1972 Session, GUILFORD County Superior Court.

The defendant was charged in four separate bills of indictment with various felonies. The first bill of indictment charged him with the felonious breaking and entering into the

business establishment of Leon's Beauty Salons, Inc., and in a second count with larceny of property valued at $175.00, and in a third count, receiving stolen merchandise. These offenses occurred 15 August 1971.

A second bill of indictment charged the defendant with the felonious larceny of a Harley Davidson motorcycle on 21 November 1971, and in a second count in the same bill with receiving stolen merchandise.

The third bill of indictment charged the defendant with the felonious breaking and entering of a building occupied by a partnership under the trade name of Econo Oil Service Station in Randleman, North Carolina, and in a second count with felonious larceny of merchandise from this partnership, and a third count of receiving stolen merchandise. These offenses were alleged to have occurred on 10 December 1971.

A fourth bill of indictment charged the defendant with the felonious breaking and entering of the business establishment of Steven L. Pegram, trading and doing business as Kash and Karry in Greensboro, North Carolina, and in a second count with the felonious larceny of various articles of personal property from said premises, and in a third count with receiving stolen merchandise. These offenses were alleged to have occurred on 4 December 1971.

To all of these charges the defendant in person and by and through his counsel tendered pleas of guilty to three charges of felonious breaking and entering and one charge of felonious larceny of a motorcycle.

The record discloses that the defendant freely, understandingly and voluntarily entered the various pleas of guilty and that same were entered without undue influence, compulsion or duress, and the trial judge so adjudicated.

All of the offenses were consolidated for the purpose of judgment, and it was adjudicated that the defendant be imprisoned for a maximum term of five years in the custody of the Commissioner of Corrections and that he be sent to a youthful offender's camp. The defendant was also given credit for time spent in jail pending trial.

From the imposition of this sentence, the defendant appealed.

Attorney General Robert Morgan by Assistant Attorney General Parks H. Icenhour for the State.

Assistant Public Defender Dallas C. Clark, Jr., for defendant appellant.

CAMPBELL, Judge.

Counsel for defendant, with commendable frankness, states that after an examination of the record, no prejudicial error was found.

We have reviewed the record, and we find it to be free of any prejudicial error. The defendant was afforded a trial, which was fair and free of error. The bills of indictment, pleas, judgment and sentence were in all respects regular and proper.

No error.

Chief Judge MALLARD and Judge BRITT concur.

F. RAY CASHATT v. JESSIE B. HACKETT AND J. F. HACKETT, JR.

No. 7218DC235

(Filed 20 September 1972)

APPEAL by defendant Jessie B. Hackett from *Haworth, District Judge,* 25 October 1971 Session of GUILFORD District Court.

In August 1969, Jessie B. Hackett executed an instrument of conveyance to plaintiff, F. Ray Cashatt, wherein she sold all the marketable timber on certain described tracts of land owned by her. The contract provided that the timber so sold must be removed within three years of the date of the instrument. Cashatt paid the full purchase price of $3,500.00. On 20 April 1971, plaintiff instituted this action seeking damages for breach of the contract. Plaintiff has been prevented from going on the property and removing the timber which he purchased by defendant's son, J. F. Hackett, Jr., who farms and lives on the subject property. Plaintiff alleged that Jessie B. Hackett had knowingly permitted her son to obstruct and prevent plaintiff

from removing the timber and that the son's actions were with her consent.

The jury found, on issues submitted, that plaintiff and defendant Jessie B. Hackett entered into a contract for the sale of the timber as alleged in the complaint; that Jessie B. Hackett knowingly and wrongfully allowed J. F. Hackett, Jr., to obstruct the plaintiff from cutting the timber and that defendant Jessie B. Hackett was indebted to the plaintiff in the amount of $3,500.00.

Frazier, Frazier & Mahler by C. Clifford Frazier, Jr., and David F. Meschan for plaintiff appellee.

Hoyle, Hoyle & Boone by John R. Barlow II and John T. Weigel, Jr., for defendant appellant.

VAUGHN, Judge.

After having carefully considered the assignments of error brought forward, we are of the opinion that substantial justice was rendered in the trial from which defendant appealed.

No error.

Judges MORRIS and GRAHAM concur.

STATE OF NORTH CAROLINA v. RICHARD WAYNE RUFTY

No. 7219SC700

(Filed 20 September 1972)

APPEAL by defendant from *Johnston, Judge,* 11 January 1972 Session of Superior Court held in CABARRUS County.

The defendant, Richard Wayne Rufty, was charged in a bill of indictment, proper in form, with misdemeanor escape, first offense, in violation of G.S. 148-45(b). The defendant, represented by court-appointed counsel, pleaded guilty and from a judgment imposing a prison sentence of six (6) months, defendant appealed.

Attorney General Robert Morgan and Associate Attorney Walter E. Ricks III for the State.

Larry E. Harris for defendant appellant.

HEDRICK, Judge.

We have carefully reviewed the record which affirmatively discloses that the defendant understandingly and voluntarily pleaded guilty to a valid bill of indictment charging him with misdemeanor escape. The judgment imposing a prison sentence of six months is within the limits prescribed for a violation of G.S. 148-45(b). We find and hold that the defendant had a fair trial free from prejudicial error.

No error.

Judges BROCK and MORRIS concur.

THE FIDELITY & CASUALTY COMPANY OF NEW YORK v. NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY, WAYNE NITROGEN, INC., E. W. HARRIS, GEORGE DEWEY HUDSON, BILLY FAISON, OLLIE FAISON, JOHN FRYER, KENNETH RAY OVERBY, HARVEY EDWARDS, JOAN MILDRED EDWARDS, AND GARY A. PRICE

No. 7210SC529

(Filed 25 October 1972)

1. **Insurance § 87— omnibus clause — construction**

Generally, an omnibus clause should be construed liberally in favor of the insured and in accordance with the policy of the clause to protect the public.

2. **Insurance § 87— liability policy — use of truck — loading and unloading — persons insured**

The loading and unloading of a tank truck is a use of the truck within the meaning of a liability policy which insures against loss "arising out of the ownership, maintenance or use" of the truck, and all persons actively engaged in the loading and unloading of the truck are additional insureds under the policy.

3. **Insurance § 93— vehicle liability policy — general liability policy — pro rata and excess insurance clauses — primary liability**

The "pro rata" clause in a liability policy on a truck and the "excess insurance" clause in a general liability policy are not repugnant so as to require that they be read out of the policies; the liability policy on the truck is the primary policy, and the liability of the excess insurer arises only after the limits of the collectible insurance under the truck policy have been exceeded.

APPEAL by plaintiff and by defendant, North Carolina Farm Bureau Mutual Insurance Company, from *Canaday, Judge,* 20 March 1972 Session, WAKE Superior Court.

This is a civil action seeking declaratory relief by way of a determination of the respective contractual obligations of two insurance companies under their contracts of insurance.

On 2 June 1966 a truck owned by George D. Hudson and driven by his agent Billy Faison was on the premises of Wayne Nitrogen, Inc., for the purpose of having its three, 500 gallons each, tanks filled with pressurized liquid anhydrous ammonia. There were two unauthorized passengers in the truck, one of them the driver's brother. The truck was left in gear and with the ignition key in place.

After the transfer hose from Wayne Nitrogen, Inc.'s storage tank was inserted into one of the tanks on the truck and the main valve of the storage tank opened by E. W. Harris, agent of Wayne Nitrogen, Inc., one of the unauthorized passengers turned the truck ignition switch on to obtain heat; the truck lunged forward breaking the transfer hose and thus allowed anhydrous ammonia to escape into the air.

E. W. Harris was overcome by the gas and unable to turn the main valve off; the ammonia continued to flow for approximately 30 minutes until Air Force personnel from Goldsboro, wearing protective masks, turned the valve off, stopping the flow of ammonia from the storage tank.

As a result of this incident several claims for recovery of damages for injury to person and property were filed. The insurer of the truck, North Carolina Farm Bureau Mutual Insurance Company, (Farm Bureau) and the general liability insurer of Wayne Nitrogen, Inc., The Fidelity and Casualty Company of New York, (F and C) acted jointly in defending and settling these suits and claims while preserving the right of each to proceed against the other for the enforcement of rights they may have with respect to each company's policy coverage.

Each company paid $3,476.28 in settlement of property damage claims, $5,562.50 in settlement of personal injury claims, and $60.70 for court costs, a total of $9,099.48 each. Plaintiff, F and C, further paid $4,250.06 legal fees and expenses in defending civil actions against E. W. Harris and Wayne Nitrogen, Inc.

F and C contends that the Farm Bureau policy also covered E. W. Harris and Wayne Nitrogen, Inc., as additional insureds; that the F and C policy was excess coverage only; and that Farm Bureau wrongfully refused to defend the claims against Harris and Wayne Nitrogen, Inc.

Farm Bureau contends that Harris and Wayne Nitrogen, Inc., were not insured under its policy and that it should pay nothing and is entitled to recover back what it has paid; that, even if Harris and Wayne Nitrogen, Inc. are insured under its policy, the F and C policy is not excess coverage and that Farm Bureau should pay on a pro rata basis only.

The relevant portion of Farm Bureau's policy provides: (1) To pay on behalf of the insured all sums which the insured

shall become legally obligated to pay as damages because of bodily injury or destruction of property caused by accident *arising out of the ownership, maintenance or use* of the automobile. (2) The word "insured" includes the named insured and, if an individual, his spouse, and any person while using the automobile, provided the actual use of the automobile is by the named insured, his spouse, or with the permission of either. F and C contends that since E. W. Harris and Wayne Nitrogen, Inc. were loading the truck, they were using the truck within the coverage of the policy.

The Farm Bureau policy contains a clause which provides that if there is any other applicable insurance its liability shall be prorated with that other applicable insurance. The F and C policy contains a clause which provides that its liability shall be excess only if it arises out of injury by non-owned vehicles.

The trial court held that the loading and unloading of vehicles is a use of the vehicle even without a specific provision to that effect in the Farm Bureau policy, but that such use must be performed by the named insured or an agent employed by the named insured, and that therefore Wayne Nitrogen, Inc. and its employee, Harris, were not covered by the policy. The trial court further found that the other insurance clauses of the two policies were repugnant to each other, that both are to be read out of the policies, and therefore that both insurance companies must share the liability on a pro rata basis. There was no finding as to the relative liability of the truck owner and Wayne Nitrogen, Inc. or their agents, determining whether one was the sole tort-feasor, a joint tort-feasor or whether one was primarily or secondarily liable.

Teague, Johnson, Patterson, Dilthey & Clay by Ronald C. Dilthey for plaintiff appellant.

Dees, Dees, Smith & Powell by William W. Smith for defendant appellant.

CAMPBELL, Judge.

[1] The widespread enactment of financial responsibility and compulsory insurance laws has caused a decided trend in the courts toward liberal construction of omnibus clauses. It is the purpose of the Financial Responsibility Act to provide protection for persons injured or damaged by the negligent opera-

tion of automobiles. *Hawley v. Insurance Co.*, 257 N.C. 381, 126 S.E. 2d 161 (1962); *Swain v. Insurance Co.*, 253 N.C. 120, 116 S.E. 2d 482 (1960). Generally, an omnibus clause should be construed liberally in favor of the insured and in accordance with the policy of the clause to protect the public. *Chatfield v. Farm Bureau Mut. Auto. Ins. Co.*, 208 F. 2d 250 (4th Cir. 1953). The terms "ownership, maintenance or use" should not be treated as mere surplusage. They were placed in the policy in order to cover situations distinct and separate from any other term. Absent specific language to the contrary, they must be given effect in accordance with their common, daily, non-technical meaning. Ambiguity in a policy which requires interpretation as to whether the policy provisions impose liability requires construction in favor of coverage and against the company. *Williams v. Insurance Co.*, 269 N.C. 235, 152 S.E. 2d 102 (1967).

[2] It is a matter of normal construction to hold that "use" means the loading and unloading of motor vehicles within the terms of the omnibus insurance clause which insures against loss arising out of the ownership, maintenance and use of a motor vehicle, especially when the motor vehicle is a truck designed to transport goods. There is adequate precedent, and we so hold, that when the policy is silent on the point, loading and unloading is using an insured motor vehicle. *Liberty Mutual Ins. Co. v. Truck Insurance Exch.*, 245 Ore. 30, 420 P. 2d 66 (1966); *Red Ball Motor Freight v. Employers Mut. Liability I. Co.*, 189 F. 2d 374 (5th Cir. 1951); *Travelers Insurance Co. v. American Fidelity & Cas. Co.*, 164 F. Supp. 393 (D. Minn. 1958).

Farm Bureau urges this Court, however, to hold that although use does include loading and unloading operations, a third person who has no connection with a vehicle and who is only participating in the loading or unloading activities is not an additional insured under the vehicle liability policy. This is the view taken by the Ohio Court. *Travelers Ins. Co. v. Buckeye Union Casualty Co.*, 172 Ohio St. 507, 178 N.E. 2d 792, 95 A.L.R. 2d 1114 (1961). (A bulk oil tank employee, while loading customer's oil tank truck, spilled some of the oil on the truck driver to his injury. It was held that the bulk oil tank employee was not an insured under the truck policy even though engaged in a loading operation.) *Buckeye Union Cas. Co. v. Illinois National Ins. Co.*, 2 Ohio St. 2d 59, 206 N.E. 2d

209 (1965). (In this case a bag boy at a grocery store loaded the groceries in the trunk of a customer's automobile. After doing so he injured the customer when shutting the trunk lid. It was held the bag boy was not an insured under the automobile policy.)

This Ohio rule may be summarized as follows: (1) A third party not connected with the vehicle must be shown to have been an actual user with the named insured's permission before he will become an additional insured under the vehicle policy; (2) Loading and unloading are but component parts of an overall use; (3) The loader or unloader is covered by the policy only if he has first qualified as an insured by some other use of the vehicle. The Ohio view has not been followed by a majority of the states. This is pointed out in the dissenting opinion in *Buckeye Union Cas. Co. v. Illinois National Ins. Co., supra.*

An insurance policy is a contract between the parties, and the intention of the parties is the controlling guide in its interpretation. It is to be construed and enforced in accordance with its terms insofar as they are not in conflict with pertinent statutes and court decisions. *Hawley v. Insurance Co., supra.*

The policy provision in question speaks of liability "arising out of the ownership, maintenance or use" of the truck. The words "arising out of" are not words of narrow and specific limitation but are broad, general, and comprehensive terms effecting broad coverage. They are intended to, and do, afford protection to the insured against liability imposed upon him for all damages caused by acts done in connection with or arising out of such use. They are words of much broader significance than "caused by." They are ordinarily understood to mean "originating from," "having its origin in," "growing out of," or "flowing from," or in short, "incident to," or "having connection with" the use of the automobile. *Red Ball Motor Freight v. Employers Mut. Liability I. Co., supra; Schmidt v. Utilities Ins. Co.,* 353 Mo. 213, 182 S.W. 2d 181 (1944); *Merchants Co. v. Hartford Accident & Indemnity Co.,* 187 Miss. 301, 188 So. 571 (1939). The act of loading and unloading a truck is not an act separate and independent of the use and is an act necessary to accomplish the purpose of using the truck.

The parties do not, however, contemplate a general liability insurance contract. There must be a causal connection between the use and the injury. This causal connection may be shown to

be an injury which is the natural and reasonable incident or consequence of the use, though not foreseen or expected, but the injury cannot be said to arise out of the use of an automobile if it was directly caused by some independent act or intervening cause wholly disassociated from, independent of, and remote from the use of the automobile. *Bituminous Casualty Corp. v. Hartford Accident & Indem. Co.*, 330 F. 2d 96 (7th Cir. 1964).

We find better reasoning in the view that the "use" of a vehicle includes its loading and unloading, and that all persons actively engaged in the loading and unloading with the permission of the named insured are additional insureds under policy omnibus clauses. This view has been referred to as being followed in the majority of states and is well summarized in *Fireman's Fund Insurance Co. v. Canal Insurance Co.*, 411 F. 2d 265 (5th Cir. 1969).

This opinion was by Judge Orie L. Phillips of the Tenth Circuit sitting by assignment with the Fifth Circuit. The facts in this case were that Canal Insurance Company had a policy on a truck. The truck owner drove it to an ice house platform and ordered ice. The ice company employees, while loading the ice, negligently dropped a block of ice on the truck owner causing extensive personal injuries. Fireman's Fund had issued a comprehensive liability policy to the ice company. When Canal refused to defend, Fireman's Fund paid out nearly $30,000 to settle the loss and brought this action to recover from Canal for that the ice company was an unnamed insured under the Canal policy pertaining to loading the vehicle. The court allowed recovery against Canal and the following is a summary of the decision:

(1) Loading and unloading coverage as an expansion of the term "use"; a more liberal concept of causation is imparted than "proximate cause" in its traditional legal sense.

(2) If the accidental injury arises out of the loading of the insured vehicle, persons engaged in such loading operations were using the vehicle within the meaning of that phrase of the coverage provision of such policy.

(3) Causal relationship between the accident and the use of the insured vehicle as a vehicle is not necessary.

(4) It is not necessary that either the insured vehicle itself or the driver thereof be involved in the accident.

(5) Loading begins when the object to be loaded leaves its original location and starts toward the insured vehicle, to be placed therein.

(6) If the bodily injuries were caused by accident and resulted from the manner in which the party loading the insured vehicle carried out an essential part of the loading operations, that is, if they were caused by what he did or failed to do in carrying out an essential part of the loading operations, the party doing the loading was using the insured vehicle and is an unnamed insured within the coverage of the policy, if such use thereof was with the consent of the named insured.

The holding that all persons, whether the named insured, his agent, or a third party, engaged in loading and unloading operations are covered by the vehicle's insurance policy under the "use" provision is amply supported by precedent from other jurisdictions.

In *Liberty Mutual Ins. Co. v. Truck Insurance Exch., supra,* a truck driver delivered a load of logs to a pond operated by U. S. Plywood, and through negligence of employees of U. S. Plywood, a log was caused to roll off the truck while it was being unloaded, and the truck driver, who was walking by, was injured. It was held that U. S. Plywood was an insured under the truck policy since it was engaged in an unloading of the truck and hence was a permissible user under the truck policy. The insurance carrier of the truck was held to be primarily liable. The same holding in a similar type case is found in *Travelers Insurance Co. v. American Fidelity & Cas. Co., supra.*

In the case of *St. Paul Mercury Insurance Company v. Huitt,* 336 F. 2d 37 (6th Cir. 1964), a ready-mix concrete truck took a load of concrete to a job site. A crane operator manipulated a bucket to the truck, received a bucket full of concrete and then manipulated the bucket to the building foundation where it was dumped into the foundation. During the course of unloading the truck and pouring concrete in this manner, the boom on the crane fell and injured a third person. It was held that the crane operator was an unnamed insured in the truck insurance policy as he was engaged in an unloading enterprise

and the truck insurance carrier was held primarily liable. A thorough review of the law is given in the majority and dissenting opinions.

In *Caribou Four Corners, Inc. v. Truck Insurance Exchange,* 443 F. 2d 796 (10th Cir. 1971), the question presented was whether an insurance company on a truck or an insurance company with general liability was primarily liable. The truck was being unloaded by employees of the consignee of a load of pipe. The consignee was using a crane in the unloading operation, and the crane operator caused the boom to strike an electric wire, thereby causing injury to the truck driver, who was also engaged in the unloading operation. It was held that the consignee was an additional insured under the truck policy since he engaged in an unloading operation.

In *State Automobile & Cas. Under. v. Casualty Under., Inc.,* 266 Minn. 536, 124 N.W. 2d 185 (1963), a truck driver was making a delivery to a restaurant. On arrival at the restaurant, he notified the owner that he had merchandise for delivery. The owner sent one of his employees to the basement to unlock a trapdoor in the sidewalk. It was customary for the trapdoor to be unlocked, and then the truckdriver would open the trapdoor from the outside. On this occasion, however, the employee not only unlocked the trapdoor but opened it from down below. At the time the truck driver was on the truck checking his invoices and getting the particular merchandise to be delivered ready to be taken off the truck. While thus engaged, a pedestrian fell in the hole and was injured. The question presented was whether the restaurant's general liability policy covered the loss or were the restaurant and the employee of the restaurant additional unnamed insureds under the truck insurance policy. In an opinion by Chief Justice Knutson it was held that the truck insurance policy covered and was primarily liable. It is stated in the opinion:

> "In construing an insurance contract, where the language is ambiguous or so uncertain of meaning as to require judicial construction, we seek to ascertain the intention of the parties. The paramount question in construing an insurance contract is: What hazards did the parties intend to cover? It is reasonable to assume here that the parties intended to cover all hazards involved in handling the merchandise from its initial loading until it

was unloaded. While the merchandise actually was not being lifted from the truck when the accident occurred, the truckdriver was performing an act incident to and a necessary part of the unloading process. No matter what conclusion we may come to as to the time when unloading ceases, we are convinced that the unloading had commenced when Ryan stopped his truck and began the necessary preparations for physically moving the merchandise.

* * * *

Nor should liability be destroyed because the trapdoor was opened by Robert Gorzycki instead of by Ryan, if opening of the trapdoor was a part of the process of unloading." *State Automobile & Cas. Under. v. Casualty Under., Inc.*, 266 Minn. 536, 538-39, 544, 124 N.W. 2d 185, 187, 190.

In the case of *Wagman v. American Fidelity & Casualty Co.*, 304 N.Y. 490, 109 N.E. 2d 592 (1952), the highest court of New York was confronted with this factual situation. A trucking company was engaged to transport a load of clothing merchandise from a Bond store in New York to its warehouse in another city. Two employees of the New York store rolled the garments out on movable racks from the store to the curb line. The driver of the truck did not get off the truck, but from a position inside the truck body reached down and lifted the garments from the rack into the truck where a helper arranged them. A third employee of the New York store was engaged on the sidewalk in counting and checking the clothes for inventory purposes and in supervising the general operation. This employee did not participate in the actual pushing or carrying of the garments. This checker employee started back into the store for the purpose of seeing about other merchandise to be shipped. When he turned to go back into the store, he struck a pedestrian causing the pedestrian to fall to the sidewalk and sustain injuries. The question presented was whether this employee was covered by the insurance policy on the truck. The court held that the automobile insurance policy was to be interpreted as covering the complete operation of making a pick up and that this particular accident and injury was within the coverage.

[2] A plethora of decisions could be cited, but we think that the accident in the case at bar arose out of the use of the

truck insured by Farm Bureau. Wayne Nitrogen, Inc., and its agent, Harris, were using the vehicle through participation in the loading process. It was certainly within the contemplation of the parties to the insurance contract that the tank truck, in order to be used, would have to be loaded and unloaded. Under the terms of the policy, anyone using the truck with permission of the named insured would be an additional insured. We hold that Wayne Nitrogen, Inc., and its employee, Harris, are, therefore, unnamed, additional insureds under the Farm Bureau policy. We adopt this view rather than the more narrow and restricted view of Ohio.

[3] The appellee further argues, however, that even if Wayne Nitrogen, Inc., and Harris are additional insureds, the F and C policy on Wayne Nitrogen, Inc. is not excess insurance and must share liability on a pro rata basis. This argument is founded upon the alleged conflicting "other insurance" clauses in the two policies. The Farm Bureau policy provides that if the injury or damage is covered by other applicable and collectible insurance, then Farm Bureau shall not be liable for a greater proportion of the loss than its limit of liability bears to the total applicable limits of liability of all valid and collectible insurance. The F and C policy, however, provides that its insurance coverage shall be excess to any other valid and collectible insurance with respect to loss arising out of the use of any non-owned automobile. The Farm Bureau provision is known as a "pro rata" clause; the F and C provision, an "excess" clause.

Appellee cites several cases which have reasoned that when two or more insurance policies have conflicting "other insurance" clauses, there is no equitable way to choose the controlling clause, so that, they being repugnant, they are read out of the conflicting policies, and each company shares the liability proportionately. *Lamb-Weston, Inc. v. Oregon Automobile Insurance Co.*, 219 Ore. 110, 341 P. 2d 110 (1959); *Commercial U. Ins. Co. v. Universal Underwriters, Inc.*, 223 Tenn. 80, 442 S.W. 2d 614 (1969).

In the instant case we do not think the two clauses repugnant. The North Carolina Supreme Court in *Insurance Co. v. Insurance Co.*, 269 N.C. 341, 152 S.E. 2d 436 (1967), said at 346, 152 S.E. 2d at 440:

> "The terms of another contract between different parties cannot affect the proper construction of the provisions

> of an insurance policy. The existence of the second contract, whether an insurance policy or otherwise, may or may not be an event which sets in operation or shuts off the liability of the insurance company under its own policy. Whether it does or does not have such effect, first requires the construction of the policy to determine what event will set in operation or shut off the company's liability and, second, requires a construction of the other contract, or policy, to determine whether it constitutes such an event. A provision in a policy of insurance is not rendered invalid by the presence of a 'repugnant' provision in another policy of insurance issued by a different company to a different policy holder, but the other policy, by reason of its own terms, properly construed, may fall outside the class of events which the first policy declares to be exclusions from or limitations upon the liability of the company issuing the first policy."

The terms "prorate" and "excess" do not have, and were not meant by the insurers to have identical meanings. A construction which will give a fair meaning to both terms as used in the "other insurance" clauses is preferable to finding repugnancy. The scope of the Farm Bureau pro rata clause is for full liability to be prorated with other collectible insurance. The F & C excess clause provides that there is no other collectible insurance with which to prorate. Therefore the liability of the excess insurer, F and C, does not arise until the limits of the collectible insurance have been exceeded. This makes the Farm Bureau policy the primary one. *Consolidated Mut. Ins. Co. v. Bankers Ins. Co. of Pa.*, 244 Md. 392, 223 A. 2d 594 (1966); *Universal Under. Ins. Co. v. Dairyland Mut. Ins. Co.*, 102 Ariz. 518, 433 P. 2d 966 (1967); *Putnam v. New Amsterdam Casualty Co.*, 48 Ill. 2d 71, 269 N.E. 2d 97 (1970); *General Ins. Co. of America v. State Farm Ins. Co.*, 75 Wash. 2d 200, 449 P. 2d 391 (1969).

In *Insurance Co. v. Insurance Co.*, 277 N.C. 216, 176 S.E. 2d 751 (1970), the court held that where an excess clause relieved the plaintiff of the duty to defend an insured, the plaintiff could recover from the defendant primary insurer sums paid out for the defense of claims against the insured incurred because the defendant wrongfully refused to defend.

The result is that Farm Bureau will pay the entire loss to the extent of its limits and any balance remaining will be

the responsibility of F and C. In view of this holding it is not necessary to determine the relative liability of the truck owner and Wayne Nitrogen, Inc. or their agents as to whether one was the sole tort-feasor, a joint tort-feasor or whether one was primarily or secondarily liable.

Reversed.

Judges MORRIS and PARKER concur.

STATE OF NORTH CAROLINA v. RANDOLPH JENNINGS, BRADFORD MIZELL LILLEY, AND LARRY MEDLEY

No. 7218SC626

(Filed 25 October 1972)

1. **Criminal Law § 84; Searches and Seizures § 1— trespassers — standing to object to search**

Defendants who were wrongfully and unlawfully present upon leased premises after the service of Execution in Summary Ejectment upon lessee as well as upon them at the demised premises had no standing to object to a search of the premises subsequent to their eviction and arrest, and the officers' warrantless search was lawfully conducted; hence, rifles, ammunition, papers and petitions seized as a result of the search were admissible in a prosecution for felonious assault upon an officer.

2. **Assault and Battery § 13; Criminal Law § 33— admissibility of evidence of defendants' membership in Black Panthers**

Evidence of a Black Panther magazine and "Daily Reports" (time sheets) signed by defendants discovered in a search of leased premises held by defendants at the time of their arrest was admissible in a prosecution for felonious assault on a police officer to show motive, intent and a purposeful common design to commit an unlawful assault with intent to kill, and to inflict serious injury.

3. **Assault and Battery § 16— failure to submit question of guilt of lesser degree of crime — no error**

In a prosecution for felonious assault upon an officer with a deadly weapon with intent to kill where all the evidence presented showed a shooting with a deadly weapon with an intent to kill and none of the evidence showed a lack of such intent, the trial court did not err in failing to submit to the jury the lesser offense of assault with a deadly weapon (without intent to kill), inflicting serious injury.

4. **Assault and Battery §§ 5, 15— felonious assault trial — charge on conspiracy proper**

The trial court properly charged the jury on the elements of conspiracy and aiding and abetting, though a criminal conspiracy was not charged in the bills of indictment, where there was evidence to support such charge.

5. **Assault and Battery § 15; Criminal Law § 111— failure to read indictments to jury**

The failure of the trial judge to read the indictments of each defendant in full during his instructions to the jury did not constitute prejudicial error.

APPEAL by defendants from *Copeland, Judge,* 24 January 1972 Special Session of Superior Court held in GUILFORD County.

Defendants were each indicted, tried and convicted upon identical bills of indictment, proper in form, for felonious assault upon one Lieutenant Shaw Cook with a deadly weapon with intent to kill and inflicting serious injury, a violation of G.S. 14-32(a). Defendants were also indicted and tried upon bills of indictment charging them with felonious assaults upon Police Officers T. S. Bryant and G. S. McDowell, but were acquitted of those charges.

The evidence for the State tended to show the following facts. On 10 February 1971, at about 6:30 a.m., several law enforcement officers from the Guilford County Sheriff's Department and the High Point Police Department went to the vicinity of 612 Hulda Street in the City of High Point, there to complete the service upon the occupants of 612 Hulda Street of an Execution in Summary Ejectment issued by a Deputy Clerk of the Superior Court of Guilford County on 4 February 1971 in the case of *Mendenhall-Moore Realtors, Agt., Judge Byron Haworth, Owner against Forrest White.* Chief of Police Laurie Pritchett was in command of the High Point Police detachment, and the police were accompanying the sheriff's deputies for the purpose of aiding the deputies in the service of the Execution in Summary Ejectment.

Among the number of police officers who had proceeded to the vicinity of 612 Hulda Street was Lieutenant Shaw Cook who commanded a squad of some three or four police officers and who had taken a position of cover behind a tree facing the front of the premises at 612 Hulda Street, pursuant to a plan

of action promulgated by the Chief of Police earlier on the morning of 10 February 1971.

At about 6:45 a.m., Chief of Police Pritchett, Deputy Sheriff Larry Linthicum and Lieutenant Arrington of the Sheriff's Department went to the front door of the premises at 612 Hulda Street, whereupon Deputy Linthicum and Lieutenant Arrington attempted to complete the service of the Execution in Summary Ejectment and requested the occupants of the premises to leave. Upon being informed that the officers were from the Sheriff's Department and were there to complete the service of the eviction order, a male voice inside the house replied that "we don't have nothing to say to you." Deputy Sheriff Linthicum had previously served the Execution in Summary Ejectment on Forrest White, the lessee, on 5 February 1971, informing him in writing that the Sheriff would, on 10 February 1971, at 7:00 a.m. remove the goods and chattels of the defendant, Forrest White, from plaintiff's premises at 612 Hulda Street if the premises had not been vacated. White was not in the building at the time of the battle between the occupants and the police. The three officers left the front porch of the premises after the occupants refused to come out, and another officer addressed the occupants of the premises at 612 Hulda Street over a public address system, informing the occupants as to the summary ejectment order and giving them a period of time in which to leave the building. After the period of time had expired, some ten to fifteen minutes, the police fired two tear gas projectiles toward the building, but neither shot entered the building. Then a third tear gas projectile was fired which did enter the house through one of the windows, and at about the same time, a shot from a 30.06 rifle was fired from inside the premises, hitting Lieutenant Shaw Cook in his chest, causing serious injuries.

After Lieutenant Cook was wounded, the police and the occupants at 612 Hulda Street traded volleys of fire, approximately two minutes in duration, during which other officers were struck by bullets but fortuitously not wounded because they were wearing "flak jackets." Lieutenant Cook was not wearing a "flak jacket." Then a voice from the building announced, "We are coming out," at which time the police ceased fire. The three defendants (and one other person tried with the defendants and acquitted) walked from the house, were placed under arrest, handcuffed, and were immediately removed

from the area to the Guilford County-High Point jail by two deputies.

The State's evidence also tended to show the following: That Lieutenant Shaw Cook was shot with a 30.06 caliber rifle slug; that the police at 612 Hulda Street had only one 30.06 caliber rifle and that most of the officers had been armed with shotguns; that the one 30.06 rifle was used by a "sniper officer" who was located outside of the premises and next to the Chief of Police; that the judgment that had been entered in the ejectment proceedings directed the Sheriff of Guilford County to remove the defendant Forrest White from and put the plaintiff in possession of the premises; that the plaintiff in the ejectment proceeding had not received possession of the premises prior to this occasion; that the defendants in this case were in the house and refused to come out as demanded by the sheriff's deputy; that a "primer residue" test was conducted on the defendants and that as to each of the convicted defendants, the test showed a positive reading of primer residue on his hands, and that a person would get primer residue on his hands if he were close to a weapon which had been fired; and that the owner of a sporting goods store had sold a box of 30.06 caliber and a box of 30.30 caliber shells to one Bradford Mizell Lilley on 2 February 1971.

The State's evidence further tended to show that immediately after the defendants came out of the house and were placed under arrest, one Officer Pike entered the house and conducted a quick search of the premises and determined that there were no other persons present therein. Chief Pritchett then ordered a detective captain to conduct an investigation into the shooting of the officers, and pursuant thereto, the captain and his party entered the premises at 612 Hulda Street a few minutes after the shooting stopped and conducted a search for the instruments of, and evidence pertaining to, the crime. The search resulted in the location of sandbagged gun positions at the front upper and lower windows of the house, two rifles and a shotgun, one of which was a 30.06 caliber rifle, bandoliers of ammunition, instructions for the preparation of an anti-tear gas mixture ("The People's Antidote for Tear Gas"), two spent cartridges from the 30.06 rifle, a copy of the eviction notice previously served on Forrest White, reports or writings with the names of the defendants on them, a copy of a "Black Panther" maga-

zine, a blank form of a petition entitled, "WE WILL LET THE PEOPLE DECIDE," which read as follows:

> "At this time the power structure of High Point has moved behind closed doors in cahoots with Menden Hall Realty (sic) to evict the members of the Black Community Information Center who have done nothing more than served the people since they've been here.
>
> On Dec. 25 there was an open house held at 612 Hulda St. The people from the community gave tremendous support to the center. On the 28th the following Monday we received an eviction notice stating that the realty wanted the house by Jan. 28th, they wouldn't accept any money just the house. After members were summoned to court the judge ruled that we would have to move because we were given 30 days notice.
>
> The National Committee to Combat Fascism in Winston-Salem ad (sic) the Community Center in High Point are putting it before the people. The people will decide whether we move or not.
>
> IF YOU WANT US TO STAY IN THIS COMMUNITY SIGN YOUR NAME AND ADDRESS BELOW"

Three copies of this petition were taken off of the person of the defendant Larry Medley, two of which had a total of 31 names signed thereon.

Other evidence tended to show that fingerprints from defendant Jennings were found on a cartridge box secured in the aforementioned search, and that the bullet removed from the body of Lieutenant Shaw Cook was a 30.06 caliber bullet and was fired by the 30.06 rifle identified as having been found in the house at 612 Hulda Street during the search.

The defendants offered no evidence, and from the judgment of imprisonment as to each for not less than seven nor more than ten years, each defendant appealed to the Court of Appeals.

Attorney General Morgan, Assistant Attorney General Magner and Associate Attorney Haskell for the State.

Public Defender, Eighteenth Judicial District, Wallace C. Harrelson and Assistant Public Defender Dale Shepherd for defendants appellants.

MALLARD, Chief Judge.

[1] Defendants assign as error the conclusions of the trial court as a matter of law, based upon findings of fact, made on a voir dire hearing that no search warrant was necessary for the search of the premises at 612 Hulda Street and that the items seized pursuant to the search were admissible in evidence. Defendants rely on cases which hold that a search incident to an arrest is not permissible beyond the person or the immediate surrounding area of the one searched. *Chimel v. California,* 395 U.S. 752, 23 L.Ed. 2d 685, 89 S.Ct. 2034 (1969). However, defendants have failed to address themselves to the more pertinent issue, which is, whether the defendants have standing to object to the search and seizure.

The 4th Amendment excludes from its protection those who are not legitimately on the premises, and such persons may not object to a search thereof. The defendants had not leased the premises. Assuming that Forrest White, the lessee, may have invited them to be on the premises, *his* legal right to the premises, and therefore *theirs,* if any, had terminated when the execution in summary ejectment was served. From the petitions found on the person of one of the defendants, it is clear that they had knowingly and wilfully decided to unlawfully keep possession of the premises in open defiance of the duly constituted authorities. See *State v. Eppley,* 14 N.C. App. 314, 188 S.E. 2d 758 (1972), *cert. granted,* 281 N.C. 625, 190 S.E. 2d 468 (1972). On this basis, the defendants, who had become wrongfully present upon the premises, have no standing to object to the search of the premises at 612 Hulda Street after they were lawfully evicted. Moreover, there was uncontroverted evidence that the sheriff's deputies and police officers assisting them at the scene had in their possession and were in the process of completing a valid Execution in Summary Ejectment issued in the case of Mendenhall-Moore Realtors, Agt., Judge Byron Haworth, Owner against Forrest White. This Execution in Summary Ejectment required the officers to dispossess the lessee and place the plaintiff in the ejectment case in possession.

These defendants had no legitimate interest in the premises, and as such, have no standing to object to a search, after they were lawfully evicted, of the premises they had wrongfully withheld from the owner. *State v. Eppley, supra;* Annot., 78 A.L.R. 2d 246, § 8; see also *Jones v. U.S.,* 362 U.S. 257, 4 L.Ed.

2d 697, 80 S.Ct. 725, 78 A.L.R. 2d 233 (1960); *Mancusi v. DeForte,* 392 U.S. 364, 20 L.Ed. 2d 1154, 88 S.Ct. 2120 (1968); *U. S. v. Croft,* 429 F. 2d 884 (10th Cir. 1970); and *U. S. v. Paroutian,* 299 F. 2d 486 (2d Cir. 1962).

Furthermore, the police officers and sheriff's deputies were lawfully authorized to enter the premises and to remove the goods and chattels of the defendant pursuant to the Execution in Summary Ejectment, the validity of which is not challenged by these defendants.

Chapter 838 of the Session Laws of 1953, as amended by Chapter 256 of the Session Laws of 1957, applicable only to Guilford County, provides:

> "Sec. 2. Before a Sheriff, constable or other lawful officer shall remove the goods and chattels of a defendant from the premises of plaintiff when required and commanded to do so by an execution or order in his hands, said officer shall give the defendant at least forty-eight hours personal notice of the exact time that such removal will be made . . . .
>
> Sec. 3. . . . (I)n the event the defendant is not present at or near the premises at the time set for the removal of the goods and chattels . . . ; then said officer without any liability on his part may deliver said goods and chattels to any storage warehouse in his county for storage."

Deputy Sheriff Linthicum testified that on 5 February 1971, more than 48 hours prior to the removal of the goods from 612 Hulda Street, he personally served two copies of the Execution in Summary Ejectment on Forrest White, the lessee of the demised premises.

We are of the opinion and so hold that the defendants were wrongfully and unlawfully present upon the premises at 612 Hulda Street after the service of the Execution in Summary Ejectment upon Forrest White, as well as upon them at the demised premises on 10 February 1971, and had no standing to object to the search of the premises subsequent to their eviction and arrest. In addition, we further hold that the search of the demised premises, 612 Hulda Street, was lawfully conducted, and all goods and chattels lawfully removed by the officers and sheriff's deputies present on 10 February 1971

pursuant to the authority granted them by virtue of the Execution in Summary Ejectment and by Session Laws 1953, Chapter 838, as amended by Session Laws 1957, Chapter 256.

[2] Defendants assign as error the admission into evidence of certain items on the grounds that the evidence was irrelevant and prejudicial. The State offered into evidence copies of a Black Panther magazine discovered in the search of the premises at 612 Hulda Street and copies of "Daily Reports" signed by defendants, and showing their activities on particular days, in the manner of a time sheet. Defendants contend that the admission of these items in evidence was prejudicial, relying on *State v. Lynch,* 279 N.C. 1, 181 S.E. 2d 561 (1971). In Lynch, defendant was charged with arson and the question of a conspiracy was not involved. In this case, however, there was considerable evidence of a conspiracy to openly defy the duly constituted authorities. That the defendants may have been, or were, members of the Black Panther organization and that they chose to resist with the use of firearms their eviction from a house that had been attached to the outside of it a sign reading, "Death to the Fascist Pigs," is evidence which is competent to show motive, intent and a purposeful, common design to commit an unlawful assault with intent to kill, and to inflict serious injury. See *State v. Hairston,* 280 N.C. 220, 185 S.E. 2d 633 (1971). Evidence of motive is competent where the doing of the act is in dispute. Stansbury, N.C. Evidence 2d, § 83.

The sign, which was attached to the outside of the house and was large enough to extend across the two upstairs windows, bore pictures of two black panthers, or cats, and read as follows:

"From each according to his ability, to each according to his needs.

National Committee to Combat Fascism in America

COMMUNITY CENTER

Legal Aid Here
Free All Political Prisoners ! ! !

Community Control of police for a people's community Socialism

— Free breakfast program
— Free clothing program
— Liberation school to teach our youth

— Community political education classes
— Free daycare center

Power to the people! ! ! Death to the Fascist Pigs

On organizing bureau of the BLACK PANTHER PARTY"

Under these and the other circumstances of this case, we are of the opinion and so hold that the Black Panther magazine and the "Daily Reports" had probative value and were admissible in evidence.

Defendants have a combined total of one hundred and thirty-nine assignments of error based upon three hundred and four exceptions. Many of these assignments of error are to the admission of evidence. We have considered all of these assignments of error and are of the opinion that the evidence excepted to was either competent or harmless beyond a reasonable doubt under the circumstances of this case and therefore not prejudicial.

[3] Defendants assign as error the failure of the trial judge to submit to the jury certain lesser offenses for determination as to the defendants' guilt or innocence thereof, and the failure of the judge to charge the jury on the elements of those offenses. Defendants urge that the recent decision of the North Carolina Supreme Court in *State v. Thacker,* 281 N.C. 447, 189 S.E. 2d 145 (1972), requires our reversal of the judgments of guilty. In Thacker, defendant was allowed to use a telephone in a private office of an FCX store. Immediately after using the phone, defendant assaulted two persons with a 6-inch blade knife, seriously wounding both persons. Defendant was charged with a violation of G.S. 14-32(a) [1969], and the trial court limited the jury to one of four verdicts: guilty as charged; guilty of assault inflicting serious injury; guilty of assault with a deadly weapon; or not guilty. Defendant contended that the court should have submitted to the jury a lesser degree of the crime charged, "to-wit, assault with a firearm or other deadly weapon *per se* inflicting serious injury, a five year felony under G.S. 14-32(b) (1969)." The Supreme Court stated that "(i)t suffices to say that the crime condemned by G.S. 14-32(b) is a lesser degree of the offense defined in G.S. 14-32(a), and a defendant is entitled to have the different permissible verdicts *arising on the evidence* presented to the jury under proper instructions."

The issue presented, therefore, is whether there was evidence present upon which the lesser included offense of assault with a deadly weapon (without intent to kill), inflicting serious injury, could properly have been submitted to the jury. Defendants presented no evidence. The State's evidence tended to show that all three of the defendants were inside the house at 612 Hulda Street at the time that Lieutenant Shaw Cook was seriously wounded by a 30.06 caliber rifle bullet fired from that house; that defendant Lilley had purchased 30.06 and 30.30 caliber rifle bullets and that 30.30 and 30.06 caliber rifle bullets were found inside the house at 612 Hulda Street; that a 30.06 caliber rifle was found at a gun position inside the house; that all three defendants had traces of primer residue on their hands, indicating that they had fired or had been close to a gun that was fired; that there were other gun positions inside the premises of 612 Hulda Street, all elaborately constructed with sandbags and chicken wire; that a copy of the Execution in Summary Ejectment was found in a desk drawer inside the house, which would indicate that defendants knew, or should have known, that the lessee was to be evicted at 7:00 a.m. on the morning of 10 February 1971 if the lessee had not vacated the premises as ordered by the court; that one of the defendants had circulated a petition stating that "The people will decide whether we move or not"; that defendants were officially notified of the Execution in Summary Ejectment at the door of 612 Hulda Street on the morning of 10 February 1971 but refused to comply with the order to vacate the premises; and that defendants traded volleys of fire with the police officers present, hitting but not wounding two other officers, after tear gas had been introduced into the house by the officers in their efforts to enforce the court order.

All the evidence presented tends to show that defendants wielded a deadly weapon; that they inflicted serious injuries to Lieutenant Shaw Cook; and that they intended to defy the order of the court and the officers of the law present at the premises of 612 Hulda Street under lawful authority, and intended to kill Lieutenant Cook and other officers in the course of their defiance. "Death to the Fascist Pigs" was the slogan and sign under which these defendants were actually shooting and operating. It is a common knowledge that police officers are frequently referred to in a derogatory manner by certain elements in our society as "pigs." In the Thacker case, supra,

the evidence *permitted* an inference of an intent to kill because of the "viciousness of the assault and the deadly character of the weapon used." In this case, however, the evidence of an intent to kill is clear and compelling. One who fires a 30.06 rifle at the middle of the chest of another person who is standing within shooting range has the intent to kill. No other inference is logically permissible. All the evidence presented shows a shooting with a deadly weapon *with an intent to kill* and none of the evidence shows the lack of such intent. For this reason, it was not error for the court to have failed to have submitted to the jury the lesser offense described in G.S. 14-32(b).

[4] Defendants assign as error the charge to the jury of the trial judge concerning the elements of conspiracy and aiding and abetting, where a criminal conspiracy was not charged in the bills of indictment. Defendants conceded in their brief that in North Carolina the court may charge on conspiracy where there is evidence to support the charge, even if conspiracy is not alleged in the bill of indictment. *State v. Cox,* 281 N.C. 275, 188 S.E. 2d 356 (1972). Defendants contend, however, that *State v. Cox, supra,* does not contain a correct statement of the law, and that for that reason, this court is not bound to follow the principles set forth in that decision. In the alternative, the defendants contend that even if the charges were correctly given under the authority of *State v. Cox, supra,* that there was insufficient evidence to support the charges as to conspiracy and aiding and abetting. We do not agree with either of defendants' contentions.

[5] Defendants assign as error the failure of the trial judge to read the indictments of each defendant in full during his instructions to the jury. At the opening of the charge, the court read to the jury the three indictments charging defendant Medley with felonious assaults upon Officers Cook, Bryant and McDowell. Thereafter, as to defendants Jennings and Lilley, the court merely instructed the jury that their indictments charged them with the identical offenses as were charged against defendant Medley, and the court did not read those indictments due to their being repetitious. In 3 Strong, N.C. Index 2d, Criminal Law, § 111, we find the following statement:

> "There are no stereotyped forms of instructions. The trial judge has wide discretion in presenting the issues to

> the jury, so long as he charges the applicable principles of law correctly, and states the evidence plainly and fairly . . . . "
>
> In 53 Am. Jur., Trial, § 639, it is stated that:
>
> "In a criminal prosecution, it is the duty of the court to give the law as to the offense charged and the elements thereof. * * * Instructions need not be couched in the same form or phraseology as the indictment or information . . . . "

The failure to read each of the nine bills of indictment involved herein was not error.

Defendants assign other errors to the charge of the court which we have carefully reviewed, but we find no prejudicial error therein.

Defendants' assignment of error that the court erred in failing to allow their motions for judgment as of nonsuit is without merit. The trial judge properly submitted the case to the jury.

We have studied and reviewed all of defendants' voluminous assignments of error. As to some of the assignments, the record may reveal technical procedural error. However, we are of the opinion that these are not sufficiently prejudicial to entitle defendants to a new trial, nor do we feel that upon a new trial a different result would obtain. On this record it appears, and we so hold, that the defendants have had a fair trial, free from prejudicial error.

Affirmed.

Judges CAMPBELL and BRITT concur.

SHIRLEY D. LONG, ADMINISTRATRIX OF THE ESTATE OF BRUCE E. LONG, DECEASED v. GEORGE R. CLUTTS, M.D., H. JOHN BRADLEY, M.D., W. RALPH DEATON, JR., M.D., JOHN A. LYDAY, M.D., JOHN A. MOORE, M.D., AND THE WESLEY LONG HOSPITAL, INC., A CORPORATION

No. 7218SC637

(Filed 25 October 1972)

1. **Appeal and Error § 49— exclusion of evidence — pertinent issue not reached**

The plaintiff in a wrongful death action was not prejudiced by the exclusion of a medical bill where the jury did not reach the issue of damages.

2. **Evidence § 49— hypothetical question — explanation of answer — facts not referred to in question**

In a malpractice action, the trial court did not err in striking those portions of an expert witness' explanation of his answer to a hypothetical question which were not referred to in the facts contained in the hypothetical question.

3. **Death § 7— drinking habits of decedent — damages**

In a wrongful death action based on the alleged malpractice of two physicians, testimony by a nurse as to what decedent had told her with respect to his drinking habits was competent for consideration by the jury on the issue of damages.

4. **Evidence § 49— hypothetical question — form**

Failure to preface one of the many hypothetical questions with the requirement that the facts stated must be found by the jury "from the evidence and by its greater weight" did not constitute prejudicial error.

5. **Appeal and Error § 24— form of assignments of error**

An assignment of error must show what question is intended to be presented without the necessity of going beyond the assignment of error itself.

6. **Physicians and Surgeons § 16— malpractice — negligence — limitation to activities on two dates**

In a wrongful death action based on the alleged malpractice of two physicians, the trial court did not err in permitting the jury to consider defendants' activities only on two specified dates on the issue of negligence, although the allegations of the complaint encompassed a greater span of time, where all of plaintiff's evidence was directed to diagnosis and treatment on those two dates, and the theory of plaintiff's case was that treatment on those dates was the proximate cause of subsequent shock and renal failure which resulted in decedent's death.

APPEAL by plaintiff from *Exum, Judge,* 17 January 1972 Civil Session, Superior Court, GUILFORD County.

This action for damages for physical suffering and mental anguish, medical expenses, and wrongful death of Bruce Long was brought against Dr. George R. Clutts, Dr. H. John Bradley, Dr. W. Ralph Deaton, Jr., Dr. John A. Lyday, Dr. John A. Moore, and The Wesley Long Hospital, Inc. At various stages of the trial plaintiff took a voluntary dismissal as to all defendants except Drs. Clutts and Moore.

Plaintiff alleged that "prior to December 1968 Bruce E. Long came under the consultation, advice, care, diagnosis and treatment of the defendants. As a result of such consultation, advice, care, diagnosis, and treatment, he was advised to and underwent three operative procedures . . . : November 21, 1968, cysto stone manipulation; November 25, 1968, cholocystectomy; and December 6, 1968, exploratory laporatomy." "The defendants, and each of them, were so negligent in the advice, care, consultation, diagnosis and treatment that was given, and were so negligent in the pre-operative, operative and post-operative procedures that were followed, and were generally so negligent in the premises that as a proximate result of all such negligence said Bruce E. Long died on January 1, 1969."

The evidence, summarized briefly, follows: On 15 November 1968, Bruce Long went to the office of Dr. Moore, his personal physician, suffering abdominal pain. Dr. Moore diagnosed his difficulty as renal colic and admitted him to the hospital. X-rays revealed a shadow in a position which was consistent with a kidney stone in the tube which runs from the kidney to the bladder. Dr. Bradley, a urological specialist was called who removed a stone from Long's lower right ureter. This procedure was accomplished without incision, but Long was placed under general anesthesia. Prior to this procedure blood work-up and other laboratory studies had been done. Recovery was uneventful in that he had no more of the pain related to the kidney stone. He did have intermittent discomfort located in the upper abdomen and lower chest which he had had for an indeterminate period of time. After observation and tests this was diagnosed as caused by gall bladder stones. Dr. Clutts was called in and examined Long on 22 November. Dr. Clutts discussed the surgery with Long, who signed a consent form for the operation, which was not an emergency but an elective procedure. Dr. Clutts did not order any laboratory work done prior to surgery on 25 November. The blood work done prior to the urological procedure showed 14.6 hemoglobin, essentially normal; 9.4

white count; hematocrit of 44; 1 eosinophil; 22 lymphocytes; 73 segs—all normal. He had repeated EKG tests, all normal. He had an SMA-12 test where blood was analyzed in a machine for 12 things. Everything was normal. These included tests of his kidney and liver. There was no indication of anything wrong with either. He had a serology test. It was normal. He had a urine culture and sensitivity test. On 17 November he had a SGOT test, essentially normal for his heart. It was repeated on 18 November. On 20 November there was another urinalysis, revealing 10 to 20 red blood cells, some amorphus strands, 10 milligrams of albumin, all compatible with the ureteral stone he had had but indicating nothing wrong with his kidneys or liver. A urine culture done 21 November showed no growth in 48 hours. That was the last test done before surgery. No one made any tests before surgery on Long of his bleeding time or to determine any clotting factors. No prothrombin test was made. This test is a measurement of the amount of prothrombin in the blood. The ideal figure is to have 100%. Prothrombin helps blood to clot. Prior to, during, and after surgery the patient's blood pressure was within fairly normal ranges. Surgery revealed that the gall bladder contained multiple stones. It was removed and hemostasis, control of bleeding, was obtained. A drain was placed in the area beneath the gall bladder so that any bile or blood drainage would drain to the outside of the body. Dr. Clutts then removed Long's appendix, closed the peritoneum, and the patient was returned to the recovery room, at which time his pulse and respiration were normal. Twenty minutes after the operation, Dr. Clutts saw Long in the recovery room. There was no significant change in his vital signs. He saw him again at 5 o'clock p.m. His blood pressure was lower than normal. The dressing was dry. Long was complaining of pain. At 5:30 his blood pressure was 86 over 56—"lower than we would anticipate, but not dangerously low." Medication to elevate the blood pressure was administered. By 7:00 p.m. it had dropped to 66 over 28. This was considered by Dr. Clutts to be dangerously low. Long's skin was cool, clammy, and pale. He was perspiring. His respirations were somewhat increased. A blood count was ordered which, to Dr. Clutts, did not show hemorrhagic shock. Dr. Clutts did not then know what kind of shock he had. His temperature was slightly elevated. Dr. Clutts was called back to the hospital at 7:20 p.m. There was slight to moderate red drainage on the dressing which he changed. Dr. Moore was called. The two in

consultation arrived at a diagnosis that the lowered blood pressure was from endo-toxic shock and not hemorrhagic shock. An antibiotic was ordered as was a transfusion. No blood culture was taken for the reason, according to Dr. Clutts, Long had been on antibiotics and a culture probably would not grow organisms and in any event it would take 48 to 72 hours to get the culture. Hemoglobin dropped to 12.8. Long could have withstood surgery but Dr. Clutts did not think it was indicated. The high white blood count of 44,000 was to Dr. Clutts the most important indication of endo-toxic shock. A recount that evening showed 39,000. Ten days later, on December 5 when Long had had massive doses of antibiotics, Dr. Clutts ordered a blood culture to try to find an organism which might be causing the difficulty. Three days later a report of no bacterial growth resulted. On the night of November 25 there was an emergency—Long's life was threatened. They had no evidence of hemorrhage on the dressing and around the drain. In Dr. Clutts's opinion, if this had been endo-toxic shock and they had re-operated, the operation and the anesthetic could have been fatal to him. Between November 25 and the end of November 26 at midnight, he received three pints of blood. The first time Dr. Clutts suspected bleeding was on the evening of November 26 when his hemoglobin showed 10 grams. He was given two pints of blood, having already had one pint. On 25 November his liver was in pretty good shape. Several days later it was more impaired. No vitamin K was administered until Friday night. It was done by Dr. Lyday who had evidence of bleeding from the wound and did it to aid clotting. The first prothrombin test on Long was several days after surgery. It was 40%, 100% being normal. On 5 December he again went into shock. Although he had been able to walk in the halls during the day, his temperature at about 8:00 p.m. went to 105. Drainage from his abdomen was more. He was treated with massive doses of antibiotics. His blood pressure fell from the normal it had held since 26 November. He had a white count of 75,000. Hemoglobin dropped to 12.5. He was given a transfusion and Dr. Morris was called in. Bleeding was suspected. The next morning they were able to diagnose it by the large amount of drainage from around the drain. It was evident he had intra-abdominal bleeding, and early on 6 December, exploratory surgery was done and a large amount of blood was found in his peritoneum. Most of this was fresh blood. An arterial spurter was found and this was

ligated. Following this, his blood pressure gradually rose over the period of the next few hours. He continued to have fever despite the antibiotics he was getting. For the first 24 hours he had good urinary output. The next day, it had decreased and the next day there was a marked decrease. Dr. Joyner saw him with Drs. Clutts, Moore and Bradley. Because of the signs of impending kidney failure, he was transferred to Duke Hospital under the care of Dr. Portwood. When he arrived at Duke, his vital signs were normal. During the three weeks at Duke, he was placed on the artificial kidney ten times. Five days after admission, (on 15 December) he had a severe reduction in blood pressure and increase in temperature. Transfusions were given and he stabilized. On 21 December, he went into shock. Surgery was done and he was found to be bleeding from an area of the abdomen. After correction of this situation, he again stabilized. On 26 December he again went into shock and another exploratory operation was done. Ulcers were found within his stomach. From that point on to his death on 1 January 1969 there was continuous bleeding from his stomach. Dr. Portwood testified that the cause of death was shock secondary to hemorrhage. In his opinion, Mr. Long's renal failure was secondary to shock prior to the patient's transfer to Duke Hospital.

Plaintiff's expert witness testified that in his opinion Bruce Long could have been hemorrhaging post-operatively on 25 November and early on 26 November; that diagnosis of bleeding could have been enhanced by a complete blood work-up and studies at a time nearer surgery than 16 November; that tests showing bleeding tendency and clotting time should have been given prior to surgery; that a blood culture taken shortly after he went into shock could have enhanced diagnosis; that hemorrhage was the only possible cause of shock on 25 and 26 November and Bruce Long could not have been in endo-toxic shock; that the liver and kidney disfunctions noted on 26 and 27 November could have been caused by hemorrhage and its consequences; that the 5 and 6 December hemorrhage and shock and further impairment of renal and liver functions could have been avoided by timely surgical intervention to stop the hemorrhage between 25 and 26 November; that Mr. Long on 5 and 6 December re-bled from the same vessel that caused him to have his hemorrhagic shock on 25 and 26 November; that the hemorrhage on 25 and 26 November and the failure to

re-operate to stop the hemorrhage initiated a chain of circumstances that led to re-bleeding on 5 and 6 December, further hemorrhage, further shock, further insult to the kidneys and to the liver which culminated in his death on 1 January 1969; and finally that "in the exercise of the care and diligence that a reasonable practitioner, acting under the same or similar circumstances would have exercised, the defendants should have elected surgical intervention between 25 and 26 November 1968, in the application of their knowledge and skill in Mr. Long's case."

On the other hand, defendants' expert witnesses testified that in that community prothrombin test was not given prior to surgery absent some clinical indications of liver involvement or absent some reason to suspect the patient had not been eating; that under the circumstances confronting the doctors at the time, the treatment given Bruce Long on 25 and 26 November was in conformity with approved medical practices employed by physicians and surgeons in that and other similar localities and communities; that the decision that was reached by the doctors, that the patient's condition was one of septic shock, was a logical one; that the bleeding which occurred on 5 and 6 December was not related to nor caused by the manner in which the patient was treated on 25 and 26 November; that the abnormality of the kidney function began as a result of the episode on the night of 5 December and morning of the 6th and not as result of any treatment of 25 and 26 November nor was it related to that episode; that after the bleeding stopped on 26 November, surgery should not have then been performed.

The matter was submitted to the jury who answered the issue of negligence in favor of defendants. Plaintiff appealed.

Cahoon and Swisher, by Robert S. Cahoon, for plaintiff appellant.

Jordan, Wright, Nichols, Caffrey and Hill, by Welch Jordan and William B. Rector, Jr., for defendant appellee John A. Moore, M.D.

Perry C. Henson and Hubert E. Seymour, Jr., by Perry C. Henson, for defendant appellee, George R. Clutts, M.D.

MORRIS, Judge.

[1] Plaintiff brings forward and argues ten assignments of error. No. 1 is directed to the exclusion of certain medical bills, primarily the bill from Duke. It is apparent that in presenting medical bills as exhibits, plaintiff did not use the same designations given to them in the pretrial order, and there was confusion at the time of their introduction because of the mixup in designations. It is not clear from the record what the court's ruling as to the Duke bill was. However, that was clarified at the end of the evidence. The court announced that he wanted to get the medical bills straight. During that discussion he specifically inquired about the Duke bill, was told that it was Exhibit H, and was in the amount of $7,828.50. Whereupon the court said: "Let the record show that I am allowing that exhibit number if I earlier excluded it. I am not sure whether I did or not." At this time, plaintiff went into all the medical bills and was in agreement with counsel and the court as to those admissible and the amount thereof. Even if plaintiff's present contentions were correct, we can perceive no prejudice since the jury did not reach the question of damages. This assignment of error is overruled.

[2] Plaintiff next contends that the court erred in excluding evidence offered by plaintiff through her expert witness, Dr. Wandling. The witness had answered a hypothetical question and was explaining his answer. Defendant moved to strike those portions of the explanation which were not referred to nor included in the facts contained in the hypothetical question. The court properly sustained the motion. Again, plaintiff was not prejudiced. The witness was attempting to explain his answer by ruling out pulmonary embolus and heart difficulties as possible causes of Mr. Long's condition on 25 and 26 November. There was evidence before the jury that chest x-rays and electrocardiograms had revealed no evidence of coronary difficulties or pulmonary embolus. Those facts, however, were not included in the hypothetical question. Striking these references from the witness's answer did not preclude plaintiff from further questioning him if she wished to emphasize that evidence.

[3] Plaintiff next contends that the court committed prejudicial error in allowing a nurse to testify, over plaintiff's objection, to what Mr. Long had told her with respect to his drinking habits. The evidence was proper for the jury to

consider on the issue of damages. *Journigan v. Ice Co.*, 233 N.C. 180, 63 S.E. 2d 183 (1951). It appears from the record that to interrogatories served on each defendant, the defendants stated that alcohol had nothing to do with his condition. Plaintiff was at liberty to make this information available to the jury. The jury, however, did not reach the issue of damages, and plaintiff has not been prejudiced by the admission of this evidence.

[4] By assignments of error Nos. 4, 5, 6, 7 and 8, plaintiff contends that the court erred in overruling her objection to the hypothetical question asked the medical experts testifying for defendants. The question was a long one, as hypothetical questions usually are. The witnesses had had the advantage of having a copy to study prior to their testimony. Certain additions were made and one sentence stricken. In each instance, the witness testified that he was aware of the changes and had had time to familiarize himself with the facts recited. The question itself was introduced as an exhibit for the purpose of clarity and in the interest of not consuming more trial time than necessary. Plaintiff agreed to this procedure. Her primary objection seems to be her contention that the expert witnesses were allowed and instructed to consider the results of SMA-12 tests given on 26 and 27 November when the results were not before the jury. A study of the record, however, reveals that evidence with respect to the SMA-12 tests was given with particularity by Dr. Deaton, and Dr. Moore, and the items shown by the tests and the results of each were read to the witness in the presence of the jury. Further the record contains the following statement by plaintiff's counsel with respect to the hypothetical question marked as defendant Clutts's Exhibit No. 1 "We wish to point out that this does not include quite all the results of the SMA-12 test taken on November twenty-sixth and twenty-seventh, and we have stipulated that this can be included by the witness as long as he is also instructed in the hypothetical to consider all the results of those two SMA-12 tests which were in the Wesley Long Hospital record in evidence, and as long as that is made a part of the hypothetical question, we will stipulate, without waiving our objection to the form of the question and the question itself, that he can be asked the question by written form." Plaintiff also points out that in a hypothetical question asked Dr. Myers, counsel prefaced his question "If the jury should find that . . . " without the

requirement "if the jury should find from the evidence and by its greater weight." This the plaintiff contends constitutes prejudicial error entitling her to a new trial. We do not agree. In this trial counsel for both plaintiff and defendants asked numerous hypothetical questions. We note that one of plaintiff's hypothetical questions consumes five pages of the record and is subject to the same criticism she contends constitutes prejudicial error. We certainly agree with plaintiff that the witness's opinion should be based on the hypothesis that the facts stated will be found by the jury to be true by the greater weight of the evidence. Nevertheless, we cannot say that defendants' omission of a portion of this requirement from only one of many such questions constitutes error sufficiently prejudicial to warrant a new trial.

In *Ingram v. McCuiston,* 261 N.C. 392, 399-400, 134 S.E. 2d 705 (1964), Justice Sharp said:

> "Under our system the jury finds the facts and draws the inferences therefrom. The use of the hypothetical question is required if it is to have the benefit of expert opinions upon factual situations of which the experts have no personal knowledge. However, under the adversary method of trial, the hypothetical question has been so abused that criticism of it is now widespread and noted by every authority on evidence. E.g., Stansbury, N.C. Evidence, s. 137 (2d Ed. 1963); McCormick on Evidence, s. 16; Ladd, *Expert Testimony,* 5 Vand. L. Rev. 414, 427. Wigmore has urged that the hypothetical question be abolished: 'Its abuses have become so obstructive and nauseous that no remedy short of extirpation will suffice. It is a logical necessity, but a practical incubus; and logic must here be sacrificed. After all, Law (in Mr. Justice Holmes' phrase) is much more than Logic. It is a strange irony that the hypothetical question, which is one of the few truly scientific features of the rules of Evidence, should have become that feature which does most to disgust men of science with the law of Evidence.' II Wigmore, Evidence, s. 686 (3d Ed. 1940)."

Defendants' primary hypothetical question covers 12 pages of the record. Plaintiff's primary hypothetical question covers five pages of the record. Despite their length, we are of the opinion that they sufficiently meet the tests set out in Stans-

bury, N.C. Evidence, § 137, pp. 331-334. See also *Ingram v. McCuiston, supra.* We have considered all of defendants' objections and contentions with respect to the hypothetical questions and, even conceding that technical error may appear, we find none sufficiently prejudicial to warrant a new trial.

[5] Finally plaintiff contends that the court erred in its charge to the jury. Plaintiff notes ten exceptions to the charge. These exceptions are assigned as error by assignment of error No. 9. Both in her assignments of error and her brief, plaintiff simply quotes the portions of the charge to which exception is taken with a reference to the record page on which that portion may be found. It has repeatedly been said that an assignment of error must show specifically what question is intended to be presented for consideration without the necessity of going beyond the assignment of error itself. *Lewis v. Parker,* 268 N.C. 436, 150 S.E. 2d 729 (1966). In her brief plaintiff for argument says: "The plaintiff points out that the charge, in the portions reproduced above, and as a whole (R. pp. 377-396), while in many respects a respectable dissertation upon law, is remarkably deficient in setting forth the contentions of the plaintiff and in calling to the jury's attention the evidence in the case and in applying to that evidence, for the guidance of the jury, the applicable law." We assume that plaintiff contends the court erred in failing to charge the law and explain the evidence as required by statute. This is, of course, a broadside exception and will not be considered. 1 Strong, N.C. Index 2d, Appeal and Error, § 31, and cases there cited.

[6] In addition to the above, plaintiff argues that the court "unduly narrows the time and activity of the defendants which the jury might consider negligent to November 25 and 26, 1968." Despite the ineffectiveness of plaintiff's assignment of error, we recognize, of course, the importance of this litigation, and, therefore, address ourselves to this question. It is true that the allegations of the complaint encompass the span of time from Mr. Long's admission to the hospital to the time of his death. However, all of plaintiff's evidence as to negligence was directed to the diagnosis and treatment of 25 and 26 November. The hypothetical questions asked the expert witnesses were so limited. The theory of plaintiff's case was that the negligence of defendants in diagnosis and treatment on 25 and 26 November was the proximate cause of the subsequent shock on 5 and 6 December and resulting renal failure. We are of the

opinion and so hold that the court did not err in limiting the jury to 25 and 26 November in its deliberations as to negligence.

This trial consumed some 11 days. All parties were well represented by competent counsel both at trial and on appeal. Abundant evidence was presented to the jury who, after deliberation, found that defendants were not negligent. In the trial we find

No error.

Judges BROCK and HEDRICK concur.

STATE OF NORTH CAROLINA v. FRANK PEELE

No. 7212SC697

(Filed 25 October 1972)

1. **Indictment and Warrant § 12; Larceny § 4— amendment of indictment — sufficiency of single count to support sentence**

Where defendant was tried upon a three count bill of indictment with breaking and entering and larceny, the trial court's error, if any, in striking part of the second count was not prejudicial since the sentence imposed was fully warranted by conviction under the first count alone.

2. **Constitutional Law § 21; Searches and Seizures § 1— search by private individual — admissibility of evidence**

Evidence concerning property found in defendant's attic as a result of a search of his house conducted without a warrant by the victim of a larceny was properly admitted since the security against unreasonable searches and seizures afforded by the Fourth Amendment applies solely to governmental action and not to individual action.

3. **Criminal Law § 169— evidence of shotgun and pistol — harmless error**

Defendant failed to show prejudicial error in the admission of evidence concerning a pistol and shotgun returned to the victim of a larceny by a friend of the accused.

4. **Burglary and Unlawful Breakings § 5; Larceny § 7— sufficiency of evidence to support charge**

In a prosecution for breaking and entering and larceny, there was substantial evidence which, considered in the light most favorable to the State, would warrant the jury's finding defendant guilty of all material elements of the offenses for which he was charged.

State v. Peele

APPEAL by defendant from *Clark, Judge,* 1 May 1972 Session of Superior Court held in CUMBERLAND County.

On 16 November 1971 defendant was arrested on a warrant charging him in three counts with the following offenses: (1) The felonious breaking and entering on 8 November 1971 of the dwelling located at 519 North Platte Drive, Fayetteville, N. C., occupied by Peter Hall, Joel Noah and Phillip Guilford; (2) the larceny on 8 November 1971 of a television set, shotgun, tape recorder, turntable, Kenwood stereo amplifier receiver, and other specifically described items of personal property, of the total value of about $1,480.00, the property of Peter Hall; and (3) the larceny on 8 November 1971 of a blanket, pillowcase, and a .25 caliber pistol, of a total value of about $45.00, the property of Joel Noah. On 7 March 1972 defendant was tried in the district court for the misdemeanor charged in the third count of the warrant and was found not guilty of that offense. On the same date the district court judge conducted a preliminary hearing and found probable cause on the felony charges contained in the first two counts of the warrant.

At the 1 May 1972 session of superior court the grand jury returned as a true bill a bill of indictment which charged defendant in three counts with the following offenses: (1) The felonious breaking and entering on 8 November 1971 of the dwelling occupied by Hall, Noah and Guilford located at 519 North Platte Drive, Fayetteville; (2) the felonious larceny after such breaking and entering of the television set, shotgun, and the other articles which had been described in the second count in the warrant, of the value of $1,480.00, the personal property of Peter Hall, and the blanket, pillowcase, and .25 caliber pistol of the value of $45.00, the personal property of Joel Noah (which latter property of Joel Noah had been described in the third count in the warrant on which defendant had been previously tried in the district court and found not guilty); and (3) the felonious receiving of the personal property described in the second count in the indictment.

The record on this appeal contains the following:

> "Prior to entering plea, defendant moved in chambers that a finding in the District Court of not guilty as to part of the larceny charge would serve as a plea in bar to the larceny indictment. Defendant further moved that as the larceny indictment was tainted the entire

larceny indictment was, therefore, voided. The Court agreed that the plea of double jeopardy was applicable in the case at bar and struck the portion of the larceny indictment pertaining to Joel Noah's property. However, the Court denied the defendant's motion to quash the entire larceny count of the indictment."

Upon arraignment on the charges contained in the bill of indictment as deleted, defendant pleaded not guilty to all counts.

Joel Noah, the only witness presented by the State, testified in substance to the following:

In November 1971 he, Peter Hall, and Phillip Guilford, resided at 519 North Platte. Noah knew the defendant, Frank Peele, and on 7 November 1971 defendant Peele and Lee Smith, a friend of defendant's, had come over to Noah's house. On the evening of 7 November 1971 and on the day of 8 November 1971 Noah's house was secure and there were no broken windows or doors. Later, when Noah returned to the house, he discovered that someone had broken the window in the living room and had entered the house, and the following items were missing: a turntable, two tape decks and an amplifier belonging to Peter Hall; a shotgun and a television belonging to Phillip Guilford; and a .25 caliber pistol, a blanket, a poncho, and a pillowcase belonging to Noah. Noah had not given anyone consent to remove anything from his house and to the best of his knowledge his roommates had not given consent to anyone. On 15 November 1971 Noah and Guilford went to defendant's house at Breezewood Avenue and told defendant that their house had been broken into, that the descriptions which had been given them fitted the defendant and his car, and that they thought defendant had done it. Defendant told Noah that he had picked up some stereo equipment that day with a man named Williams at a house familiar to defendant, but that defendant did not know who lived in the house; that the reason Williams went into the house was that the stereo equipment belonged to Williams, who had left it at that house; that all defendant had done was to unlock the trunk of his car; and that Williams had taken everything out of the car except one amplifier, which defendant told Noah he had in his house. Noah then called Deputy Sheriff Burgess, who came to defendant's house with another officer. When the officers arrived,

Noah, Guilford, and defendant were outside of defendant's house. Burgess asked defendant to sign a paper which would give him permission to enter the house. Defendant refused to sign the paper but stated that he would give Mr. Burgess permission to search.

(At this point in witness Noah's testimony, the trial court conducted a lengthy *voir dire* hearing and found that defendant had freely and voluntarily given Deputy Sheriff Burgess consent to search his house. The court concluded that the search pursuant to such consent was valid and that property seized pursuant thereto was admissible in evidence. On this appeal no exception has been taken to this ruling.)

Noah accompanied Deputy Sheriff Burgess and defendant Peele into Peele's house and went through the living room into Peele's bedroom. On the floor in the bedroom was some stereo equipment. Noah inspected this equipment and was able to identify the Kenwood amplifier and a pair of frayed headsets which belonged to Peter Hall. He also recognized a poncho lining as his own. Noah then assisted the other deputy in trying to look in the attic. He pulled a chair over and just got his head up there, but it was so high he couldn't hold his place and look at the same time. There were no lights in the attic and he was not able to see anything. No one went into the attic at that time. A couple of days later, about 17 November 1971, Noah and Guilford returned to defendant Peele's home with defendant's friend, Lee Smith, who let them in the front door of the house. Smith went to the attic, climbed up into the loft, and began bringing pieces of equipment which had been stolen from Noah and his roommates and handing them down through the roof to Noah and Guilford.

At this point in witness Noah's testimony, defendant's counsel objected and requested a *voir dire*. On the *voir dire*, the following witnesses were examined and testified in substance as follows:

Noah testified that Smith, who was also charged with breaking and entering his house, had come to him and stated that he could get the stolen merchandise back from defendant Peele if Noah would drop the charges against Peele and Smith; that before going to defendant's house with Smith, Noah did not communicate with Detective Burgess or any other law

enforcement official; that Smith went into the house with a key, and when they left Smith locked the door; that defendant was not at the house at the time; that only several months later, at the time of the preliminary hearing, did Noah tell Officer Burgess that he had found the items in the attic. Detective Burgess testified that the first time he learned that other items were found in defendant's home was at the preliminary hearing. Defendant Peele testified that he was not at home when Smith and Noah came to his house; that he did not give Smith or anyone else permission to enter his house; that he did not have a key to his house; that the lock on his house was not a key-type lock but was a combination lock; that there were no keys to the lock; that Smith was a friend of his and was charged with the same breaking and entering and larceny; that when he and Smith were picked up, they were put in the same cell; that Smith got out but he had had to stay a little longer; that he never told Smith to go see Noah; that Smith had never stayed with him at his house; that he did not know where Smith was at the time of the trial; and to the best of his knowledge Smith had never put anything in his attic.

At the conclusion of the *voir dire* examination, the trial judge found "the facts to be as testified by the three witnesses on voir dire, there being no conflicting evidence," and ruled as a matter of law that evidence concerning the property stored in the attic was admissible.

Following this ruling, Noah continued his testimony before the jury and in substance testified that Smith had handed down from the attic two tape decks and a turntable, an implifier, a reverberator unit which leads into an amplifier, and a blanket which was Noah's; that he could identify these items because they had had them for over two years; and that the turntable had certain scratches on top and under the case. Noah also testified:

> "All the items were not recovered. Smith said he would have to get some more items at another place. A couple days later Smith returned to my house with a shotgun and pistol that had been stolen. I could identify the shotgun and pistol by the serial numbers. The shotgun belonged to Phillip Guilford."

Defendant's motion to strike the above-quoted portion of Noah's testimony was overruled. Defendant's motion for nonsuit at the close of the State's evidence was denied.

Defendant testified that on 8 November 1971 he had occasion to see a man whom he knew by the name of Williams; that Williams asked him if he was interested in stereo equipment; that he went with Williams to a house to purchase or to look at the equipment; that he was not sure where the house was; that he did buy the stereo amplifier for $50.00; that he did not buy any other item from Williams at that time; that he had seen Williams on several occasions prior to 8 November but had not seen him since; that on 15 November he had talked with Noah at his home on Breezewood Avenue, and that Noah said he had already been in Peele's house and had seen the stereo equipment that belonged to him and wanted to know where Peele got it; that he told Noah he had purchased it from Williams, and had offered to take Noah into the house and show him the amplifier, and if it belonged to Guilford or Noah "then we would square it up from there." Defendant also testified that he was in jail on the 17th and 18th of November and did not give Lee Smith permission to go in his house, and he did not know when the items Noah found in the attic were placed there.

The jury found defendant guilty as charged of felonious breaking and entering and of larceny pursuant to breaking and entering. Judgment was imposed on the verdict sentencing defendant to prison for a term of five years as a committed youthful offender. Defendant appealed.

Attorney General Robert Morgan by Assistant Attorney General Thomas B. Wood for the State.

Assistant Public Defender Neill Fleishman for defendant appellant.

PARKER, Judge.

[1] Appellant first assigns error to denial of his motion to quash the larceny count in the indictment. In support of this assignment he contends that, absent his consent, the trial court had no power to make any change in the bill of indictment as returned by the grand jury, that the larceny count in the bill of indictment in the form in which it had been returned a true bill by the grand jury charged him with larceny of certain particularly described items of property of Joel Noah as well as with larceny of property of Peter Hall, and that, having

already been acquitted in the district court of the charge of larceny of the identical property of Joel Noah, his motion to quash the entire larceny count should have been granted.

At the outset, we observe that when facts constituting double jeopardy do not appear from the allegations of the bill of indictment itself, the defense of former jeopardy may not be taken advantage of by motion to quash. *State v. Cooke,* 248 N.C. 485, 103 S.E. 2d 846. However, since the record in the present case is not entirely clear as to what type of motions appellant made before the trial judge and "[s]ince the law looks at substance rather than form," *State v. Wilson,* 234 N.C. 552, 67 S.E. 2d 748, we shall consider appellant's contentions in connection with his first assignment of error as though these were properly presented on the record before us.

At common law the courts had no power to amend matters of substance in a bill of indictment, and in this State there is no statute allowing amendments to bills of indictment. *State v. Haigler,* 14 N.C. App. 501, 188 S.E. 2d 586. Therefore, "[a]n 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." *State v. Dowd,* 201 N.C. 714, 161 S.E. 205. In the present case the only "amendment" to the indictment made by the trial judge was to strike from the larceny count words which might well be considered mere surplusage. The deletion in no way changed the nature or the degree of the offense charged and we perceive no reason why defendant was not as fully apprised of the charge against him after the deletion as before. Courts of some jurisdictions have expressly approved amendments eliminating a portion of the property described in the indictment, Annot., 15 A.L.R. 3d 1357, § 4, and it may well be that even absent a statute authorizing amendments such a deletion could properly be approved. That question, however, need not be decided on the present appeal. Here, there was no defect in the first count in the bill of indictment and only one sentence was imposed on the jury's verdict finding defendant guilty of the charges contained in both the first and second counts. Since the sentence was fully warranted by the conviction under the first count alone, error, if any, relating solely to the second count is of no avail to defendant. *State v. Jackson,* 280 N.C. 563, 187 S.E. 2d 27; 41 Am. Jur. 2d, Indictments and Informations, § 309,

p. 1071. Appellant's first assignment of error is accordingly overruled.

[2] The next assignment of error brought forward in appellant's brief is that the trial court erred in allowing the State to introduce evidence concerning the items of property found in defendant's attic as result of the second search of his premises, which was made without a search warrant and at a time when he was not personally present and consenting to the search. This assignment is without merit. The security against unreasonable searches and seizures afforded by the Fourth Amendment to the Constitution of the United States applies solely to governmental action. *Burdeau v. McDowell,* 256 U.S. 465, 41 S.Ct. 574, 65 L.Ed. 1048; *Barnes v. U.S.,* 373 F. 2d 517 (5th Cir. 1967); *United States v. Goldberg,* 330 F. 2d 30 (3d Cir. 1964), *cert. denied,* 377 U.S. 953, 84 S.Ct. 1630, 12 L.Ed. 2d 497; *Harmon v. Virginia,* 209 Va. 574, 166 S.E. 2d 232. It is not invaded by acts of individuals in which the government has no part. The record in the present case makes manifest that the police in no way participated in the second search and indeed had no knowledge that it had taken place until some months after it occurred. Nothing in the record supports appellant's assertion, made in his brief on this appeal, that the State's witness, Noah, was "a defacto police agent." No violation of appellant's constitutional rights has been shown in the trial court's action permitting the State to introduce evidence concerning the property found in defendant's attic as result of the second search of his house.

[3] Appellant's contention that he suffered prejudicial error when the trial court refused his motion to strike evidence concerning the shotgun and pistol which his friend, Smith, returned to the State's witness, Noah, is also without merit. Nothing in the evidence connected these items directly with the defendant, and if it be granted that the evidence concerning them should have been stricken, we find the error, if any, not sufficiently prejudicial to warrant a new trial in view of the mass of competent evidence which had been admitted to establish defendant's guilt. The burden is upon appellant not only to show error but to show as well that he has been prejudiced thereby, and this he has failed to do.

[4] There was no error in denying defendant's motions for nonsuit and for a directed verdict of not guilty. There was

substantial evidence which, considered in the light most favorable to the State, would warrant the jury's finding defendant guilty of all material elements of the offenses for which he was tried. This is all that was required to send the case to the jury. *State v. Stephens,* 244 N.C. 380, 93 S.E. 2d 431.

The evidence in this case made the doctrine of possession of recently stolen property applicable, and the court's instructions to the jury, considered as a whole, correctly applied that doctrine to the evidence.

We have carefully considered all of appellant's remaining assignments of error, and find no error sufficiently prejudicial to warrant a new trial.

No error.

Judges CAMPBELL and MORRIS concur.

STATE OF NORTH CAROLINA v. IRA JEFFERIES

No. 7222SC695

(Filed 25 October 1972)

1. **Criminal Law §§ 113, 114— jury charge in compliance with G.S. 1-180**

The trial court's instruction in a murder prosecution complied with G.S. 1-180 where it explained the law arising on the evidence, it correctly defined each element of the crimes of second degree murder and manslaughter, it explained the law of self-defense, it did not amount to a comment on the evidence, and it properly failed to define proximate cause.

2. **Criminal Law § 77— admissibility of self-serving statements**

The trial court did not err in excluding testimony of an investigating officer as to statements made to him by defendant concerning circumstances surrounding the shooting for which defendant was on trial since such statements were self-serving declarations of defendant.

3. **Criminal Law § 102— jury argument**

Defendant was not prejudiced by the solicitor's argument to the jury where statements he read had already been testified to by defendant and where the court sustained defendant's objections to the argument and instructed the jury not to consider the argument to which objection had been sustained.

4. **Criminal Law § 169— objections to questions sustained — motion for mistrial properly denied**

Where improper questions were propounded by the solicitor to defense witnesses, defendant objected, and the trial judge sustained the objection and instructed the jury to disregard the questions, any impropriety was cured; therefore, defendant's motion for mistrial was properly denied.

5. **Criminal Law § 42— murder prosecution — admissibility of gun found on body of deceased**

It was not prejudicial for the Court to allow testimony as to the condition of a pistol found on the body of deceased in a murder prosecution, since any object which has a relevant connection with a case is admissible.

APPEAL by defendant from *Lupton, Judge,* 8 November 1971 session of Superior Court held in DAVIDSON County.

Defendant, Ira Jefferies, was tried on a bill of indictment, proper in form, for the murder of Howard Lee Thomas. Upon defendant's plea of not guilty, the State offered evidence tending to show:

The deceased, Howard Lee Thomas, died of a gunshot wound which was inflicted at the home of Mrs. Hester Mae Mock. The bullet entered his back, to the left of the midline, and lodged inside the chest near the windpipe. Death resulted from internal hemorrhage. The alcohol content found in the blood sample taken from the body of the deceased on the morning of 28 November 1970, was .340 milligrams.

The defendant was in the home of Mrs. Hester Mae Mock, together with relatives and friends, on the evening of 27 November 1970. At approximately 9:30 p.m. the deceased came to the Mock residence, knocked on the door and demanded entry. Mrs. Mock refused to allow Thomas to enter her home and requested that he leave. Thomas continued to knock on the door and demanded to see defendant, Ira Jefferies, saying that ". . . he had some stuff for him". Defendant, Ira Jefferies, went onto the porch to ask Thomas to leave. From his position in the yard, Thomas lunged at Jefferies' leg. Defendant picked up a chair with which he attempted to strike Thomas. When Thomas reached in his pocket, defendant shot him.

When officers from the Davidson County Sheriff's Department arrived at the Mock residence at approximately 12:40 a.m., 28 November 1970, they found the deceased lying in the

yard on his back. An unloaded .32 caliber Hopkins-Allen pistol was found in the deceased's right front pocket. While Captain Stabler was examining the body, defendant walked up to him, handed him a .22 caliber PIC pistol, and stated: "I'm the one that did the shooting."

Defendant, Ira Jefferies, testified that on the evening of 27 November 1970 he and three companions went to Winston-Salem and purchased two six packs of beer. When they returned, they went to the mobile home of defendant's brother-in-law, William Rogers Mock. The men were listening to records when Thomas came to the mobile home and was let in by the defendant. Soon, thereafter, Thomas became profane and abusive and defendant asked him to leave. Within a few minutes, Thomas returned, apologized for his earlier profanity and defendant let him reenter the mobile home. Upon entering the mobile home, Thomas pulled out a pistol and again became profane. Defendant repeatedly asked Thomas to leave, but Thomas refused. Defendant then walked to a rear room in the mobile home, removed his brother-in-law's pistol from a drawer, and placed it in his pocket. Everyone then left the mobile home. Thomas walked toward his truck and defendant and his three companions walked to the home of Hester Mae Mock, defendant's mother-in-law. Within a few minutes, Thomas knocked at the door and requested entry. Mrs. Mock refused to allow Thomas to enter. Thomas began to curse and to beat on the door, the screen and the window. Several of the guests in Mrs. Mock's home asked Thomas to leave, but he refused. Repeatedly, Thomas stated that he had some "stuff" for defendant, Ira Jefferies. When defendant walked onto the porch to ask Thomas to leave, Thomas lunged at defendant and grabbed defendant's leg with his left hand. Thomas put his right hand into his right front pocket and stated, "I have got some damn stuff for you." Defendant believed that Thomas was going to shoot him. Defendant picked up a chair with his left hand and swung it at Thomas, causing Thomas to spin. With his right hand, defendant removed a pistol from his right rear pocket and fired it at Thomas.

The jury found the defendant guilty of manslaughter. From a judgment imposing an active prison sentence of 8 to 12 years, defendant appealed.

Attorney General Robert Morgan and Assistant Attorney General Henry T. Rosser for the State.

T. H. Suddarth, Jr., for defendant appellant.

HEDRICK, Judge.

[1] The defendant contends the Court committed prejudicial error in failing to comply with the mandate of G.S. 1-180 by:

1. Not declaring and explaining the law arising on the evidence;

2. Declaring and explaining law not arising on the evidence;

3. Failing to state the evidence to such extent as is necessary to apply the law thereto;

4. Commenting on the evidence;

5. Failing to define proximate cause.

We have carefully examined the Court's instructions to the jury in the light of each exception noted in the record. The Court fairly, adequately and correctly declared and explained the law arising on the evidence. The Court carefully and correctly defined each element of the crimes of second degree murder and manslaughter. The Court carefully and correctly explained the law of self-defense and correctly applied it to the evidence in the case.

There is nothing in the record to support defendant's contention that the Court commented on the evidence in violation of the provisions of G.S. 1-180.

Under the circumstances of this case there was no necessity that the Court define proximate cause. There was evidence tending to show that the defendant shot the deceased. On cross examination, defendant testified, "I don't know how old Howard Lee Thomas was when I killed him" and "This pistol I shot him with I had in my right rear pocket." There was evidence tending to show that deceased came to his death as a result of a bullet wound. There was no evidence or suggestion that anyone other than the defendant fired a gun or that the deceased came to his death as a result of any wound or injury other than that inflicted by the defendant. These assignments of error have no merit.

[2] Defendant contends the Court erred in excluding ". . . statements of the defendant explaining the circumstances surrounding the fatal encounter." This contention is based on the Court's refusal to allow Captain Stabler on cross examination to testify as to statements made to him by defendant as to the circumstances surrounding the shooting of the deceased. The testimony was properly excluded as being self-serving declarations of the defendant. Moreover, the substance of the excluded testimony subsequently was offered and admitted into evidence. This assignment of error is without merrit.

[3] Defendant contends the Court committed prejudicial error by allowing the solicitor to read:

> " . . . to the jury a paper writing purporting to be an admission of the defendant having therefore been excluded from the evidence by the Court, by improper questions getting before the jury by innuendo and insinuation evidence not otherwise admissible and other incidents of conduct calculated to unduly prejudice the jury."

From the record before us it is not clear to what "paper writing" the defendant has reference. No paper writing purporting to be a confession was offered into evidence. With respect to the solicitor's reading to the jury during his argument, the record is as follows:

> "You heard the defendant himself on that stand when I cross-examined him, what he said, that he came off the steps—'I'm the one that did the shooting.' 'What happened?' Capt. Stabler said. 'I'm not talking until I talk with my lawyer.'
>
> OBJECTION. SUSTAINED.
>
> COURT: Don't consider that.
>
> MR. ZIMMERMAN: Then he comes to the jail and gets in and tells this—'Howard kept beating on the door and Hester told him to leave; then I asked him to leave and he wasn't going to.' I asked him did he say that; he said No, he didn't say that, he said a lot of other things. (reading resumed) 'I went back out on the porch again; she went out and led him off the porch to the truck—Hester, and he came back beating on the door again.' He said he might have said that. Then (reading)—'My wife went

out and asked him to leave; then I went out again and told him to go on; he ran his right hand in his pocket and hit at me with his left hand'—

OBJECTION SUSTAINED.

MR. SUDDARTH: The defendant tried to get this in evidence and never was permitted to.

MR. ZIMMERMAN: I cross-examined him on each and every word.

MR. SUDDARTH: He denied it and the part he admitted is the only thing in evidence.

MR. ZIMMERMAN: (reading) I hit him with a chair—

COURT: Don't argue any of the alleged part except the part admitted on the stand.

MR. ZIMMERMAN: (reading) 'I hit him with a chair; then he spun around. He still had his hand in his pocket and I shot him. Earlier tonight at William Rogers Mock's trailer Howard Lee showed me his gun; it was a small pistol, and I didn't know if it was loaded or not. I had been carrying my pistol all along.'

OBJECTION SUSTAINED.

COURT: Don't consider that, Members of the Jury."

The defendant seems to contend that the solicitor read to the jury from a statement prepared by Captain Stabler from his conversation with the defendant as to the circumstances surrounding the shooting. The record discloses that the defendant, without objection on cross examination, testified to each statement apparently read to the jury by the solicitor. It seems equally clear that the solicitor may have been reading from his own notes prepared during the trial. In any event, we do not perceive how the defendant could have been prejudiced since the trial judge sustained the defendant's several objections to the argument, told the solicitor not to argue anything "except the part admitted on the stand," and cautioned the jury not to consider the argument to which objection had been sustained.

In support of his contention that the defendant was prejudiced in the minds of the jury by the improper conduct of the

solicitor, the defendant refers us to numerous statements made by the solicitor in his argument to the jury. The record reveals that in every instance to which the defendant alludes where the defendant interposed objection, the trial judge sustained the objection and instructed the jury to disregard the comment. In other instances urged by the defendant as error, it appears that defendant failed to object. These exceptions were lost to defendant. *Reeves v. Hill,* 272 N.C. 352, 158 S.E. 2d 529 (1968). In *State v. Maynor,* 272 N.C. 524, 526, 158 S.E. 2d 612, 613 (1968), it is stated:

> "Wide latitude is given to counsel in argument. The judge hears the argument, knows the atmosphere of the trial and has the duty to keep the argument within proper bounds. His rulings will not be disturbed unless abuse of privilege is shown and the impropriety of counsel was gross and well calculated to prejudice a jury." (citations omitted)

We have examined all of the questions, statements and comments complained of and find that the rulings of the trial judge were proper and that the alleged impropriety of the solicitor's argument was not gross and calculated to prejudice the jury.

[4] Defendant next contends the trial court committed prejudicial error "by abusing its discretion in not granting the defendant's motion for a mistrial."

Defendant premised his motion for mistrial on two allegedly improper questions propounded by the solicitor to defense witnesses. In each instance the trial judge sustained defendant's objection to the question and instructed the jury to disregard the question asked by the solicitor. This prompt action of the trial judge cured any impropriety. In 2 N.C. Index 2d, Criminal Law, § 102 (1967), it is stated: ". . . an impropriety must be sufficiently grave to be prejudicial in order to entitle defendant to a new trial. It is only in extreme cases of abuse of the privilege of counsel, and when the trial court does not intervene or correct an impropriety, that a new trial may be allowed."

The trial court has broad discretion in entertaining motions for mistrial. Absent a manifest abuse of discretion or rulings which are clearly erroneous, the rulings of the trial court will not be disturbed. *State v. Sneeden,* 274 N.C. 498, 164 S.E. 2d 190 (1968); *O'Berry v. Perry,* 266 N.C. 77, 145 S.E. 2d 321 (1965); *Stone v. Baking Co.,* 257 N.C. 103, 125 S.E. 2d 363

(1962); *State v. Moye*, 12 N.C. App. 178, 182 S.E. 2d 814 (1971). This assignment of error is overruled.

Defendant assigns as error the denial of his timely motions for judgment as of nonsuit. There was ample evidence to require submission of this case to the jury and to support the verdict.

[5] Defendant's next assignment of error challenges the trial court's allowing testimony, over defense objections, as to the condition of the pistol found on the body of the deceased. Any object which has a relevant connection with a case is admissible. Stansbury, North Carolina Evidence 265 § 118 (2d ed. 1963). There was evidence tending to show that the deceased had a pistol and that Officer Stabler found the pistol in the deceased's pocket. This pistol was properly admitted into evidence as State's exhibit #7. It was not prejudicial error for the Court to allow testimony as to the condition of the pistol when it was taken from deceased's body.

The defendant has additional assignments of error which we have carefully considered and find to be without merit. We hold the defendant had a fair trial free from prejudicial error.

No error.

Judges BROCK and MORRIS concur.

LOUISE McCOY v. JAMES LARRY DOWDY

No. 7210SC692

(Filed 25 October 1972)

1. **Negligence § 35; Trial § 21— negligence of defendant — no contributory negligence of plaintiff as a matter of law — directed verdict improper**

The trial court erred in directing a verdict for defendant in an action to recover damages for personal injuries where the evidence, taken in the light most favorable to plaintiff, tended to show that defendant was negligent in striking plaintiff pedestrian after entering a lighted intersection with his lights on without reducing his speed and where the evidence tended to show that plaintiff was not contributorily negligent as a matter of law in crossing a street in an unmarked crosswalk where she thought that defendant's automobile was far enough away not to hit her and where she began running in an attempt to escape when she saw that the defendant was not going to yield to her the right of way.

2. Damages §§ 3, 13— failure to show permanent injury — exclusion of statutory life table proper

Where plaintiff's injury was subjective and she failed to present expert evidence that she had suffered a permanent injury, the trial court did not err in refusing to admit into evidence the life table of G.S. 8-46.

APPEAL by plaintiff from *Canaday, Judge,* 20 March 1972 Session of WAKE Superior Court.

Plaintiff instituted this civil action to recover damages for personal injury suffered when defendant's automobile hit her as she was walking across New Bern Avenue, Raleigh, at its intersection with Seawell Avenue. The time was about 6:50 p.m. on 30 November 1969.

Motion by defendant for directed verdict on the grounds that the plaintiff failed to show actionable negligence of the defendant and did show her own contributory negligence as a matter of law was granted by the trial judge.

Vaughan S. Winborne for plaintiff appellant.

Cockman, Alvis & Aldridge by Jerry S. Alvis for defendant appellee.

CAMPBELL, Judge.

On a motion for directed verdict by the defendant, the court must consider the evidence in the light most favorable to the plaintiff, and must grant the motion only if as a matter of law the evidence is insufficient to justify a verdict for the plaintiff.

The motion presents substantially the same question for sufficiency as did a motion for an involuntary nonsuit under former G.S. 1-183. *Younts v. Insurance Co.,* 281 N.C. 582, 189 S.E. 2d 137 (1972).

The court summarized the proper test under former nonsuit procedure in *Bowen v. Gardner,* 275 N.C. 363, 168 S.E. 2d 47 (1969).

[1] Plaintiff's evidence in the light most favorable to her tends to show the following facts:

New Bern Avenue in the City of Raleigh, North Carolina, runs in an east-west direction; Seawell Avenue, running north-

south, dead-ends into New Bern Avenue forming a "T" intersection on the north side of New Bern Avenue. Seawell and New Bern Avenues both have sidewalks.

On the night of 30 November 1969 plaintiff was walking across New Bern Avenue from south to north on a line of travel which would be a prolongation of the Seawell Avenue sidewalk on the west side and perpendicular to New Bern Avenue. At about the same time, defendant was driving his automobile from east to west along New Bern Avenue, heading into the City of Raleigh. At a point somewhere midway in New Bern Avenue defendant's automobile struck the plaintiff. There were no traffic control lights at the intersection and no lines painted on the street indicating a pedestrian crosswalk. The intersection was illuminated by a street lamp, defendant's headlights were on, and there was no other traffic on the street at the time plaintiff was hit.

Plaintiff's testimony concerning the circumstances at the time when she crossed the street is generally confusing and in some points contradictory. However, contradictions are to be resolved in her favor. Various portions of the testimony are as follows:

> " * * * When I first saw the car it was a good little ways from me. It was far enough away to not hit me. It was far enough away to not hit me."
>
> "I didn't go out in the street at first, I was walking across the street. When I looked to see the car and where I first saw it, I was crossing New Bern Avenue, I was going straight across."
>
> "The defendant's car was coming from my right. When I first saw it I was just walking across. I was already walking across, when I was walking I was fixing to cross.
>
> Q. Fixing to cross, were you at the curb of the street, fixing to cross?
>
> A. I was just about halfway the street.
>
> Q. About halfway the street when you first saw it?
>
> A. No, about halfway the street when I was crossing."

"When I saw him and he was as close as from me to you, that is when I started running and he got faster." [The distance was measured to be seventeen feet.]

"As I was crossing New Bern Avenue, I had gotten past the center line of that street when I first saw the defendant's car. I came through there out of the path. There was nothing that blocked my vision. I could see down New Bern Avenue going out of town."

" * * * This is the post I testified that the light [street light] was on. When I first saw the car of the defendant, I was a good ways from the post. I was halfway across the street when I first saw the car of the defendant. That was the first time I saw his car. I started running when I seen he was going to hit me. * * * "

Plaintiff's witness, Leona Patterson, who was walking with the plaintiff, testified:

" * * * When I first saw the car of the defendant I was fixing to cross, I had just stepped down off the curb and Louise was in front of me. I could reach out and touch her."

" * * * When I first saw it, I was standing at the curb, fixing to cross. The car was back up the street about half a block. When Louise got hit I wasn't quite to the center line and when she got hit I ran back and then I started hollering and waving my hands. There was no other traffic on the street at that time. When I waved my hand I stopped two cars that were going out of town."

" * * * As we all were going across the street, well, she was about as far from me as the first bench. . . (measured to be 25½ feet). While she was up there ahead of me as we were going across the street, that is my best recollection now. I am saying that if she was that far ahead of me, she was just about, she was on the other side of the center line. The defendant was traveling in the lane of travel close to the center of New Bern, and was going into town."

Other testimony tends to show that the plaintiff crossed New Bern Avenue directly in front of Seawell Avenue on a line straight across from the Seawell Avenue sidewalk. This evi-

dence taken as true places the plaintiff within the area which is an unmarked pedestrian crossing, thus giving her the right of way under G.S. 20-173(a) and *Anderson v. Carter,* 272 N.C. 426, 158 S.E. 2d 607 (1968).

G.S. 20-38(12) defines an intersection as the area embraced within the lateral boundary lines of two or more highways which join one another at any angle, whether or not one such highway crosses the other. G.S. 20-173(a) provides that where traffic control signals are not in place or in operation the driver of a vehicle shall yield the right of way, slowing down or stopping if need be to so yield, to a pedestrian crossing the roadway within any marked crosswalk or within any unmarked crosswalk at an intersection. In *Anderson v. Carter, supra,* the court defined an unmarked crosswalk as the prolongation of the lateral sidewalk lines.

A pedestrian who has the right of way at a crosswalk may not be held to be contributorily negligent as a matter of law for failure to see an approaching vehicle or for failure to use ordinary care for her own safety. The pedestrian is not required to anticipate negligence on the part of others. In the absence of anything which gave or should have given notice to the contrary, she was entitled to assume and to act upon the assumption, even to the last moment, that others would observe and obey the statute which required them to yield the right of way. *Bowen v. Gardner, supra.* In the *Bowen* case the pedestrian did not see the vehicle approaching, but the court held that this rule applies even where the pedestrian did see the vehicle before crossing.

In *Bowen* the plaintiff walked 24 to 26 feet across the street before she was hit. The court held that whether the speed of the motorcycle, its proximity, or manner of operation were such that plaintiff, simply by failing to see it, failed to exercise due care for her own safety is a jury question, and that since the circumstances permit opposing inferences, nonsuit as a matter of law should have been denied. In the case at bar plaintiff had walked about 25½ feet before she was hit.

In *Anderson v. Carter, supra,* the plaintiff was not walking within a pedestrian crosswalk, and thus did not have the right of way.

In the case at bar, viewing the evidence in the light most favorable to the plaintiff and resolving conflicts in her favor,

the evidence is sufficient to support a finding that she did not see the defendant until she had begun crossing and had reached the center of New Bern Avenue. Whether there were circumstances with respect to the operation of defendant's car which should have given her notice that he would not obey the law is a question which only a jury may answer.

But even if the plaintiff did see the defendant's car before she left the curb, her favorable evidence places the car half a block down the street. Whether its speed (estimated by plaintiff to have been about 50 miles per hour) was a circumstance which should have put her on notice that the defendant would not yield to her is also a proper jury question. The plaintiff's evidence concerning her location on the street when she first saw the defendant's car raises opposing inferences, and a directed verdict for contributory negligence as a matter of law is not proper.

The instant case is clearly distinguishable from *Anderson v. Carter, supra,* in that here the plaintiff had the right of way if the jury finds she was in a crosswalk and thought that the automobile was far enough away not to hit her; and, when she saw that the car was not going to yield to her the right of way, she began running in an attempt to escape. Her conduct is not unreasonable as a matter of law.

With respect to the defendant's negligence, the evidence tends to show that the intersection was illuminated by a street lamp, that defendant's headlights were on, that there was no traffic heading in defendant's direction at the time which could have momentarily distracted or blinded him, and that he never reduced the speed of his automobile. Such evidence is sufficient to go to the jury on the issue of defendant's negligence. A driver must exercise that degree of care which an ordinarily prudent person would exercise under similar circumstances; he must keep his vehicle under control and keep a reasonably careful lookout so as to avoid collision with persons and vehicles upon the highway; he is under the duty to see what he ought to have seen. The defendant had the duty to yield to the pedestrian. *Bowen v. Gardner, supra.*

[2] Plaintiff asserted as error failure of the trial court to admit into evidence the life table of G.S. 8-46. On the evidence which plaintiff has presented there was no error in this regard.

Evidence of future life expectancy is not admissible until the plaintiff has presented evidence that he has suffered a permanent injury. The only evidence concerning the permanency of plaintiff's injury was testimony of the plaintiff herself:

> " * * * As a result of the accident I hurt all through my body now, and my head, and my leg too. I can't walk too good at times. They took the cast off in six weeks and I used the walker about six months. I am not able to get around all right now. I'm not because I hurt so bad through my body. Down across the bottom of my stomach."

In *Gillikin v. Burbage,* 263 N.C. 317, 139 S.E. 2d 753 (1965), plaintiff suffered a back injury which she said kept her from performing regular housework, made it difficult for her to stoop to retrieve objects from the floor, and which generally had caused continual pain since the accident. Her medical expert testified that such back injuries usually improve, but can reoccur. The court held that this evidence was insufficient to justify permanent damages.

Where the injury complained of is *subjective* and of such a nature that laymen cannot, with reasonable certainty, know whether there will be future pain and suffering, it is necessary in order to warrant an instruction which will authorize the jury to award permanent damages that there be offered in evidence testimony by expert witnesses, either from personal knowledge and examination or hypothetical questions based upon the facts, that the plaintiff may, with reasonable certainty, be expected to experience future pain and suffering.

Mrs. Gillikin did not "get around all right now" either, but even with expert medical testimony she fell short of proof of permanent injury. Mrs. McCoy did not offer any expert medical testimony concerning the permanency of her injury, and, her injury being *subjective* rather than *objective,* she has not carried the burden of proof on this issue. *Dolan v. Simpson,* 269 N.C. 438, 152 S.E. 2d 523 (1967); *Callicutt v. Hawkins,* 11 N.C. App. 546, 181 S.E. 2d 725 (1971); *Hood v. Kennedy,* 5 N.C. App. 203, 167 S.E. 2d 874 (1969).

Reversed.

Judges MORRIS and PARKER concur.

MARY ELIZABETH TEACHEY (NATALE) v. JAMES DALE WOOLARD

No. 7212SC717

(Filed 25 October 1972)

1. **Damages §§ 3, 13— evidence of causal relationship between expenses and injury in question — evidence of permanency of injury**

In an action to recover for personal injuries and property damage sustained in an automobile collision, plaintiff presented sufficient evidence causally relating disputed medical and travel expenses to her injury sustained in the collision with defendant and presented sufficient evidence of the permanency of her injury to warrant introduction of mortuary tables into evidence.

2. **Automobiles § 45— evidence of guilty plea to criminal charge arising out of collision**

Evidence that defendant entered a plea of guilty to a traffic offense arising out of the same collision in which plaintiff sustained injuries was admissible in plaintiff's civil action for damages, though such evidence was not conclusive and could be explained.

3. **Automobiles §§ 50, 54— passing vehicle on right — sufficiency of evidence to withstand nonsuit**

The trial court properly denied defendant's motions for directed verdict and for judgment NOV where the evidence tended to show that plaintiff prepared to execute a left turn, that all oncoming traffic had stopped to permit the lead vehicle to execute a left turn, that as plaintiff began to turn left, defendant drove his vehicle from a position two cars to the rear of the lead vehicle preparing to turn left, thus overtaking and passing the two stopped cars on the right, and that defendant then collided with plaintiff, causing personal injury and property damage.

4. **Automobiles § 90— instruction on passing vehicle on right supported by evidence**

The trial judge did not err in charging the jury on G.S. 20-150(c) prohibiting the overtaking and passing of a vehicle proceeding in the same direction at any intersection, though he did not specifically refer to that statute, where there was evidence that defendant had violated its provisions and where there was no evidence that defendant was passing on the right pursuant to any of the provisions of G.S. 20-150.1.

APPEAL by defendant from *Hall, Judge,* 29 May 1972 Session of CUMBERLAND County Superior Court.

Plaintiff seeks to recover of defendant for personal injuries and property damage alleged to have been sustained on 15 October 1970 as a result of a collision between a Ford Mustang

automobile she was operating and a Mercury Cougar automobile being operated by the defendant. Defendant denies negligence and alleges contributory negligence.

Plaintiff's evidence tended to show that on 15 October 1970 at about 1:00 p.m. she was operating her automobile in a northerly direction on North Main Street within the town of Fuquay-Varina approaching the point where it is intersected by Wake Chapel Road; that prior to making a left turn into Wake Chapel Road, plaintiff gave a left turn signal and brought her vehicle to a complete stop; that at approximately the same time, oncoming southbound traffic on North Main Street also came to a complete stop with the lead vehicle making preparation to turn left into a private drive; that as plaintiff began to turn left into Wake Chapel Road, defendant drove his vehicle from a position two cars to the rear of the stopped southbound vehicle preparing to turn left into the private drive, thus overtaking and passing the two stopped vehicles on the right and then collided with the vehicle driven by the plaintiff which was then in the actual process of turning left into Wake Chapel Road.

There was also evidence that it was raining at the time, the highway was wet, and visibility was impaired. A local police officer testified that the intersection was wide enough for an automobile to overtake and pass on the right a vehicle preparing to turn left, but it was only designated and marked for one lane of traffic in either direction. He also testified that there was a traffic island at the intersection and double yellow center dividing lines on North Main Street as it proceeds southward and that there were no other traffic control signals or signs facing northbound traffic.

Defendant's motions for directed verdict at the close of plaintiff's evidence and again after he chose not to present any evidence in his behalf were denied.

The jury found defendant negligent and plaintiff free of any contributory negligence. Defendant's motion for judgment notwithstanding the verdict was denied and from a judgment awarding plaintiff $9,133 for personal injuries and $1,000 for property damage, defendant appealed.

Rudolph G. Singleton, Jr., for plaintiff appellee.

A. Maxwell Ruppe for defendant appellant.

MORRIS, Judge.

Defendant's assignments of error Nos. 1, 2, 3 and 5 all relate to the question of damages. Defendant contends that the plaintiff has introduced no evidence establishing a causal connection between her injury sustained in the collision of 15 October 1970 and the need for certain medical treatments, and therefore the admission of testimony concerning those treatments and the expenses incurred was error.

In question are certain chiropractic treatments that plaintiff received from 13 January 1972 until the time of trial, visits to three medical doctors starting in February of 1971 and continuing until January 1972, and transportation costs incurred in seeking the above mentioned medical care. Also defendant contends that plaintiff failed to plead and prove permanent injury and therefore the trial court erred in allowing the introduction of mortuary tables into evidence and in instructing the jury on the issue of permanent injury. We find no merit in defendant's contentions.

Plaintiff testified that before the collision on 15 October 1970 she had never had any back or neck trouble. Immediately after the accident she was treated at Womack Army Hospital at Fort Bragg for neck and back injuries. Plaintiff stated that from the first part of November 1970 until 11 January 1971, she was under the care of Dr. John Baluss, orthopedic surgeon, on an outpatient basis, and Dr. Baluss testified that he diagnosed plaintiff's injury as torn ligaments in both the neck and low back area. Dr. Baluss also testified that as of 11 January 1971 he felt that plaintiff's condition had reached a a tolerable level of discomfort and that he didn't find it necessary to treat her any further, recommending only home exercises for the future. Defendant's assignments of error do not relate to any of the medical expenses incurred before 11 January 1971.

However, Dr. Baluss also testified:

"My opinion was that she had some lasting harm to her low back area."

"I thought that she did not have, was not going to have complete, absolute restoration of her circumstances as it was before she was injured in October, 1970."

Plaintiff testified that after 11 January 1971, her neck ceased bothering her but that she continued experiencing pain in her lower back and sought treatment at various times from three other doctors plus chiropractic help, thereby incurring the medical and related travel expenses at issue. Dr. Erle Downing, chiropractor, also testified as to the treatments he administered to the plaintiff.

[1] The sensation of pain is a subjective experience, therefore the need for medical treatment in response may very well have to rest upon the creditability of the plaintiff's testimony. But the plaintiff in this case has shown more. Based on the above, we feel plaintiff has presented sufficient evidence causally relating the disputed medical and travel expenses to her injury sustained in the collision of 15 October 1971. It was for the jury to give her testimony whatever weight they saw fit on the question of damages. Also we are of the opinion that there was sufficient evidence of permanent injury to sustain the trial court's allowing the introduction of mortuary tables into evidence and upon which to base an instruction to the jury.

[2] Defendant also assigns as error the trial court's allowing into evidence a portion of a pretrial adverse examination pertaining to defendant's plea of guilty to a traffic offense arising out of the same collision. This assignment of error is equally without merit. While it is not clear from the record just what the traffic offense was, evidence that a defendant entered a plea of guilty to a criminal charge arising out of an automobile accident is generally admissible in a civil action for damages arising out of the same accident, although it is not conclusive and may be explained. *Grant v. Shadrick,* 260 N.C. 674, 133 S.E. 2d 457 (1963).

[3] Defendant next assigns as error the trial court's failure to grant his motions for directed verdict and judgment notwithstanding the verdict. He contends there was insufficient evidence of negligence on his part for submission of the issue to the jury and that plaintiff's own evidence showed contributory negligence on her part as a matter of law, in that she violated G.S. 20-154(a) in turning from a direct line without first seeing that such movement could be made in safety. In determining whether the trial court erred in passing on defendant's motions, all the evidence which supports the plaintiff's claim must be taken as true and viewed in the light most favorable to her,

giving plaintiff the benefit of every reasonable inference which may reasonably be drawn therefrom, with any contradictions, conflicts and inconsistencies resolved in her favor. *Maness v. Construction Co.*, 10 N.C. App. 592, 179 S.E. 2d 816 (1971), cert. denied 278 N.C. 522 (1971). We are of the opinion that on the evidence before it, the court properly submitted the issues of negligence and contributory negligence to the jury and properly denied defendant's motion for judgment notwithstanding the verdict.

[4] Finally, defendant assigns as error that portion of the trial judge's charge to the jury in which he instructed them that they should answer the question of defendant's negligence in favor of the plaintiff if they find by the greater weight of the evidence the following:

> " . . . that he overtook and passed another car preceding him in the same direction at an intersection of streets without being permitted to do so by a traffic officer or police officer, or that he passed the car in front of him on the right when the car in front of him was not giving a clear signal of intention to make a left turn or had not left sufficient room to pass to the right to permit passing in safety or that he turned from a direct line and attempted to pass the vehicle in front of him without exercising due care to see that he could make the movement in safety . . [and] that such negligence in any one or more of these respects was a proximate cause of the collision and resulting injuries and damages to the plaintiff . . . "

Defendant argues that the trial judge erred in instructing upon abstract principles of law and statutory provisions not presented by the allegations or the evidence. However, plaintiff did introduce evidence that showed that defendant passed two vehicles, on the right, at an intersection, while it was raining, while visibility was impaired, and we feel the evidence was sufficient to support the above charge.

While the trial judge made no specific reference to G.S. 20-150(c) in the above instruction, he did embody the substance of it in his charge. G.S. 20-150(c) reads in relevant part:

> "The driver of a vehicle shall not overtake and pass any other vehicle proceeding in the same direction at any rail-

way grade crossing nor at any intersection of highway unless permitted to do so by a traffic or police officer."

Violation of this section has been held to constitute negligence *per se* if injury proximately resulted therefrom. *Donivant v. Swaim,* 229 N.C. 114, 47 S.E. 2d 707 (1948).

There is also a statute, G.S. 20-150.1, which sets out specifically when passing on the right is permissible. This statute was not referred to by the trial judge in his charge. G.S. 20-150.1 reads in its entirety as follows:

"*When passing on the right is permitted.*—The driver of a vehicle may overtake and pass upon the right of another vehicle only under the following conditions:

(1) When the vehicle overtaken is in a lane designated for left turns;

(2) Upon a street or highway with unobstructed pavement of sufficient width which have been marked for two or more lanes of moving vehicles in each direction and are not occupied by parked vehicles;

(3) Upon a one-way street, or upon a highway on which traffic is restricted to one direction of movement when such street or highway is free from obstructions and is of sufficient width and is marked for two or more lanes of moving vehicles which are not occupied by parked vehicles;

(4) When driving in a lane designating a right turn on a red traffic signal light."

None of the evidence indicates that defendant was passing on the right pursuant to any of the four provisions of G.S. 20-150.1. There was no evidence that the overtaken vehicles were in lanes designated for left turns. By its own wording the statute permits passing on the right "only under the following conditions." Therefore, since there is no showing that the defendant was passing pursuant to any of the provisions of G.S. 20-150.1, we feel that it was not prejudicial for the trial judge to charge on G.S. 20-150(c).

It may have well been proper for the trial judge to instruct that passing on the right when not sanctioned by G.S. 20-150.1 also constitutes negligence *per se* if found to be the proximate

cause of the collision. It is well established that in the absence of specific provisions in particular statutes which are susceptible of a contrary interpretation, the violation of a motor vehicle traffic regulation constitutes negligence *per se. Correll v. Gaskins,* 263 N.C. 212, 139 S.E. 2d 202 (1964); 1 Strong, N.C. Index 2d, Automobiles, § 7, p. 383. Therefore, the language in the trial judge's charge which implies that passing on the right is permitted outside the provisions of G.S. 20-150.1 was actually more favorable to the defendant than had the court charged on the provisions of G.S. 20-150.1. We do not perceive that defendant was prejudiced by this portion of the charge.

Defendant does not carry forth his eighth assignment of error in his brief and it is deemed abandoned. Rule 28, Rules of Practice in the Court of Appeals of North Carolina.

In this trial we find

No error.

Judges CAMPBELL and PARKER concur.

DONALD BAIN HATHCOCK v. MALCOLM MONROE LOWDER

No. 7220SC504

(Filed 25 October 1972)

1. **Automobiles §§ 19, 57— intersection collision — stop sign down — instruction on yielding right of way proper**

The trial court properly instructed the jury with respect to the duty of the driver on the left to yield the right of way at an intersection where plaintiff and defendant approached an intersection at approximately the same time; plaintiff was on the dominant highway but to the left of defendant; defendant entered the intersection from the servient highway without stopping, as the stop sign controlling traffic from that highway had been removed from its post; defendant collided with the side of plaintiff's vehicle causing personal injuries to plaintiff. G.S. 20-155(a).

2. **Rules of Civil Procedure § 50— verdict for defendant — defendant's motion for judgment NOV improper**

Where defendant's motions for directed verdict made at the close of plaintiff's evidence and at the close of all the evidence were denied by the trial court and the jury returned a verdict for defendant,

defendant's motion for judgment NOV was improperly made and the order allowing it constituted error.

APPEAL by plaintiff from *Collier, Judge,* 31 January 1972 Session of STANLY County Superior Court.

Plaintiff seeks to recover damages for personal injuries arising out of a collision which occurred on 3 November 1969 at about 7:00 p.m. at the intersection of Rural Paved Road No. 1535 and Rural Paved Road No. 1534. Road No. 1534 runs east and west; road No. 1535 runs north and south. Plaintiff was driving west along No. 1534 in a car owned by a friend and defendant was driving south along No. 1535. Evidence tended to show that the automobile plaintiff was driving was struck on the right side by defendant's vehicle.

Plaintiff testified that he was familiar with the intersection; that he knew stop signs had been erected on either side of the intersection controlling the southbound and northbound traffic on No. 1535; and that he was unaware that the stop sign facing the southbound traffic (the direction in which the defendant was traveling) had been removed from its post.

Defendant testified as an adverse witness called by plaintiff that he was unfamiliar with the intersection; that he had not traveled over that particular road for approximately 19 years; and that he was maintaining a speed of approximately 35-40 miles an hour which was reduced to approximately 15-20 miles an hour immediately prior to impact. He also offered evidence tending to show that there were no double yellow lines on the highway leading to the intersection from the direction of his approach due to the recent resurfacing of No. 1535.

The issues of defendant's negligence and plaintiff's damages were submitted to the jury who answered the first issue "No", and therefore did not consider the second issue. From judgment entered 11 February 1972 predicated on the verdict in favor of defendant, plaintiff appealed.

Olive, Howard, Downer and Williams, by Carl W. Howard, for plaintiff appellant.

Coble, Morton and Grigg, by Warren L. Coble, and Jones, Hewson and Woolard, by Harry C. Hewson, for defendant appellee.

MORRIS, Judge.

Plaintiff's first and third assignments of error are not discussed in his brief and are deemed abandoned. Rule 28, Rules of Practice in the Court of Appeals of North Carolina.

[1] Plaintiff in his second assignment of error contends that the trial court erred in charging the jury on G.S. 20-155 (a) which provides:

> *"Right-of-way.*—(a) When two vehicles approach or enter an intersection and/or junction at approximately the same time, the driver of the vehicle on the left shall yield the right-of-way to the vehicle on the right except as otherwise provided in § 20-156 and except where the vehicle on the right is required to stop by a sign erected pursuant to the provisions of § 20-158 and except where the vehicle on the right is required to yield the right-of-way by a sign erected pursuant to the provisions of § 20-158.1."

Plaintiff further contends that his vehicle had the right-of-way at the intersection relying on the provisions of G.S. 20-158 (a) which provide in part:

> *"Vehicles must stop and yield right-of-way at certain through highways.*—(a) The State Highway Commission, with reference to State highways, and local authorities, with reference to highways under their jurisdiction, are hereby authorized to designate main traveled or through highways by erecting at the entrance thereto from intersecting highways signs notifying drivers of vehicles to come to full stop before entering or crossing such designated highway, and whenever any such signs have been so erected it shall be unlawful for the driver of any vehicle to fail to stop in obedience thereto and yield the right-of-way to vehicles operating on the designated main traveled or through highway and approaching said intersection . . . ."

Plaintiff argues that he had the right-of-way at the intersection, the stop sign having been erected pursuant to G.S. 20-158(a) making No. 1534 the dominant highway and No. 1535 the servient one, and that his rights were not changed just because the stop sign was missing at the time of the collision, relying on *Kelly v. Ashburn,* 256 N.C. 338, 123 S.E. 2d 775 (1962); and *Dawson v. Jennette,* 278 N.C. 438, 180 S.E. 2d 121 (1971), where the Court said at page 445:

> "Nothing else appearing, the driver of a vehicle having the right of way at an intersection is entitled to assume and to act, until the last moment, on the assumption that the driver of another vehicle, approaching the intersection, will recognize his right of way and will stop or reduce his speed sufficiently to permit him to pass through the intersection in safety. (Citations omitted.)"

There is evidence that the missing stop sign had been initially erected pursuant to the authority of G.S. 20-158.

In *Kelly,* the negligence of both the plaintiff and the defendant was at issue and the Court held that it was error for the trial judge peremptorily to instruct the jury *solely* on the law governing the right-of-way at an intersection at which no stop sign had been erected. The Court held that although plaintiff's right to rely on the assumption that defendant would stop was not lost by reason of the fact that the stop sign had been removed; nevertheless, defendant's rights and duties were to be governed by the provisions of G.S. 20-155(a).

In *Dawson v. Jennette, supra,* where the Court overturned a directed verdict in favor of defendant and remanded for a new trial, because viewing the evidence most favorably for the plaintiff it could be inferred that the agent-driver of the defendant passenger-owner whose vehicle was entering the intersection from a servient road was negligent in not keeping a proper lookout and that the defendant passenger-owner should have been familiar with the intersection and was negligent in failing to warn his driver, Justice Lake stated:

> "Were this suit against the driver of the Jennette vehicle, the second portion of *Kelly v. Ashburn, supra,* would be applicable, for the plaintiff's evidence is that she [driver] was not familiar with this intersection and so did not know that a stop sign had been erected there. Thus, had she known she was approaching an intersection, she would have reason to assume that she had the right of way over the Parks vehicle approaching from her left. (Citation omitted.)" *Dawson v. Jennette,* pp. 446-447.

In *Douglas v. Booth,* 6 N.C. App. 156, 159-160, 169 S.E. 2d 492 (1969), a case involving an intersection collision where a stop sign was also missing and where the evidence showed

that the defendant was unfamiliar with the intersection, and where only the negligence of the defendant was in issue, Judge Brock speaking for this Court stated:

> "Plaintiff was approaching from Booth's left and Booth was approaching from plaintiff's right. Under these circumstances Booth was entitled to rely on G.S. 20-155(a) granting the vehicle on the right the right of way when they both approach an intersection at approximately the same time. (Citations omitted.)"

Plaintiff also contends that G.S. 20-155(a) is inapplicable because the evidence shows that plaintiff's vehicle actually entered the intersection first before being struck by the defendant's automobile. The test of the applicability of G.S. 20-155(a) however is whether both vehicles approach or reach the intersection at "approximately the same time," and "the right of way . . . is not determined by a fraction of a second." *Dawson v. Jennette, supra,* p. 445. Here there is ample evidence that both vehicles did approach or reach the intersection at approximately the same time.

Under the facts of this case, the court properly instructed the jury on the provisions of G.S. 20-155(a). Plaintiff's assignments of error are overruled.

[2] At the conclusion of plaintiff's evidence, and at the conclusion of all the evidence, defendant moved for a directed verdict. The court denied the motions and allowed the case to go to the jury. Whether denial of the motion for directed verdict was error is not before us. The posture of the case on appeal is such that defendant is not required to so argue. Within 10 days of the entry of the judgment on the verdict, defendant moved for "entry of a judgment as if a motion for a directed verdict at the conclusion of all the evidence had been granted." This was done from an abundance of caution and in view of language in G.S. 1A-1, Rule 50(b)(2), which defendant construed as requiring such a motion "in order to permit an appellate court to direct entry of judgment in accordance with the motion."

The court on 19 February 1972 signed an order "that the motion for entry of judgment in accordance with the motion for directed verdict is granted and judgment is entered accordingly, judgment having already been entered in favor of

the defendant on the verdict of the jury." Plaintiff also appealed from this order. G.S. 1A-1, Rule 50(b)(1) provides:

> "Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the submission of the action to the jury shall be deemed to be subject to a later determination of the legal questions raised by the motion. Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. In either case the motion shall be granted if it appears that the motion for directed verdict could properly have been granted. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the judge may allow the judgment to stand or may set aside the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the judge may direct the entry of judgment as if the requested verdict had been directed or may order a new trial. Not later than ten (10) days after entry of judgment or the discharge of the jury if a verdict was not returned, the judge on his own motion may, with or without further notice and hearing, grant, deny, or redeny a motion for directed verdict made at the close of all the evidence that was denied or for any reason was not granted."

We think it clear that the language of the Rule presupposes that its provisions are applicable only to situations in which the party moving for a directed verdict has his motion denied and the verdict of the jury is *adverse* to his position. The fact that the Rule provides that a motion for a new trial may be joined with the motion for judgment notwithstanding the verdict as prayed for in the alternative, in our opinion, substantiates this position. It is inconceivable that a party who has won before the jury would seek a new trial. We are of the opinion and so hold that defendant's motion for judgment notwithstanding the verdict was improvidently made and that the

order allowing it was improvidently entered and entry thereof constituted error. The order signed 19 February 1972 allowing the motion for judgment notwithstanding the verdict is vacated and in the trial resulting in judgment on the verdict, entered 11 February 1972, we find no error.

As to order of 19 February 1972: vacated.

As to judgment entered on the verdict: no error.

Judges BROCK and HEDRICK concur.

IN RE: MOSS TRUCKING COMPANY, INC. AND McLEOD TRUCKING & RIGGING COMPANY, INC.

No. 7210SC525

(Filed 25 October 1972)

1. **Taxation § 24— over-the-road vehicles — tax situs**

Unless some other subsection of G.S. 105-302 otherwise provides, G.S. 105-302(a), for purposes of determining ad valorem taxes, requires that certain long-haul over-the-road vehicles of taxpayers be listed in Charlotte Township where appellants maintain their principal place of business rather than in Paw Creek section of Mecklenburg County where they maintain an enclosed location with a railroad siding next to it at which freight is infrequently handled.

2. **Taxation § 24— location where personal property situated — tax situs**

G.S. 105-302(d) providing that the tax situs for personal property be determined with respect to where the property is situated rather than to where the owner resides or has his principal place of business is not applicable in this case involving over-the-road vehicles, since their occasional temporary parking or their occasional visits to load or unload freight at a location other than that of appellant's principal place of business was insufficient to establish that the vehicles had become "situated" at any particular location within the meaning of G.S. 105-302(d).

APPEAL by Moss Trucking Company, Inc., and McLeod Trucking & Rigging Company, Inc. from *Canaday, Judge,* 28 February 1972 Session of Superior Court held in Wake County.

This appeal presents the question whether the correct tax situs for ad valorem tax purposes of certain long-haul over-the-road vehicles owned by Moss Trucking Company, Inc.

(Moss) and by McLeod Trucking & Rigging Company, Inc. (McLeod) was within the City of Charlotte, where taxpayers maintained their principal offices, or in the Paw Creek section of Mecklenburg County outside the City of Charlotte, where taxpayers maintained a storage area. For 1969 the taxpayers listed the vehicles for ad valorem taxes as being taxable by Mecklenburg County but not by the City of Charlotte. By appropriate proceedings taken in apt time the Mecklenburg County Board of Equalization and Review (the County Board) ruled that the vehicles here involved had a taxable situs in the City of Charlotte. Taxpayers appealed this decision to the North Carolina State Board of Assessment (the State Board), sitting as the State Board of Equalization and Review. The State Board held a hearing on the matter in Raleigh on 9 December 1969. At this hearing the parties stipulated that the appeal was properly before the State Board and that the case of Moss and the case of McLeod should be joined and considered as one case. They also stipulated that the principal office of the taxpayers was within the City Limits of Charlotte and in Charlotte Township, that the only property involved in this controversy consisted of 245 over-the-road vehicles owned by the taxpayers, being 195 tractors and trailers owned by Moss and 25 trailers, 4 tractors, 14 trucks and 7 cranes owned by McLeod, and that the tax valuation of these units was not in controversy. After receiving evidence presented by taxpayers and by Mecklenburg County the State Board entered its order dated 14 January 1970 in which it made the following findings of fact:

"(1) That both appellants are North Carolina corporations with their principal offices at 3027 North Tryon Street, within the city limits of Charlotte, Mecklenburg County, North Carolina.

(2) That Moss is engaged in the business of heavy-duty hauling in 20 to 25 states on the eastern seaboard.

(3) That McLeod is engaged in the business of rigging and crane work in the southeastern states.

(4) That in addition to the principal office wherein all administrative activities of appellants are carried on, the Tryon Street location also contains the appellants' operations office, equipment repair and maintenance facilities and storage facilities for rigging and repair parts.

(5) That the North Tryon Street location contains approximately 3 acres of land and could provide parking space for about 16% of appellants' vehicles.

(6) That in addition to the above location, appellants also rent a location containing approximately 5.48 acres, which is in the Paw Creek section of Mecklenburg County, outside the City of Charlotte.

(7) That the Paw Creek location has a railroad siding next to it with a spur track running into it.

(8) That this location is entirely enclosed with a chain link fence and the gates are normally locked.

(9) That this location is not normally attended, has no employees assigned to it and has no power or telephone facilities.

(10) That on one occasion in March or April, 1969, this location was used for unloading from rail cars approximately 5,000,000 pounds of steel owned by U. S. Steel Corporation and reloading it on appellants' trailers for delivery to highway job sites.

(11) That at other times during the year, varying amounts of freight may be handled at this location, but there have been no other occasions when any substantial amount of freight was handled there.

(12) That this location is also used for storage of materials, junked or broken down equipment, and on occasion, some of the vehicles involved in this appeal.

(13) That the 245 vehicles involved in this appeal are over-the-road vehicles, which in their normal operation, are either in movement from one place to another or are located at a job site on a more or less temporary basis.

(14) That in their normal operation, the vehicles are not permanently located at any place.

(15) That none of the vehicles in question are permanently based at the Paw Creek location.

(16) That the only time a significant number of the vehicles in question are at either the Charlotte or Paw Creek location is during the Christmas holidays, from about December 20 to January 2 or 3.

(17) That even at this time, only a small percentage of the total number of the vehicles in question are at the two locations.

(18) That all of the vehicles in question are dispatched from the North Tryon Street location.

(19) That all maintenance and repair work on the vehicles in question is done at the North Tryon Street location.

(20) That the drivers of the vehicles in question are instructed to leave the vehicles at the North Tryon Street location when they are in overnight."

Upon these findings of fact the State Board concluded that the vehicles involved in this appeal had a taxable situs in the City of Charlotte as well as in Mecklenburg County, and affirmed the decision of the County Board. On appeal to the Superior Court, by order dated 28 February 1972 the court sustained the order of the State Board, and from this ruling the taxpayers have appealed to the Court of Appeals.

Bryan, Jones, Johnson, Hunter & Greene by Robert H. Jones for appellants.

Ruff, Perry, Bond, Cobb, Wade & McNair by Hamlin L. Wade for Mecklenburg County, appellee.

PARKER, Judge.

Decision of this appeal is controlled by *In re Freight Carriers,* 263 N.C. 345, 139 S.E. 2d 633 and by *In re Trucking Co.,* 281 N.C. 242, 188 S.E. 2d 452. As in the last cited case, citations to the General Statutes in this opinion must be understood as relating to the statutes in effect in 1969, both as to section numbers and as to content.

[1] By G.S. 105-302(a), except as otherwise provided in that section, all tangible personal property shall be listed in the township in which the owner has his residence. This statute expressly provides that the residence of a corporation shall be the place of its principal office in this State. Appellants have stipulated that their principal office in this State is within the City of Charlotte and in Charlotte Township. Therefore, under G.S. 105-302(a) their tangible personal property must be listed

in Charlotte Township, unless some other subsection of G.S. 105-302 otherwise provides. Appellants contend that such is the case and that the correct taxable situs of their property here in question is controlled by subsection (d) of G.S. 105-302, which, insofar as pertinent to this appeal, provides that "tangible personal property shall be listed in the township in which such property is situated, rather than in the township in which the owner resides, if the owner or person having control thereof hires or occupies a store, mill, dockyard, piling ground, place for the sale of property, shop, office, mine, farm, place for storage, manufactury or warehouse therein for use in connection with such property." Speaking of a similar contention made by the taxpayer in the case of *In re Trucking Co., supra,* Lake, J., writing the opinion of the Court, said (p. 250):

> "This contention cannot be sustained for the reason that the tractors and trailers in question were not 'situated' on the lot in Broadbay Township owned by McLean and designated by it as a place for storage of such property. *In re Freight Carriers,* 263 N.C. 345, 139 S.E. 2d 633. As of 1 January 1969, and for many months prior thereto, none of these vehicles was stored upon this lot or elsewhere in Broadbay Township, if, indeed, they ever were there. Consequently, Winston Township was the tax situs of these tractors and trailers as of 1 January 1969 and they should have been listed for 1969 taxes therein."

[2] In the present case, the president and sole owner of both Moss and McLeod, appearing as a witness for the taxpayers at the hearing before the State Board, testified on cross-examination that:

> "[T]he Paw Creek location is not used as a storage for equipment because the equipment generally isn't in storage, generally it is on the way from one place to another. . . . [T]he company doesn't have any equipment permanently based at the Paw Creek location and the company doesn't move the equipment from the Paw Creek location because all of the equipment is generally on the move rather than permanently stationed anywhere . . . . "

This testimony fully supported the finding of fact made by the State Board that the 245 over-the-road vehicles here involved in their normal operation "are not permanently located

at any place" but "are either in movement from one place to another or are located at a job site on a more or less temporary basis." This crucial finding, being supported "by competent, material, and substantial evidence in view of the entire record as submitted," G.S. 143-315, is binding upon the courts on this appeal. *In re Appeal of Broadcasting Corp.*, 273 N.C. 571, 160 S.E. 2d 728; *In re Pine Raleigh Corp.*, 258 N.C. 398, 128 S.E. 2d 855. In turn, this factual finding supports the State Board's conclusion that taxpayers' over-the-road vehicles here involved were not "situated" at the Paw Creek location within the meaning of that word as used in G.S. 105-302(d). *In re Freight Carriers, supra.* We agree with the State Board's further conclusion that an occasional temporary parking or an occasional visit to load or unload freight is not sufficient to establish that the vehicles in question had become "situated" at any particular location within the meaning of G.S. 105-302(d).

The order of the Superior Court here appealed from which sustained the order and decision of the State Board is

Affirmed.

Judges CAMPBELL and MORRIS concur.

STATE OF NORTH CAROLINA v. JOHN ANDERSON HOLLOWAY

— AND —

STATE OF NORTH CAROLINA v. LARRY GREGORY JONES

No. 7214SC722

(Filed 25 October 1972)

1. **Constitutional Law § 34; Criminal Law § 26— second degree murder — plea of former jeopardy properly denied**

Defendant's contention that he was subjected to double jeopardy in his second trial for second degree murder resulting from the failure of the court at his first trial to submit a possible verdict of second degree murder, such failure being tantamount to an acquittal of the charge of murder in the second degree, was untenable where the court at the first trial submitted the possible verdict of "aiding and abetting Phillip Jones or John Holloway in the offense of second degree murder."

2. **Criminal Law §§ 40, 91— motion to use transcript from former trial — motion to continue — denial within discretion of trial court**

Denial of defendants' motions to continue and to use the transcript of testimony of a witness from a previous trial did not con-

stitute abuse of discretion where the motion to continue was not supported by affidavits setting out the reasons for the motion and where no showing was made of attempts to secure presence of the witness whose transcript defendants sought to introduce.

3. Criminal Law § 43— photograph admissible — no limiting instruction requested

The trial court did not err in a murder prosecution in allowing the jury to examine a photograph of deceased without instructing that the photograph could be considered only for the purpose of illustrating the testimony of a witness, since such limiting instruction is not required, absent a timely request therefor.

4. Criminal Law § 169— prejudicial evidence excluded — motion for mistrial properly denied

Motion for mistrial was properly denied where any possible prejudice which might have resulted from an improper question was cured by the trial court's prompt action in sustaining defendants' objection to the question and directing the jury to disregard the question and answer.

5. Criminal Law § 80— admissibility of testimony given from notes of police officer

A police officer could properly testify from notes typed by a third person some three months after the alleged homicide, as the recorded past recollection of a witness may properly be read by that witness.

APPEAL by defendants from *Martin, Robert M., Judge,* 13 March 1972 session of Superior Court held in DURHAM County.

Defendants John Anderson Holloway and Larry Gregory Jones were charged in bills of indictment, proper in form, with murder. Upon defendants' pleas of not guilty, the State offered evidence tending to show the following.

The deceased, William Worsley, died of a .22 caliber gunshot wound which pierced the brain, producing hemorrhage and death. The gunshot wound was inflicted at the home of James Albert Jones where deceased was a guest during the night of Saturday and early morning of Sunday, 12 and 13 April 1969. In the early morning hours of Sunday, the defendant John Holloway and his son Larry Jones pushed their way into the Jones' home. Holloway was carrying a shotgun and Larry Jones was carrying a .22 caliber rifle. The deceased and Holloway began fighting over the shotgun and they "scuffled" into the kitchen with defendant Larry Jones in pursuit. Larry Jones fired the rifle as he entered the kitchen and a second shot was fired "a minute or two later." After the second shot, Larry

Jones stated: "Turn that damn door aloose or I am going to kill you." Phillip Jones, Larry's brother, entered the kitchen through a rear door, carrying a "long gun." A third shot was fired; whereupon, defendants Holloway and Larry Jones and Phillip Jones exited through the front door.

Patrolman Day of the Durham Police Department was present when Officer Hales of the Durham Police Department arrived at the James Jones home at approximately 3:00 a.m. The deceased was lying face down with a hole in his head and Officer Day believed that he was dead. Three unexpended shotgun shells and two expended .22 caliber rifle shells were on the floor.

After their investigation at the James Jones residence, Officers Day and Owens proceeded to the home of John Holloway where they found Larry Jones seated on a sofa inside and Holloway in the back yard, with a .22 caliber rifle. Unexpended cartridges and shotgun shells were found in the pockets of both Holloway and Larry Jones. A .22 caliber rifle and a shotgun were found approximately 75 feet behind the Holloway home, near a trash can.

After being advised of his constitutional rights, defendant Holloway stated, "I know all of that, I know you, I done you a favor, I shot him."

On the basis of information furnished him by witnesses in the James Jones home, Detective Cameron proceeded to arrest Phillip Jones, charging him also with the homicide of the deceased.

Defendant Larry Jones testified that on Saturday, 12 April 1969, the deceased came to the home of defendant Holloway at approximately 2:00 p.m. and said, "Larry, my wallet is missing, and I don't know who got it, but I am going to shoot you and your father and your brother if I don't get it." At approximately 11:30 p.m. that night, the deceased returned to the Holloway home and stated, "You better get ready I will be back to shoot up the place." A few minutes later, deceased fired one or two shots. Defendants were concerned for the safety of Phillip Jones. They armed themselves with a .22 caliber rifle and a shotgun and went to the home of James Jones. After entering the home of James Jones, Worsley attacked defendant Holloway " . . . by grabbing the shotgun and saying,

'I am going to kill you, you son of a bitch.' " Defendant Holloway was pulled into the kitchen by the deceased and was thrown to the floor. Worsley then began fighting defendant Larry Jones and managed to pick up the rifle Larry Jones had been carrying and aim it at Larry Jones. At that point, a shot was fired, and defendant Larry Jones "turned around and saw his brother Phillip there with a 22 rifle in his hand."

Lewis Edward Green testified that shortly before midnight, 12 April 1969, he saw the deceased carrying a rifle and was told by the deceased that "he was going to kill the Holloways. That is Larry Jones and Phillip. That Worsley said a pocketbook band watch and something was stole from him and he was going to kill them."

Ann Belcher testified that the deceased stated to her at approximately 11:00 p.m., 12 April 1969, "Annie, don't be in John Holloway's house between 11:30 and 12:00 o'clock . . . I'm going to shoot this house up."

Grover Neal, a roomer in the Holloway home, testified that on Sunday, 13 April 1969, he found a bullet stuck in the side of the door facing and a broken window in the Holloway home.

Numerous witnesses testified that the deceased had the reputation of a dangerous man in the community.

Each defendant was found guilty of second degree murder. From judgments imposing prison sentences of eight to ten years, Larry Jones, and eighteen to twenty years, John Holloway, defendants appealed.

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

James R. Patton and C. Horton Poe, Jr., for defendant appellants.

HEDRICK, Judge.

[1] Defendant, Larry Jones, assigns as error the court's denial of his plea of "former jeopardy." At the 7 July 1969 session of Superior Court held in Durham County, the defendants Larry Jones and John Holloway along with Phillip Jones were tried under separate bills of indictment charging them with the murder of William Worsley. At the first trial, defendant Larry

Jones was found "guilty of aiding and abetting Phillip Jones or John Holloway in the offense of murder in the second degree." On appeal, this court awarded all three defendants a new trial when it appeared that the court committed error in not submitting to the jury a possible verdict of manslaughter. *State v. Holloway,* 7 N.C. App. 147, 171 S.E. 2d 475 (1970). Larry Jones now contends that the trial court's failure at his first trial to submit a possible verdict of second degree murder was tantamount to an acquittal of the charge of murder in the second degree, and that his plea of "former jeopardy" should have been sustained. This contention has no merit simply because the judge at the first trial, by submitting the possible verdict of "aiding and abetting Phillip Jones or John Holloway in the offense of second degree murder," in effect did submit a possible verdict of murder in the second degree. *State v. Holloway, supra; State v. Johnson,* 272 N.C. 239, 158 S.E. 2d 95 (1967); *State v. Taft,* 256 N.C. 441, 124 S.E. 2d 169 (1962); *State v. Peeden,* 253 N.C. 562, 117 S.E. 2d 398 (1960); *State v. Spencer,* 239 N.C. 604, 80 S.E. 2d 670 (1954).

[2] Assignments of error two, three and four relate to the court's denial of the defendants' motion to consolidate their trial with that of Phillip Jones, and with the denial of their motions to continue and to use the transcript of the testimony of Phillip Jones from the previous trial.

Ostensibly, the defendants sought to have their case continued so they could obtain the presence of Phillip Jones as a witness; however, their motion to continue was not supported by affidavits setting out the reasons for the motion. Furthermore, their motion to use the transcript of testimony of Phillip Jones from a previous trial was not supported by affidavits setting out either the reasons therefor or what they had done to secure his presence as a witness. Indeed, in response to the judge's inquiry as to what had been done to secure the presence of the witness, counsel for defendants stated that they had done nothing. Such motions are addressed to the discretion of the trial judge and his rulings thereon will not be upset on appeal absent a showing of such abuse of discretion as would deprive the defendants of a fair trial. *State v. Fox,* 274 N.C. 277, 163 S.E. 2d 492 (1968); *State v. Gibson,* 229 N.C. 497, 50 S.E. 2d 520 (1948); *State v. Walker,* 6 N.C. App. 447, 170 S.E. 2d 627 (1969), cert. denied 277 N.C. 117 (1970); 29 Am. Jur. 2d *Evidence* § 755 (1967). Defendants

have failed to show any abuse of discretion by the trial judge in denying their several motions. These assignments of error are overruled.

[3] Defendants next assign as error that "the Court permitted the State to hand the Jury, for their own personal examination, seven (7) photographs of the deceased that had been used for the purpose of illustrating without further instructing the Jury that the photographs could only be used to illustrate the testimony of a witness." This contention is without substance for it appears that only one photograph of the body of the deceased was exhibited to the jury. Furthermore, absent a timely request, the failure to give a limiting instruction is not prejudicial error. *State v. Casper,* 256 N.C. 99, 122 S.E. 2d 805 (1961), cert. denied 376 U.S. 927, 11 L.Ed. 2d 622, 84 S.Ct. 691 (1964); *State v. Cade,* 215 N.C. 393, 2 S.E. 2d 7 (1939).

[4] Defendants assert that the trial court erred in failing to grant a mistrial after the solicitor asked a witness about a verdict at a previous trial. Any possible prejudice which might have resulted from the question was cured by the trial court's prompt action in sustaining defendants' objection to this question and in directing the jury to disregard the question and answer. The court did not err in denying the motion for mistrial.

[5] Defendants next contend that the trial court erred in "permitting a police officer to testify on rebuttal from police notes typed by a third person some three months after the alleged homicide and to read from the police records alleging statements that the defendant had made." The recorded past recollection of a witness may properly be read by that witness. Stansbury, N.C. Evidence 2d § 33 (1963). The fact that the report may not have been recorded until several months after the event lessens the weight that should be attributed to that statement, but does not render it incompetent. This assignment of error is overruled.

Defendants next challenge the trial court's denial of their motions for judgments as of nonsuit. There was sufficient evidence to require submission of the case to the jury and to support the verdict.

All of the defendants' assignments of error, including those based on exceptions to the court's instructions to the jury, have been carefully considered and found to be without merit.

We hold that the defendants had a fair trial free from prejudicial error.

No error.

Judges VAUGHN and GRAHAM concur.

IN RE: NORTHWESTERN BONDING CO., INC., WILLIAM H. DAYTON, AMERICAN BONDING CO., INC., JACK E. MORGAN AND GROVER CLEVELAND MOONEYHAM (APPELLANT)

No. 7228SC572

(Filed 25 October 1972)

1. **Appeal and Error § 6— denial of motion to dismiss — denial of motion for jury trial — interlocutory order**

An order denying a motion to dismiss a complaint seeking disciplinary action against an attorney and denying a request for a jury trial is interlocutory and not subject to appeal before trial and final judgment. G.S. 1-277.

2. **Attorney and Client § 10— discipline and disbarment of attorneys — statutory and judicial methods**

In North Carolina there are two methods by which disciplinary action or disbarment may be imposed upon attorneys—statutory and judicial; the judicial method is not dependent upon statutory authority, but arises because of a court's inherent authority to take disciplinary action against attorneys licensed before it, an authority extending even to matters not pending in the particular court exercising the authority.

3. **Attorney and Client § 10— discipline or disbarment of attorney — sufficiency of complaint**

Complaint alleged sufficient facts to subject an attorney to disciplinary action or disbarment where it alleged that the attorney and a bondsman told a person charged with drunken driving that his license could be saved for $1,000, that the accused paid that amount to the attorney and the attorney told him he had "been tried and found not guilty," that prior to the trial date the warrant, bond and shuck file relating to the drunken driving case disappeared from the clerk's office, that a new warrant was issued and the accused was tried under that warrant, that the bondsman returned $1,000 to the accused before the trial and a new bond was made without charge, and that the attorney appeared for the accused in the trial without charge.

4. Attorney and Client § 10— disciplinary and disbarment proceeding — judicial method — jury trial

An attorney does not have the right to a trial by jury in a judicial disciplinary or disbarment proceeding.

APPEAL by respondent, Grover C. Mooneyham, from *Martin (Harry C.), Judge,* 22 May 1972 Session of Superior Court held in BUNCOMBE County.

Civil action seeking, among other things, disciplinary action against respondent, Grover C. Mooneyham, as an attorney licensed to practice in this State.

On 1 May 1972 the solicitor for the 28th Solicitorial District filed a sworn complaint in the Superior Court of Buncombe County. The first of two counts in the complaint alleges in substance the following:

On 13 January 1971, Edgar Ernest Bell was arrested in Buncombe County and charged with violating G.S. 20-138 (operating a vehicle while under the influence of intoxicating liquor). He was cited to appear in District Court for trial on 1 February 1971 and his bond in the sum of $300.00 was made by Northwestern Bonding Co., Inc. Bell told Jack Morgan, an agent of Northwestern, that he wished to forfeit his bond and paid Morgan $300.00 "in addition to $60 which Morgan said represented an attorney's fee in the forfeiture proceedings." Morgan later sent word to Bell that he thought he knew a way to save Bell's driver's license. The two men then met with respondent Mooneyham, a licensed attorney, in Mooneyham's office. Mooneyham and Morgan advised Bell that his license could be saved for approximately $1,000.00, with the $300.00 which had been paid previously being credited against that amount. On 30 January 1971, Bell paid $700.00 to Mooneyham, and told Mooneyham that he did not want a capias issued for him. Mooneyham replied: "[Y]ou have been tried and found not guilty." Prior to the trial date, the warrant, bond, and shuck file relating to the case against Bell disappeared. The clerk's office, not having given the case a number, has no index record of the original case. When the arresting officer discovered that the clerk's office had no record of the case, a new warrant was issued and Bell was tried under the new warrant on 14 February 1972. Morgan returned $1,000.00 to Bell before trial, and a new bond for Bell was made without charge by American Bonding Co., Inc. Morgan is now president

and agent of that company. Mooneyham appeared for Bell at the trial in District Court and did not ask for or receive any attorney's fee. Bell was convicted and appealed to Superior Court where he was represented by another lawyer and again convicted.

Allegations in count two of the complaint have been stricken as to Mooneyham.

Based upon the sworn allegations in the complaint, Judge Thornburg signed an order directing Mooneyham to appear in Superior Court at a time specified for the purpose of showing cause why disciplinary action should not be taken against him as an attorney at law. The complaint and order to show cause were served on Mooneyham, and he personally appeared and agreed to file answer on or before 17 May 1972. On that date Mooneyham filed an answer admitting that he appeared for Bell in District Court as alleged in the complaint. Other allegations in the complaint pertaining to Mooneyham, except for the allegation that he is a licensed and practicing attorney, are denied.

On 22 May 1972 Judge Martin entered an order denying Mooneyham's motion to dismiss the complaint, and also denying a request for a jury trial made in Mooneyham's answer. Mooneyham appeals from this order.

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

Uzzell and DuMont by Harry DuMont for respondent appellant, Grover Cleveland Mooneyham.

GRAHAM, Judge.

[1] The order appealed from is interlocutory, and in our opinion, it is not subject to appeal before trial and final judgment. G.S. 1-277; Rule 4, Rules of Practice in the Court of Appeals as amended 20 January 1971. We nevertheless elect to treat the appeal as a petition for certiorari, allow it and consider the questions raised on their merits.

Appellant contends the Superior Court has no subject matter jurisdiction. In support of this contention he argues that authority to discipline or disbar attorneys for conduct such as alleged in the complaint has been delegated exclusively to

the North Carolina State Bar. This contention cannot be sustained.

[2] It is true that by virtue of G.S. 84-28 to 32, questions relating to the propriety and ethics of an attorney are ordinarily for the consideration of the North Carolina State Bar. *In re Burton,* 257 N.C. 534, 126 S.E. 2d 581; *McMichael v. Proctor,* 243 N.C. 479, 91 S.E. 2d 231. G.S. 84-36 specifically provides, however, that the provisions of these statutes are not to be construed as disabling or abridging the inherent powers of a court to deal with its attorneys. Furthermore, it has been held repeatedly that in North Carolina there are two methods by which disciplinary action or disbarment may be imposed upon attorneys—statutory and judicial. *In re Burton, supra; In re Gilliland,* 248 N.C. 517, 103 S.E. 2d 807; *In re West,* 212 N.C. 189, 193 S.E. 134; *Committee on Grievances of Bar Association v. Strickland,* 200 N.C. 630, 158 S.E. 110; *In re Stiers,* 204 N.C. 48, 167 S.E. 382. The judicial method is not dependent upon statutory authority. It arises because of a court's inherent authority to take disciplinary action against attorneys licensed before it; an authority which extends even to matters which are not pending in the particular court exercising the authority. This power is based upon the relationship of the attorney to the court and the authority which the court has over its own officers to prevent them from, or punish them for, acts of dishonesty or impropriety calculated to bring contempt upon the administration of justice. *In re Burton, supra; State v. Spivey,* 213 N.C. 45, 195 S.E. 1.

[3] Appellant next challenges the sufficiency of the complaint, contending that the facts alleged therein do not charge him with any act which would subject him to discipline or disbarment. Misconduct of a serious nature is so manifest from the allegations in the complaint that this contention may be rejected without discussion.

[4] Appellant's final contention is that the court erred in denying his motion for a jury trial. This raises a more difficult question. Appellant cites the case of *State v. Parrish,* 254 N.C. 301, 118 S.E. 2d 786, for the proposition that a license to engage in the practice of law is a property right that cannot be taken away without due process of law. There can be no argument as to this principle. *Ex parte Wall,* 107 U.S. 265, 2 S.Ct. 569, 27 L.Ed. 552; *In re Burton, supra; In re West, supra.* The essential

question, however, is whether "due process" in an action of this sort encompasses a right to a trial by jury. If the action were based on the statutory procedure, the answer would be "yes" because G.S. 84-28 expressly grants a right to trial by jury, upon appeal from the council of the Bar, on the written evidence of the issues of fact arising on the pleadings. *In re Gilliland, supra.* The procedure employed here, however, is not statutory. It is judicial, and we find no statute which provides for a jury trial when the judicial method is employed to seek disciplinary action against an attorney practicing in this State.

While the question here involved has apparently never been precisely presented to our Supreme Court, in the case of *In re Burton, supra,* the court discussed at length the due process requirements of both the statutory and judicial methods. It is pointed out in that opinion that under the statutory method there must be a written complaint, notice to the accused, an opportunity to answer and to be represented by counsel, a hearing before a committee conducting proceedings in the nature of a reference, and a *trial by jury unless waived.* Under the judicial method, it is said that "where the attorney pleads guilty or is convicted in another court, or the conduct complained of is not related to litigation pending before the court investigating attorneys' alleged misconduct, the procedure, to meet the test of due process, must be initiated by a sworn written complaint, and the court should issue a rule or order advising the attorney of the specific charges, directing him to show cause why disciplinary action should not be taken, and granting a reasonable time for answering and preparation of defense, and attorney should be given full opportunity to be heard and permitted to have counsel for his defense." *In re Burton, supra* at 544, 126 S.E. 2d at 588-589. We think it is significant that, in outlining the due process elements of the judicial method, the court did not mention a right to trial by jury. On the other hand, it stated that "[w]here issues of fact are raised the court may appoint a committee to investigate and make report." *In re Burton, supra* at 544, 126 S.E. 2d at 589. Several cases are cited where no jury trial was afforded and an investigative committee was utilized. *Attorney General v. Gorson,* 209 N.C. 320, 183 S.E. 392; *Attorney General v. Winburn,* 206 N.C. 923, 175 S.E. 498; *In re Stiers, supra; Committee on Grievances of Bar Association v. Strickland, supra.*

It is almost universally held that in the absence of a statute so providing, procedural due process does not require that an attorney have a jury trial in a disciplinary or disbarment proceeding. See 7 Am. Jur. 2d, Attorneys at Law, § 63, and cases cited. Traditionally, only a small minority of states have provided for a jury trial in any type of disbarment proceeding. 14 N.C.L. Rev. 374; 45 Harv. L.Rev. 737; 11 Tex. L.Rev. 28. See also *Ex parte Thompson,* 228 Ala. 113, 152 So. 229, 107 A.L.R. 671, which extensively reviews the position of the various states with respect to affording jury trials in proceedings of this nature.

A disbarment proceeding is usually considered civil in nature rather than criminal. *In re Gilliland, supra; In re West, supra.* Appellant contends that Article 1, Section 25 of the North Carolina Constitution applies here as in other civil proceedings. This section provides: "*Right of jury trial in civil cases.* In all controversies at law respecting property, the ancient mode of trial by jury is one of the best securities of the rights of the people, and shall remain sacred and inviolable." However, the right to jury trial preserved under this section applies only in cases in which the prerogative existed at common law or by statute at the time the Constitution was adopted. *In re Wallace,* 267 N.C. 204, 147 S.E. 2d 922; *Belk's Department Store, Inc. v. Guilford County,* 222 N.C. 441, 23 S.E. 2d 897.

An attorney had no right at common law to trial by jury when called upon by a court to answer allegations of misconduct bearing upon his fitness as an officer of the court. *Ex parte Wall, supra; Ex parte Thompson, supra; In re Carver,* 224 Mass. 169, 112 N.E. 877 (1916). As stated in the case of *Ex parte Wall, supra,* "[i]t is a mistaken idea that due process of law requires a plenary suit and a trial by jury, in all cases where property or personal rights are involved." In that case the Supreme Court of the United States refused a disbarred attorney's petition which sought to have the order of his disbarment vacated. The attorney, who had been convicted of no offense, was not afforded a trial by jury on the factual issues raised by a trial court's charge that he did "engage in and with an unlawful, tumultuous and riotous gathering, he advising and encouraging thereto, take from the jail . . . and hang by the neck until he was dead, one John. . . . " The Supreme Court reviewed extensively the procedures followed at common law and in the various states and concluded that "in the present

case, due notice was given to the petitioner, and a trial and hearing was had before the court, in the manner in which proceedings against attorneys, when the question is whether they should be struck off the roll, are always conducted."

We find no evidence that a right to trial by jury in a case of this nature existed by statute in this State at the time our Constitution was adopted. In 1871 a statute was enacted which provided: "That no person who shall have been duly licensed to practice law as an attorney, shall be debarred or deprived of his license and right so to practice law either permanently or temporarily, unless he shall have been convicted or in open court confessed himself guilty of some criminal offense, showing him to be unfit to be trusted in the discharge of the duties of his profession." Ch. 216, § 4, [1871], Public Laws of N. C. 336 at 337. This statute was subsequently held to take from the court the common law power to purge the bar of unfit members, except in the cases specified. See *Ex parte McCown,* 139 N.C. 95, 51 S.E. 957; *In re Gorham,* 129 N.C. 481, 40 S.E. 311; *In re Oldham,* 89 N.C. 23; *Kane v. Haywood,* 66 N.C. 1; *Ex parte Schenck,* 65 N.C. 353. The effect of the statute, as construed in these cases, was to deprive a court of the authority to disbar an attorney unless he was convicted by *a jury* or confessed in open court when charged in a bill of indictment. This statute was repealed in 1933. Before its repeal, the Supreme Court noted that the statute "was not intended to restrict the right to disbar in cases calling for disbarment which was not imposed under the power to punish for contempt. There has been some confusion in not distinguishing between disbarment for contempt, which was restricted by the statute, and disbarment on account of the misconduct of counsel in matters affecting his fitness to be a member of the bar." *McLean v. Johnson,* 174 N.C. 345, 348, 93 S.E. 847, 848-49 (1917).

We conclude that this State has never had a statute which expressly conferred upon an attorney the right to a trial by jury in a *judicial* disciplining or disbarment proceeding. Since no such right existed at common law, or by statute at the time our Constitution was adopted, and is not now provided for by statute, we hold that appellant's motion for a trial by jury was properly denied.

Affirmed.

Judges PARKER and VAUGHN concur.

STATE OF NORTH CAROLINA EX REL. COMMISSIONER OF INSURANCE AND THE NORTH CAROLINA AUTOMOBILE RATE ADMINISTRATIVE OFFICE v. STATE OF NORTH CAROLINA EX REL. ATTORNEY GENERAL

No. 7210INS731

(Filed 25 October 1972)

Insurance § 79.1— automobile liability insurance rates — failure to make necessary findings — remand

Automobile liability insurance rate case is remanded to the Commissioner of Insurance with direction that specific findings of fact be made, upon substantial evidence, as to (1) the earned premiums to be anticipated by companies operating in North Carolina during the life of policies to be issued in the near future, (2) the reasonably anticipated loss experience during the life of said policies, (3) the reasonably anticipated operating expenses in said period, and (4) the percent of earned premiums which will constitute a fair and reasonable profit in that period.

APPEAL by Attorney General, intervenor, from decision and order of Commissioner of Insurance entered 26 May 1972.

On 1 July 1971 the North Carolina Automobile Rate Administrative Office (Rate Office) made a filing with the Commissioner of Insurance, (Commissioner), pursuant to G.S. 58-248, which filing proposed a schedule of increased rates on private passenger automobile liability insurance in the amount of 16.4% for bodily injury insurance and 29.0% for property damage insurance, making an overall or average increase of 21.4%. On 21 July 1971, the Commissioner entered an order, based on 1 July 1970 filing, increasing liability insurance rates on private passenger automobiles 7.7%; as a result of this order the Rate Office, by amendment, reduced its request for an increase in rates to 13.9%.

After due advertisement as required by law, the Commissioner conducted a hearing on said 1971 filing on 16 September 1971 and thereafter recessed and continued the hearing on 29 and 30 September, 4 and 28 October, 22 November, and 14 December 1971, and 25 January, 10, 11, and 21 February, 15 March, and 18 and 26 April 1972 at which time the hearing was concluded.

On 23 August 1971 the Attorney General, as authorized by G.S. 114-2(8)(a), intervened in behalf of "the insurance consuming public," and denied that any revision of private pas-

senger automobile liability insurance rates was justified at that time.

At the hearing the Rate Office presented evidence consisting of numerous exhibits and the testimony of some six witnesses including its General Manager, Paul Mize. The Commissioner called as a witness Robert E. Holcombe, Assistant Fire and Casualty Actuary of the North Carolina Department of Insurance. The Attorney General offered testimony by J. Finley Lee, Associate Professor of Business Administration at U.N.C.-C.H., and William E. L. Hack, Claims Adjuster with the N. C. Department of Justice.

In his lengthy order dated 26 May 1972, the Commissioner, after preliminary recitals, made numerous findings of fact and conclusions, ordered that private passenger automobile liability insurance be increased by 8.9%, reduced by reason of Federal Price Control regulations to 7.4%; the rate increase to be effective on the earliest practicable date that the increase can be placed into effect by the Rate Office.

The Attorney General excepted to the Commissioner's order and gave notice of appeal.

Attorney General Robert Morgan by Jean A. Benoy, Deputy Attorney General and Benjamin H. Baxter, Jr., Associate Attorney, for appellant intervenor.

Allen, Steed and Pullen by Arch T. Allen for North Carolina Automobile Rate Administrative Office, appellee.

Hugh R. Owen, Staff Attorney, for North Carolina Department of Insurance, appellee.

BRITT, Judge.

The case of *In re Filing by Automobile Rate Office,* 278 N.C. 302, 180 S.E. 2d 155 (1971), hereinafter referred to as Automobile Rate Office case, involved an appeal from an order of the Commissioner approving an increase of rates on private automobile liability insurance based on a 1 July 1969 filing by the Rate Office. In the opinion in that case, Chief Justice Bobbitt sets forth fully the statutory framework and procedures in North Carolina governing regulation of private automobile liability insurance rates applicable at that time. No worthwhile

purpose would be served in restating the statutory framework and procedures set forth in that opinion but a statement as to pertinent 1971 amendments to our insurance laws is in order.

Chapter 1115 of the 1971 Session Laws rewrote G.S. 58-248 and the rewrite contains the following pertinent provisions:

> " . . . The Commissioner of Insurance in considering any rate compiled and promulgated by the bureau may take into consideration the earnings of all companies writing automobile liability insurance in this State realized from the investment of unearned premium reserves and investments from loss reserves on policies written in this State. The amount of earnings may in an equitable manner be included in the rate-making formula to arrive at a fair and equitable rate.
>
> In determining the necessity for an adjustment of rates the Commissioner shall give consideration to past and prospective loss experience, including the loss-trend and other relevant factors developed from the latest statistical data available; to such relevant economic data from reliable indexes which demonstrate the trend of costs relating to the line of automobile insurance for which rates are being considered and to such other reasonable and related factors as are relevant to the inquiry. The bureau in promulgating and fixing rates shall consider the same factors and shall prepare and present such information, data, indexes and exhibits with rate filings.
>
> The Commissioner shall approve proposed changes in rates, classifications or classification assignments to the extent necessary to produce rates, classifications or classification assignments which are reasonable, adequate, not unfairly discriminatory, and in the public interest. Proposed rates shall not be deemed unreasonable, inadequate, unfairly discriminatory or not in the public interest, if such proposed rates make adequate provision for premium rates for the future which will provide for anticipated loss and loss adjustment expenses, anticipated expenses attributable to the selling and servicing of the line of insurance involved and a provision for a fair and reasonable underwriting profit."

Chapter 703 of the 1971 Session Laws provides, among other things, that from and after 1 January 1972 appeals from the Commissioner of Insurance "pursuant to G.S. 58-9.4" would be to the Court of Appeals (rather than to the superior court).

The Attorney General states his first contention on this appeal as follows: "The Commissioner of Insurance erred in not finding facts upon substantial evidence sufficient to support his ultimate finding or conclusion that the present rate level for private passenger automobile liability insurance is inadequate."

The case of *In re Filing by Fire Insurance Rating Bureau*, 275 N.C. 15, 165 S.E. 2d 207 (1969), hereinafter referred to as Fire Insurance Rating Bureau case, involved an appeal from an order of the Commissioner denying adjustments in certain premium rates on fire insurance policies issued in North Carolina. (The net effect of the "adjustments" was to allow an increase in rates.) In the unanimous opinion Justice Lake quoted statutes providing for the creation and operation of the Fire Insurance Rating Bureau and the powers and obligations of the Commissioner with respect to fire insurance premium rates. It appears that the purpose and duties of the North Carolina Fire Insurance Rating Bureau (Rating Bureau) created by G.S. 58-125 are quite similar to the purpose and duties of the North Carolina Automobile Rate Administrative Office (Rate Office) created by G.S. 58-246, with the Rating Bureau dealing with fire insurance rates and the Rate Office dealing with automobile bodily injury and property damage insurance rates.

In the *Fire Insurance Rating Bureau* case, at page 30, the Court quoted from G.S. 58-131.2 as follows:

> "The Commissioner is hereby empowered to investigate at any time the necessity for a reduction or increase in rates. If upon such investigation it appears that the rates charged are producing a profit in excess of what is fair and reasonable, he shall order such reduction of rates as will produce a fair and reasonable profit only.
>
> If upon such investigation it appears that the rates charged are inadequate and are not producing a profit which is fair and reasonable, he shall order such increase of rates as will produce a fair and reasonable profit."

In the *Rate Office* case, pp. 307-308, the court quoted from G.S. 58-248.1 as follows:

> "Whenever the Commissioner, upon his own motion or upon petition of any aggrieved party, shall determine, after notice and a hearing, that the rates charged or filed on any class of risks are excessive, inadequate, unreasonable, unfairly discriminatory, or otherwise not in the public interest, or that a classification or classification assignment is unwarranted, unreasonable, improper or unfairly discriminatory he shall issue an order to the bureau directing that such rates, classifications or classification assignments be altered or revised in the manner and to the extent stated in such order to produce rates, classifications or classification assignments which are reasonable, adequate, not unfairly discriminatory, and in the public interest."

From the quoted statutes, it appears that at the times the cited cases were decided, the Commissioner had similar statutory guidelines in considering adjustment of fire insurance rates and adjustment of automobile bodily injury and property damage insurance rates. Regarding fire insurance rates, the Commissioner was authorized to order "such increase of rates as will produce a fair and reasonable profit;" regarding automobile insurance rates, he was required to order "rates, classifications or classification assignments which are reasonable, adequate, not unfairly discriminatory and in the public interest." The 1971 amendments make the guidelines even more similar when they provide that "[p]roposed rates shall not be deemed unreasonable, inadequate, unfairly discriminatory or not in the public interest, if such proposed rates make adequate provision for premium rates for the future which will provide for anticipated loss and loss adjustment expenses, anticipated expenses attributable to the selling and servicing of the line of insurance involved and a provision *for a fair and reasonable underwriting profit.*" (Emphasis added.)

In the *Fire Insurance Rating Bureau* case, the Rating Bureau appealed from an order of the Commissioner denying an increase in rates. In ordering the case remanded to the Commissioner for further proceedings, the Supreme Court said (pp. 39-40):

"The ultimate question to be determined by the Commissioner is whether an increase in premium rates is necessary in order to yield a 'fair and reasonable profit' in the immediate future (i.e., treating the Bureau as if it were an operating company whose experience in the past is the composite of the experiences of all of the operating companies), and, if so, how much increase is required for that purpose. This cannot be determined without specific findings of fact, upon substantial evidence, as to (1) the reasonably anticipated loss experience during the life of the policies to be issued in the near future, (2) the reasonably anticipated operating expenses in the same period, and (3) the percent of Earned Premiums which will constitute a 'fair and reasonable profit' in that period."

We are unable to distinguish the requirement for specific findings of fact called for in the *Fire Insurance Rating Bureau* case and those required in the instant case where the findings or lack of findings are *directly challenged.* Appellees argue that this case is controlled by the more recent *Automobile Rate Office* case (278 N.C. 302) in which the findings of fact and conclusions of the Commissioner were very similar to those in the instant case. In the *Automobile Rate Office* case, the court said (p. 315):

"The case is before us upon the ten assignments of error set forth in the Attorney General's petition for review by the Superior Court of the Commissioner's order of December 18, 1969. These assignments challenge all findings of fact in the Commissioner's order on the ground they were based wholly or principally on incompetent testimony and unauthenticated and otherwise incompetent documentary evidence.

* * * The Attorney General's petition for review of the Commissioner's order of December 18, 1969, brought the matter to the Superior Court for hearing on the assignments of error set forth in that petition. We are concerned only with that portion of Judge Bailey's judgment which overrules these assignments of error and affirms the Commissioner's order."

A close study of the *Automobile Rate Office* case leads us to conclude that a majority of the court felt that the question

whether there were sufficient findings of fact to support the Commissioner's conclusions and order was not properly before the court in that case. The primary question before the court in that case was whether the provisions of G.S. 143-317, 318, apply to hearings before the Commissioner of Insurance. The court held that they do not and did not address itself in any way to the question presently before us. We do not think the opinion in the *Automobile Rate Office* case overruled the opinion in the *Fire Insurance Rating Bureau* case.

Under mandate of the *Fire Insurance Rating Bureau* case, we conclude that the decision and order of the Commissioner in the instant case must be vacated and the case remanded to the Commissioner for further proceedings and findings of fact as required by the *Fire Insurance Rating Bureau* case. A careful review of the record in this case including the Commissioner's decision and order reveals that the Commissioner considered proper evidence, data and statistics, particularly that reflecting actual underwriting experience of companies writing private passenger automobile insurance in North Carolina. The decision and order recites that "for rate making purposes, the Statutory Bureau is to be regarded as it were ONE insurance company and the only one operating in North Carolina and as if it had all of the premium, loss, and expense experience of all the companies writing private passenger automobile insurance within the State."

The decision and order further recites that it has been long standing administrative practice to construe G.S. 58-248 "to mean that proposed rates would be proper for future use in North Carolina if they provided for anticipated losses, loss adjustment expenses, and other expenses of the companies attributable to that line of insurance business and included in the formula an amount which would provide for a fair and reasonable underwriting profit to the companies." The Commissioner found as a fact that the rates proposed in the 1 July 1971 filing are based upon the latest available premium and loss statistics for accident years 1968 and 1969, weighted equally; and that the actual North Carolina underwriting experience data shows that the companies sustained an underwriting loss on automobile liability insurance in North Carolina for the years 1967, 1968 and 1969. The order and decision further recites that the Commissioner in determining a fair and reasonable profit took into consideration investment income realized from

unearned premium reserves and from loss reserves as he was authorized to do under the 1971 amendments. In all probability the decision of the able and conscientious Commissioner is fair to all parties and is in the public interest; however, the appellate courts cannot properly review his decision and order without the findings of fact required in the *Fire Insurance Rating Bureau* case.

On remand the Commissioner will make specific findings of fact, upon substantial evidence based on underwriting experience in North Carolina, as to (1) the earned premiums to be anticipated by the company *(i.e.,* all companies operating in North Carolina considered as one) during the life of policies to be issued in the near future, (2) the reasonably anticipated loss experience during the life of said policies, (3) the reasonably anticipated operating expenses in said period, and (4) the percent of earned premiums which will constitute a fair and reasonable profit in that period.

With respect to the sufficiency of evidence to support an order of the Commissioner adjusting insurance premiums, it would appear from the *Automobile Rate Office* case (278 N.C. 302, 320) that in addition to considering evidence that does not meet the tests required for the admissibility of evidence over objection thereto in a trial in a superior or district court, the Commissioner, "in making what must be considered in large measure a policy or judgment decision," may utilize "his own continuous study and knowledge of changing conditions."

We have carefully considered the other contentions argued in the Attorney General's brief but find them to be without merit.

For the reasons stated the decision and order appealed from is vacated and this case is remanded to the Commissioner for further proceedings consistent with this opinion.

Remanded.

Chief Judge MALLARD and Judge BROCK concur.

WILLIAM T. GRAHAM, TRUSTEE IN BANKRUPTCY OF THE ESTATE OF EDWARD GERALD LACKEY v. THE NORTHWESTERN BANK

No. 7221SC603

(Filed 25 October 1972)

1. **Rules of Civil Procedure § 56— motion for summary judgment — question presented**

On the hearing of a motion for summary judgment, it is not the duty of the court to decide an issue of fact but rather to determine whether a genuine issue of material fact exists; where the facts of the case are plain and unambiguous, their effect is a question of law for the court.

2. **Uniform Commercial Code § 79— notice of public sale of collateral — substantial compliance with statute**

A notice of public sale of securities pledged as collateral for six notes substantially complied with the requirements of G.S. 25-9-602 where it listed and described all of the securities pledged as collateral for each of the six notes, although one of the security agreements was not referred to in the notice and two of the security agreements were referred to by incorrect dates.

3. **Uniform Commercial Code § 79— public sale of collateral — commercial reasonableness — presumption**

The public sale of collateral by the secured party is conclusively presumed to be commercially reasonable when the secured party has substantially complied with the procedures set forth in part 6 of Article 9 of the North Carolina Uniform Commercial Code, G.S. 25-9-601 *et seq.*, notwithstanding allegations by the debtor of inadequate and unreasonably low prices. G.S. 25-9-601.

APPEAL by plaintiff from *Gambill, Judge,* 17 April 1972 Session of Superior Court held in FORSYTH County.

Plaintiff trustee appeals from what purports to be a summary judgment against the plaintiff, dismissing plaintiff's action for injunctive relief to restrain the sale of pledged securities and for damages caused by the alleged improper sale and disposition of certain other securities by defendant, The Northwestern Bank (Northwestern).

The bankrupt, Edward Gerald Lackey (Lackey), owned certain stocks which were pledged to the defendant in order to secure a total indebtedness to defendant of some $300,500, represented by six paper writings each intended to act as a note and security agreement. Five notes were made by Lackey and dated 6 December 1968, 29 December 1969, 9 February 1970, 15

February 1970, and 27 February 1970. A sixth note dated 19 March 1970, containing the same security agreement, was made by Parrish Dray Lines, Inc., and endorsed by Lackey.

On 13 November 1970 defendant sent a Notice of Sale by certified mail to Lackey and on the same date posted the Notice of Sale at the courthouse in Wilkes County, North Carolina. The Notice of Sale referred to security agreements between bankrupt and defendant dated 6 December 1969, 2 February 1970, 15 February 1970, 27 February 1970 and 19 March 1970.

The Notice of Sale made no reference to the security agreements between bankrupt and defendant dated 6 December 1968, 29 December 1969, 9 February 1970, or to a subsequent pledge of collateral on 27 May 1970, further securing the 6 December 1968 note. However, the Notice of Sale listed by way of description all of the securities pledged as collateral for each of the six notes and described in those six notes.

Pursuant to the Notice of Sale, defendant sold at public auction in Wilkes County on 20 November 1970 all of the securities described in the Notice of Sale. Defendant purchased at this sale all the blocks of securities offered for sale, except for one block of stock. Thereafter, at private sale on 17 December 1970, defendant resold a portion of the securities which it had purchased at the 20 November 1970 sale and gave Lackey full credit on his indebtedness for the total value of the money received at the private sale.

After the foregoing sale and credits, Lackey remained indebted to defendant in the sum of $63,772.34.

On 18 December 1970, Lackey filed a petition in bankruptcy in Federal District Court, and on 22 December 1970, he was adjudged bankrupt. On 7 January 1971, plaintiff William T. Graham was appointed Trustee in Bankruptcy, and on 18 January 1971, plaintiff qualified as Trustee and posted bond.

Plaintiff sets forth in his verified complaint allegations to the effect that the public sale of stock by Northwestern was for inadequate and unjustifiably low prices, and that the sale amounted to a fraud on Lackey's creditors. However, subsequent to the filing of this action, plaintiff and defendant consented to an order by the trial court providing for further private sale of the securities presently retained by Northwestern and the application of those proceeds to the $63,772.34 deficiency.

Billings & Graham by William T. Graham for plaintiff appellant.

W. G. Mitchell for defendant appellee.

MALLARD, Chief Judge.

In the judgment entered by Judge Gambill herein there appears, among other things, a conclusion as a matter of law "That there is no genuine issue as to any material fact and the defendant is entitled to Summary Judgment as a matter of law." We hold that this judgment, although it does not contain language expressly doing so and was inexpertly prepared, was sufficient to dismiss the case upon defendant's motion for summary judgment, and that plaintiff had the right to appeal therefrom.

[1] On the hearing of a motion for summary judgment, it is not the duty of the court to decide an issue of fact but rather to determine whether a genuine issue as to any material fact exists. *Kessing v. Mortgage Corp.*, 278 N.C. 523, 180 S.E. 2d 823 (1971); G.S. 1A-1, Rule 56. But where the facts of the case are plain and unambiguous, their effect is a question of law for the court. *Sales Co. v. Plywood Distributors*, 13 N.C. App. 429, 185 S.E. 2d 737 (1972).

[2] Plaintiff assigns as error the trial court's conclusion as a matter of law that there was no genuine issue as to any material fact. Plaintiff contends that an issue of fact exists as to whether defendant Northwestern's Notice of Sale "substantially" referred to the security agreements pursuant to which the sale of securities was held.

Under G.S. 25-9-501, Northwestern had the rights and remedies granted under part 5 of Article 9 [G.S. 25-9-501, et seq.] of the Uniform Commercial Code, as well as those provided in the security agreement except as the security agreement was limited by subsection (3) of G.S. 25-9-501. In each of the security instruments involved in this proceeding, it was provided that the collateral could be sold without advertisement or notice, at public or private sale, and that Northwestern could become the purchaser. Northwestern, as it had the right to do, notified Lackey that it would sell the securities at public sale. [See G.S. 25-9-504(3) and part 6 of Article 9 (G.S. 25-9-601, et seq.) of the Uniform Commercial Code.]

G.S. 25-9-504(3) provides in part:

"* * * Unless collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market, *reasonable notification of the time and place of any public sale* . . . shall be sent by the secured party to the debtor. . . . The secured party may buy at any public sale . . . ." (Emphasis added.)

G.S. 25-9-601 provides in part:

"Disposition of collateral by public proceedings as permitted by § 25-9-504 may be made in accordance with the provisions of this part. * * *"

G.S. 25-9-602 provides in part that:

"The notice of sale shall *substantially:* (a) Refer to the security agreement pursuant to which the sale is held . . . ." (Emphasis added.)

G.S. 25-9-603 provides in part that:

"(1) In each public sale conducted hereunder, the notice of sale shall be posted on a bulletin board provided for the posting of such legal notice, in the courthouse, in the county in which the sale is to be held, for at least five days immediately preceding the sale.

(2) In addition to the posting of notice required by subsection (1), the secured party or other party holding such public sale shall, at least five days before the date of sale, mail by registered or certified mail a copy of the notice of sale to each debtor obligated under the security agreement . . . ."

In the defendant Bank's Notice of Sale, posted on the bulletin board for posting legal notices in the Wilkes County Courthouse more than five days immediately preceding the date of sale and sent by certified mail to the debtor more than five days before the sale, the reference to the security agreements pursuant to which the sale was to be had was by dates. Due to clerical error, two security agreements were referred to by improper dates. The one dated 6 December 1968 was apparently referred to in error as being dated 6 December 1969. The one dated 9 February 1970 was apparently referred to in error as being dated 2 February 1970. The one dated 29 December 1969,

which was for $14,000, and was secured by "(a)ll collateral held by bank (D/T) 4 (O/C) collateral held with NH-H 56500," was not mentioned or referred to in the Notice of Sale.

On the other hand, defendant's Notice of Sale listed by way of description all the securities pledged as collateral to defendant and securing all six of plaintiff's notes payable to defendant, including the one omitted and the two erroneously referred to.

Plaintiff contends that the Notice of Sale, therefore, was not in substantial compliance with the provisions of G.S. 25-9-602.

In *Douglas v. Rhodes,* 188 N.C. 580, 125 S.E. 261 (1924), dealing with the requirements for notice of sale under former G.S. 45-25, re-enacted as former G.S. 45-21.16(4) [which was substantially re-enacted as G.S. 25-9-602 insofar as it relates to disposition of collateral at public proceedings], defendant Trustee under a deed of trust advertised for sale the real property secured but failed to set out in the notice a metes and bounds description. Holding that the Trustee's description of the land as "the Melton-Rhodes Company or the Rhodes Company factory and consisting of about 6.75 acres" was a "substantial" compliance with the statute, the Court said:

> "* * * The word 'substantially,' Webster defines to mean: 'In a substantial manner, in substance, essentially.' It does not mean an accurate or exact copy. The purpose and intent of the statute was to give complete and full notice to the public of the land to be sold, so that the public generally would know and understand from the advertisement the exact property offered for sale."

To the same effect, see *Peedin v. Oliver,* 222 N.C. 665, 24 S.E. 2d 519 (1943); *Blount v. Basnight,* 209 N.C. 268, 183 S.E. 405 (1936).

In the case at bar, although two of the dates were incorrectly stated in the Notice of Sale as references to security agreements pursuant to which the sale was to be held, the Notice of Sale contained an extensive and, for the most part, accurate listing of the securities to be sold, and the description paralleled the description of the securities in the six security agreements pursuant to which the sale was to be held.

The description of the securities to be sold adequately and substantially notified Lackey and any other person who chose to be informed what securities were to be sold and that all of the security interests of Northwestern in these collateral securities were to be foreclosed upon and sold for cash.

There is no contention that the Notice of Sale was not published in accordance with the terms of the statute and security agreement or that Lackey did not actually receive the Notice of Sale of all of the securities. We are of the opinion and so hold that the trial court properly determined as a matter of law that the Notice of Sale was in substantial compliance with G.S. 25-9-602.

It is noted that the Notice of Sale and the Report of Sale both referred to the sale of 23.043 shares of Terminal Warehouse stock, 40.1715 shares of Commercial Auto Corporation stock and 3,900 shares of Tar Heel Financial Corporation stock, whereas the actual amount of stock pledged was 23.052 shares of Terminal, 40.1725 shares of Commercial and 3,940 shares of Tarheel Financial Corporation. Whether the error in the figures is clerical or indicative of an accounting problem is a question which has not been raised in this appeal, and this opinion is not intended to be dispositive thereof.

[3] Plaintiff further argues that whether the 20 November 1970 public auction sale was "commercially reasonable" and whether defendant "substantially complied" with part 6 of Article 9 of the North Carolina Uniform Commercial Code, G.S. 25-9-601, et seq., are genuine issues of material fact.

G.S. 25-9-504(3) reads in part:

> "Disposition of the collateral may be by public or private proceedings and may be by way of one or more contracts. Sale or other disposition may be as a unit or in parcels and at any time and place and on any terms but every aspect of the disposition including the method, manner, time, place and terms must be *commercially reasonable.* * * *" (Emphasis added.)

G.S. 25-9-601 provides:

> "Disposition of collateral by public proceedings as permitted by § 25-9-504 may be made in accordance with the provisions of this part. The provisions of this part are

not mandatory for disposition by public proceedings, but any disposition of the collateral by public sale wherein the secured party has *substantially complied* with the procedures provided in this part (Part 6) shall *conclusively be deemed to be commercially reasonable in all aspects.*" (Emphasis added.)

In other jurisdictions that have not enacted part 6, or similar provisions, to supplement Article 9 of the Uniform Commercial Code, there is much litigation to determine what constitutes commercial reasonableness in the sale or other disposition of collateral. See Annot., 30 A.L.R. 3d 9 (1970). And whether the current or market price of the collateral was realized at public sale has been held to present a triable factual issue on motion for summary judgment. *California Airmotive Corp. v. Jones,* 415 F. 2d 554 (6th Cir. 1969).

North Carolina, however, has by statute created a conclusive presumption of commercial reasonableness if the secured party substantially complies with part 6 of Article 9 of North Carolina's Uniform Commercial Code. Part 6 of Article 9 [G.S. 25-9-601, et seq.] of the North Carolina U.C.C. is not a part of the "Official Text of the U.C.C." but is in effect in North Carolina. Bender's U.C.C. Service, Hart and Willier, Table of State Variations § 9-601 (Rel. No. 6-1971, Matthew Bender & Co.). The procedure therein and the conclusive presumption created by G.S. 25-9-601 appears to be peculiar to North Carolina.

The facts before the court on motion for summary judgment were not in dispute. Holding as we do that the Northwestern Bank substantially complied, as a matter of law, with the requirements in G.S. 25-9-602 for the Notice of Sale, we are constrained to hold as a matter of law that Northwestern substantially complied with the procedures in part 6 of Article 9, and that the sale of the collateral securities, despite plaintiff's allegations of inadequate and unreasonably low prices, was conclusively presumed to be commercially reasonable. G.S. 25-9-601.

The trial court correctly determined that there was no genuine issue as to any material fact. Summary judgment for defendant was properly entered.

Affirmed.

Judges CAMPBELL and MORRIS concur.

CITY OF WINSTON-SALEM v. LETITIA C. RICE

No. 7221DC655

(Filed 25 October 1972)

1. **Automobiles §§ 19, 38— fire truck — speeding — crossing intersection on red light — duty of care required**

Though plaintiff's ordinances grant special privileges to emergency vehicles including that of "proceeding past a red or stop signal or stop sign," the driver of a fire truck is not relieved from the standard of due care commensurate with the circumstances, but must drive with regard for the safety of all persons.

2. **Negligence § 34— contributory negligence — jury question — judgment NOV improper**

In an action for property damage resulting from a collision between plaintiff's fire truck and defendant's automobile, the trial court erred in entering judgment NOV on grounds that plaintiff was contributorily negligent as a matter of law where the evidence tended to show that at the time of the collision the fire truck's red dome light and siren were both in operation, that traffic in northbound lanes had stopped to permit the fire truck to traverse the intersection in a westerly direction, that the driver of the fire truck saw no traffic in the southbound lanes, and that the fire truck proceeded through the intersection facing a red light only after slowing down to a speed of between 10 and 12 miles per hour.

3. **Rules of Civil Procedure § 59— insufficiency of evidence to support verdict — granting of new trial within court's discretion**

The trial court properly exercised its discretion in granting defendant's motion for a new trial on the issue of damages, should the judgment NOV be vacated on appeal, on the grounds that plaintiff failed to supply evidence as to the fair market value of its damaged property before and after the accident, that the evidence was insufficient to justify the verdict as to the issue of damages, and that the verdict as to the issue of damages was contrary to law. G.S. 1A-1, Rule 59(a)(7).

APPEAL by plaintiff from *Billings, District Judge,* at the 17 April 1972 Session of FORSYTH District Court.

Plaintiff brought this action to recover for property damage resulting from a street intersection collision between plaintiff's fire truck and defendant's automobile.

Plaintiff's evidence tended to show:

At approximately 9:30 a.m. on 18 October 1970, a fire truck, some 62 feet long and over 11 feet high, owned by plaintiff and operated by members of its fire department, was pro-

ceeding west on Northwest Boulevard in the City of Winston-Salem en route to a residential fire. As the fire truck traversed the intersection of Northwest Boulevard and Cherry Marshall Street, it collided with a 1970 Chevrolet being driven by defendant in a southerly direction on Cherry Marshall Street.

At said intersection Northwest Boulevard is a two-lane street while Cherry Marshall is 84 feet wide and north of the intersection is relatively straight for more than 442 feet, has two lanes for northbound traffic, a median, a lane for southbound traffic turning left, two lanes for traffic proceeding south, and a lane for southerly traffic turning right. The terrain north of the intersection is uphill. Defendant was traveling in the westernmost lane of Cherry Marshall and the left side of her automobile struck the right front wheel of the fire truck.

Traffic at the intersection was controlled by duly erected traffic lights. As the fire truck approached the intersection the light was red to it, but with siren sounding and red lights on top of the truck pivoting, it proceeded into and through the intersection at 10 to 12 m.p.h. Cherry Marshall traffic to the left of the fire truck was northbound and stopped to allow the truck to proceed through the intersection. Defendant was proceeding on a green light and the truck driver did not see her until the moment of the collision. The fire was some three blocks west of the intersection and the truck driver could see the smoke from the intersection.

The parties stipulated that a fire truck is an emergency vehicle as defined in plaintiff's ordinances, pertinent provisions of the controlling ordinances being introduced into evidence and providing as follows:

"Sec. 17-45. Exemptions to authorized emergency vehicles.

(a) The provisions of this chapter regulating the operation, parking and standing of vehicles shall apply to authorized emergency vehicles, as defined in this chapter except as follows:

A driver, when operating any such vehicle in an emergency, except when otherwise directed by a police officer, may

* * * *

(2) Proceed past a red or stop signal or stop sign, but *only after slowing down as may be necessary for safe operation;* (Emphasis added.)

* * * *

(b) These exemptions hereinbefore granted in reference to the movement of an authorized emergency vehicle shall apply only when the driver of such vehicle sounds a siren as may be reasonably necessary, and the vehicle displays a lighted red lamp visible from the front as a warning to others, except that such police cars as are designated by the chief of police shall not be required to display a red lamp.

* * * *

Sec. 17-46. Operation of vehicles on approach of authorized emergency vehicles.

(a) Upon the approach of an authorized emergency vehicle equipped with at least one lighted lamp exhibiting a red light visible under normal atmospheric conditions from a distance of five hundred feet (500') to the front of such vehicle and when the driver is giving audible signal by siren, the driver of every other vehicle shall yield the right-of-way and shall immediately drive to a position parallel to, and as close as possible to, the right-hand edge or curb (or the nearest edge or curb of a one-way street) of the roadway clear of any intersection and shall stop and remain in such position until the authorized emergency vehicle has passed, except when otherwise directed by a police officer;

(b) *This section shall not operate to relieve the driver of any authorized emergency vehicle from the duty to drive with due regard for the safety of all persons using the street.* (Code 1953, Sec. 26-33.)" (Emphasis added.)

The defendant offered no evidence.

At the close of plaintiff's evidence and again at the close of all the evidence, defendant moved for a directed verdict pursuant to G.S. 1A-1, Rule 50. The motions were denied and the jury found that plaintiff's property was damaged by the negligence of the defendant, that plaintiff was not contributorily

negligent and awarded plaintiff recovery in the amount of $3,059.25.

Thereafter, defendant moved the court pursuant to G.S. 1A-1, Rule 50, to set aside the verdict and enter judgment for defendant notwithstanding the verdict on the grounds that there was "no evidence of negligence on the part of the defendant and that the evidence in the case showed conclusively that any damages sustained by the plaintiff were the proximate result of its own negligence." Defendant moved in the alternative to set aside the verdict and grant defendant a new trial on the grounds that plaintiff supplied no evidence of the fair market value, before and after the accident, of the fire truck and that evidence of the repair cost alone was an insufficient basis to support the jury verdict as to damages, that the evidence was insufficient to justify the verdict, that the verdict is contrary to law and on the ground of error in law occurring at the trial.

The court entered judgment n.o.v. in favor of defendant on the ground that "the evidence in the case showed conclusively" that any damages sustained by plaintiff were the proximate result of its own negligence and further that should the judgment n.o.v. be vacated or reversed, the defendant be granted a new trial as to the issue of damages.

Plaintiff appealed.

Womble, Carlyle, Sandridge & Rice by Allan R. Gitter and Roddey M. Ligon, Jr., for plaintiff appellant.

Deal, Hutchins and Minor by William Kearns Davis for defendant appellee.

BRITT, Judge.

Plaintiff contends that the trial judge erred in entering judgment for defendant notwithstanding the jury verdict for plaintiff on the ground that plaintiff was contributorily negligent as a matter of law. As to this contention we agree with plaintiff.

It is established that a motion for a directed verdict or judgment n.o.v. presents substantially the same question as that presented by a motion for nonsuit under former G.S. 1-183. *Kelly v. International Harvester Co.*, 278 N.C. 153, 179 S.E. 2d

396 (1971); *Sadler v. Purser*, 12 N.C. App. 206, 182 S.E. 2d 850 (1971). Therefore, the statement in *Mims v. Dixon*, 272 N.C. 256, 158 S.E. 2d 91 (1967), that whether a motion for nonsuit on the ground of contributory negligence is to be granted or the issue submitted for jury determination must be decided after considering the facts of each particular case also applies as the proper test for disposition of a motion for a directed verdict or judgment n.o.v. under our new code of civil procedure.

[1] Our research reveals that a majority of jurisdictions by statutes or ordinances exempt emergency vehicles (such as police cars, ambulances and fire department apparatus) from strict compliance with traffic regulations. However, the allowance of these special privileges (which include traveling through a red traffic light and exceeding speed limits) has been held generally not to relieve the operator of the emergency vehicle from the exercise of ordinary, reasonable care commensurate with the circumstances. 7 Am. Jur. 2d, Automobiles and Highway Traffic, §§ 206, 357; *Finderne Engine Co. v. Morgan Trucking Co.*, 98 N.J. Super, 421, 237 A. 2d 624 (1968); *Freeman v. Reeves*, 241 Ark. 867, 410 S.W. 2d 740 (1967); *Myers v. Able*, (Ky.), 417 S.W. 2d 235 (1967); *Clark v. Sterrett*, (Ind. App.), 220 N.E. 2d 779 (1966); *Merkel v. Scranton*, 202 Pa. Super. 15, 193 A. 2d 644 (1963); *Norman v. Shreveport*, (La. App.), 141 So. 2d 903 (1962); *Rosenstiel v. Weigel*, 117 Ohio App. 383, 184 N.E. 2d 772 (1962); *Torres v. Los Angeles*, 58 Cal. 2d 35, 372 P. 2d 906 (1962); *Baltimore v. Fire Ins. Salvage Corps.*, 219 Md. 75, 148 A. 2d 444 (1959). In *Spittle v. R. R.*, 175 N.C. 497, 95 S.E. 910 (1918), an intersection accident case involving a fire truck, the court held that the question of contributory negligence was one of fact for the jury.

Plaintiff's ordinances grant special privileges to emergency vehicles including that of "proceeding past a red or stop signal or stop sign," but as the emphasized parts of the ordinances indicate these privileges are not absolute. The driver of an emergency vehicle is not relieved from the standard of due care commensurate with the circumstances but must drive with regard for the safety of all persons. A like interpretation was given in *Williams v. Funeral Home*, 248 N.C. 524, 529, 103 S.E. 2d 714, 718 (1958) wherein the court in construing a similar Morganton ordinance as it applied to a collision involving an ambulance and an automobile said:

". . . [T]he ordinance of Morganton which permits ambulances to 'proceed past red or stop signals' does not require the siren to be sounded, but it does limit their right to proceed 'only after slowing down as may be necessary for operation.' This necessarily means, we think, that the special privileges can only be exercised when the ambulance can proceed with safety to others who have a legal invitation to use the intersection. To give it any other interpretation would change an ordinance intended to facilitate the safe movement of vehicles across intersecting highways into a trap for those invited to enter."

[2] Having concluded that the fire truck belonging to plaintiff could proceed against the red light only through the exercise of due care by slowing down as "necessary for safe operation," we must examine plaintiff's evidence to determine if it meets this test. Plaintiff's evidence, if believed, would support a finding that at the time of the collision herein complained of, the fire truck's red dome light and siren were both in operation, northbound traffic on Cherry Marshall was stopped to permit the fire truck to traverse the intersection in a westerly direction, the driver of the fire truck saw no traffic in the southbound lanes, and although the huge fire truck did not stop it proceeded through the intersection facing a red light only after slowing down to a speed of between 10 and 12 miles per hour.

We hold that the facts in this case presented a jury question as to contributory negligence and the trial judge erred in setting aside the verdict and entering judgment n.o.v. on the ground that plaintiff was contributorily negligent as a matter of law.

[3] In its next assignment of error plaintiff contends the trial judge erred in granting defendant's motion in the alternative for a new trial on the issue of damages should the judgment n.o.v. be vacated or reversed on appeal. Pursuant to G.S. 1A-1, Rule 50(c)(1), the district court conditionally granted defendant's motion for a new trial on the grounds that plaintiff failed to supply evidence as to the fair market value of its damaged property before and after the accident and that the evidence is insufficient to justify the verdict as to the issue of damages and that the verdict as to the issue of damages is contrary to law. The record is devoid of evidence as to the value of the fire truck before and after the collision; plaintiff introduced only

the repair bill to show the "dollars and cents" damage to its fire truck.

Damages are not to be presumed, and the burden is on a complainant to show such facts as will provide a basis for their assessment, according to a definite and legal rule. *Lieb v. Mayer,* 244 N.C. 613, 94 S.E. 2d 658 (1956). Plaintiff argues that although the measure of damages for a tortious injury to personal property is the difference in the market value of the property immediately before and immediately after the injury, this difference may be established by showing the reasonable cost of necessary repairs to restore the property to its previous condition. In support of its argument, plaintiff cites *Farrall v. Garage Company,* 179 N.C. 389, 102 S.E. 617 (1920); *Guaranty Company v. Motor Express,* 220 N.C. 721, 18 S.E. 2d 116 (1942), and *Simrel v. Meeler,* 238 N.C. 668, 78 S.E. 2d 766 (1953).

We find it unnecessary to agree or disagree with plaintiff's argument. G.S. 1A-1, Rule 59(a)(7) authorizes a trial judge to grant a new trial on all or part of the issues on the ground of insufficiency of the evidence to justify the verdict. In *Glen Forest Corp. v. Bensch,* 9 N.C. App. 587, 176 S.E. 2d 851 (1970), this court held that a motion to set aside the verdict and for a new trial pursuant to G.S. 1A-1, Rule 59(a)(5) and (7), is addressed to the sound discretion of the trial judge, whose ruling, in the absence of abuse of discretion, is not reviewable on appeal. Plaintiff does not argue that there was an abuse of discretion in the instant case and the record reveals no abuse. We hold that the trial court properly exercised its discretion in granting a new trial on the issue of damages on the ground that the evidence was insufficient to justify the verdict as to the issue of damages.

For the reasons stated, the judgment n.o.v. in favor of defendant is reversed; the portion of the judgment granting defendant a new trial on the issue of damages is affirmed.

Partial new trial.

Chief Judge MALLARD and Judge CAMPBELL concur.

STATE OF NORTH CAROLINA v. BOYD L. COXE, JR., AND CALVIN McLEAN JACKSON, ALIAS MACK JACKSON

No. 7212SC657

(Filed 25 October 1972)

1. **Conspiracy § 4— conspiracy to commit armed robbery — indictment**
   Bill of indictment was sufficient to charge the crime of conspiracy to commit an armed robbery.

2. **Conspiracy § 5— statements of co-conspirators — order of evidence**
   In a prosecution for conspiracy to commit armed robbery, the trial court did not err in the admission of testimony as to statements of co-conspirators prior to a showing by evidence and a finding by the court that a conspiracy existed, since wide latitude is allowed in the order in which pertinent facts are offered in evidence in a conspiracy trial.

3. **Criminal Law § 89— impeachment — cross-examination — indictment for other crimes**
   In cases begun after 15 December 1971, a witness may not be cross-examined for impeachment purposes as to whether he has been indicted or is under indictment for a criminal offense.

4. **Robbery § 5— armed robbery — verdict of felonious larceny**
   In this trial upon an indictment charging armed robbery, there was ample evidence to support the verdict of guilty of the lesser included offense of felonious larceny.

5. **Conspiracy § 6— conspiracy to rob — sufficiency of evidence**
   The State's evidence was sufficient to be submitted to the jury in a prosecution for conspiracy to commit armed robbery.

APPEAL by defendants from *Hall, Judge* 24 April 1972 Session of Superior Court held in HOKE County for the trial of criminal cases.

Defendants were tried, with others, upon identical bills of indictment charging them with the felony of conspiracy to commit the crime of armed robbery and with the felony of armed robbery.

The bill of indictment charging B. L. Coxe, Jr., with conspiracy to commit the crime of armed robbery reads as follows:

"THE GRAND JURORS FOR THE STATE UPON THEIR OATH PRESENT, That Boyd L. Coxe, Jr., Calvin McLean Jackson,

Anna Grace Jackson, Don W. Thomas, Johnnie Leon Spencer, Elaine Hartman Spencer, Linda Locklear Coxe, and others, late of the County of Hoke on or about the 27th day of December, 1971, with force and arms, at and in the county aforesaid, did unlawfully, wilfully, and feloniously agree, plan, combine, conspire and confederate, each with the other, to unlawfully, wilfully and feloniously commit the unlawful and felonious crime of armed robbery at Burlington Industries, Inc., Raeford, North Carolina, having in their possession and with the use and threatened use of firearms to wit: two pistols whereby the life of Preston Moore was endangered and threatened to unlawfully, wilfully, forcibly, violently and feloniously take, steal and carry away 3 money changer machines containing $800.00 in money to wit: United States Currency of the total value of $3,200.00 from the presence and place of business of Burlington Industries, Inc., a Corporation, property of Mid-South Vending Company, Inc., a Corporation, against the form of the statute in such case made and provided and against the peace and dignity of the State."

The conspiracy bill of indictment against Calvin McLean Jackson is identical in language to the Coxe conspiracy bill of indictment with the exception that in the Jackson bill of indictment the names of the alleged conspirators appear in the following sequence: Calvin McLean Jackson, Boyd L. Coxe, Jr., Don W. Thomas, Anna Grace Jackson, Johnnie Leon Spencer, Elaine Hartman Spencer, Linda Locklear Coxe.

The bill of indictment charging B. L. Coxe, Jr., with armed robbery reads as follows:

"THE JURORS FOR THE STATE UPON THEIR OATH PRESENT, That Boyd L. Coxe, Jr., late of the County of Hoke, on or about the 27th day of December, 1971, with force and arms, at and in the county aforesaid unlawfully, wilfully and feloniously having in his possession and with the use and threatened use of firearms, to wit: two pistols, whereby the life of Preston Moore was endangered and threatened, did then and there unlawfully, wilfully, forcibly, violently and feloniously take, steal and carry away Three (3) Money change Machines containing Eight Hundred Dollars ($800.00) in money, to wit: United States Currency and coins of the value of Three Thousand Two Hundred

Dollars ($3,200.00) property of Mid-South Vending Incorporated, a corporation, from the place of business of Burlington Mills Incorporated, a corporation, on North Carolina State Highway 211 By-pass, Raeford, Hoke County, North Carolina, and from the presence, person, and possession of Preston Moore, employee of Burlington Mills Incorporated, a corporation, against the form of the statute in such case made and provided and against the peace and dignity of the State."

The armed robbery bill of indictment against Calvin McLean Jackson is identical in language to the Coxe armed robbery bill of indictment with the exception that instead of the name "Boyd L. Coxe, Jr.," there appears therein the name "Calvin McLean Jackson alias Mack Jackson."

The cases were consolidated for trial, and each of these two defendants, Coxe and Jackson, pleaded not guilty. The jury returned a verdict against each defendant of guilty as charged of conspiracy to commit the crime of armed robbery and guilty of the lesser included offense of felonious larceny on the armed robbery charge. From judgment of imprisonment on each count, each of these two named defendants appealed to the Court of Appeals.

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

Barrington, Smith & Jones, P.A., by Carl A. Barrington, Jr., and William S. Geimer for defendant appellant Coxe.

John C. B. Regan III for defendant appellant Jackson.

MALLARD, Chief Judge.

The evidence for the State tended to show that Coxe, Jackson, their wives, one Johnny Spencer and his wife (Coxe and his wife and Spencer and his wife were married after this occurrence), and one Donald Thomas all entered into a conspiracy to commit the felony of armed robbery of the night watchman, Preston Moore, at the building of the Burlington Mills (Burlington), Raeford, North Carolina. The robbery was planned for 27 December 1971. (Spencer, Mrs. Spencer and Thomas were witnesses for the State.) On the night of 27 December 1971, Thomas held a pistol on Preston Moore, the night watchman at

the building occupied by Burlington, while Coxe and Spencer went into another part of the building and took therefrom "three money changers," the property of Mid-South Vending Corporation. These money changers were attached to the wall of the building. Because the machines were too heavy for them to carry out to meet the Jackson car as planned, they were placed in and hauled away in a Burlington pickup truck and taken to the Coxe residence. Spencer, Thomas and Coxe had been taken to the scene by Jackson and his wife in the Jackson car. The Jacksons were to pick them up after the robbery was accomplished, but they left in the stolen pickup truck and did not wait to be picked up by the Jacksons. The Jacksons later met Spencer, Thomas and Coxe at Coxe's residence and the machines, which contained eight hundred dollars in cash, were pried open with crowbars and the money removed and divided equally among the four men, to wit: Spencer, Coxe, Thomas and Jackson. Each got two hundred dollars. They then took the machines and threw them into the water at McKinnon Bridge and hid the truck in the woods.

The defendants did not offer any evidence.

APPEAL OF COXE

[1] Defendant assigns as error the failure of the trial judge to allow his motion to quash the indictments on the grounds, among other things, that the conspiracy indictment did not give him notice of the crime he was alleged to have conspired to commit. This assignment of error is overruled. The defendant in his brief does not argue the invalidity of the bill of indictment charging armed robbery. We hold that the indictment in this case charging a conspiracy to commit the crime of armed robbery meets the test of validity under the rules set forth in *State v. Gallimore*, 272 N.C. 528, 158 S.E. 2d 505 (1968) and the cases cited therein.

[2] Defendant contends in his assignment of error numbered 3 that the trial judge committed error in admitting into evidence certain statements of a co-conspirator and another State's witness without proper limiting instructions before evidence establishing a conspiracy was presented. Defendant argues that before any evidence of a conspiracy was admissible against these two defendants, the evidence should have shown and the trial judge should have found that a prima facie case had been made out establishing a completed conspiracy.

The correct rule relating to the order of proof in conspiracy cases is stated in *State v. Jackson,* 82 N.C. 565 (1880), where it is said:

> "Although the usual and more orderly proceeding in the development of a conspiracy is to establish the fact of its existence, and then the connection of the defendants with it, yet the conduct of the trial and the order in which the testimony shall be introduced must rest largely in the sound discretion of the presiding Judge, and if at the close of the evidence every constituent of the offense charged is proved, the verdict resting thereon will not be disturbed. * * * "

See also *State v. Thomas,* 244 N.C. 212, 93 S.E. 2d 63 (1956); *State v. Boswell,* 194 N.C. 260, 139 S.E. 374 (1927); and *State v. Anderson,* 92 N.C. 732 (1885).

In *State v. Conrad,* 275 N.C. 342, 168 S.E. 2d 39 (1969), [cited by defendant] Justice Higgins said:

> " * * * Because of the nature of the offense (conspiracy) courts have recognized the inherent difficulty in proving the formation and activities of the criminal plan and have allowed wide latitude in the order in which pertinent facts are offered in evidence. * * * "

In 15A C.J.S., Conspiracy, § 92, p. 893, it is said:

> "In a conspiracy prosecution, great latitude must be allowed the state in producing its evidence; and the accused must be allowed to introduce any competent evidence on his behalf."

We hold that the trial judge did not commit prejudicial error in the admission of the testimony complained of relating to the conspiracy.

[3] Defendant assigns as error the action of the trial court in sustaining the objections of the solicitor to questions propounded by the defendant to the State's witness Thomas, a co-conspirator, concerning criminal charges pending against him. This trial was held at the 24 April 1972 Session of Superior Court for the trial of criminal cases in Hoke County. The rule is that in cases begun after 15 December 1971, a witness may not be cross-examined for impeachment purposes as to whether

he has been indicted or is under indictment for a criminal offense. See *State v. Harris,* 281 N.C. 542, 189 S.E. 2d 249 (1972) and *State v. Williams,* 279 N.C. 663, 185 S.E. 2d 174 (1971). We hold, therefore, that this assignment of error numbered 4 is without merit.

[4] Defendant's assignment of error numbered 6, that the trial judge erred in failing to grant his motion for judgment of nonsuit of the armed robbery charge in its entirety and in submitting the issue of felonious larceny to the jury, is without merit. The trial judge did allow defendant's motion for nonsuit as to the armed robbery offense charged. The felony of larceny is a lesser included offense of armed robbery when allegations in the bill of indictment and the evidence offered at the trial will support it. *State v. Swaney,* 277 N.C. 602, 178 S.E. 2d 399 (1970), *cert. denied,* 402 U.S. 1006; *State v. Rorie,* 252 N.C. 579, 114 S.E. 2d 233 (1960); *State v. Bell,* 228 N.C. 659, 46 S.E. 2d 834 (1948); *State v. Bailey,* 4 N.C. App. 407, 167 S.E. 2d 24 (1969). In the case before us, the bill of indictment charging armed robbery contained, as required by the rule, all of the essential elements of the lesser included offense of felonious larceny. See *State v. Booker,* 250 N.C. 272, 108 S.E. 2d 426 (1959); 42 C.J.S., Indictments and Informations, § 275; 41 Am. Jur. 2d, Indictments and Informations, §§ 97 and 313. There was ample evidence of larceny offered at the trial to support the verdict of guilty of felonious larceny.

[5] The defendant's assignment of error that the court erred in failing to allow his motion for nonsuit as to the conspiracy to commit armed robbery is without merit. There was ample evidence of a conspiracy to commit the crime of armed robbery offered at the trial to support the verdict of guilty as charged.

Defendant contends that the trial judge erred in the instructions given the jury. We have examined the charge, and when it is considered as a whole, we are of the opinion that no prejudicial error appears therein.

APPEAL OF JACKSON

[2] Defendant Jackson contends that the trial judge committed error in allowing the State's witness Thomas to testify regarding conversations between the co-conspirators prior to a showing by evidence and a finding by the court that a conspiracy existed.

This contention is without merit for the reasons hereinabove stated in the appeal of Coxe.

Defendant contends that the trial judge erred in failing to adequately instruct the jury as to the law with respect to responsibility of co-conspirators for one another's acts done in furtherance of the conspiracy. We hold that the trial judge adequately and fairly explained the law arising on the evidence to the jury.

We have carefully examined all of the assignments of error properly brought forward and are of the opinion that the defendants have had a fair and impartial trial, free from prejudicial error.

No error.

Judges BROCK and BRITT concur.

STATE OF NORTH CAROLINA v. BOBBY RAY WILSON

No. 7218SC636

(Filed 25 October 1972)

1. **Criminal Law §§ 162, 169— unresponsive answer — no motion to strike — similar testimony subsequently given without objection**

Admission of a witness's answer which allegedly was not responsive to the question put to him did not constitute prejudicial error where defendant objected but failed to make a motion to strike the answer and where the witness gave the same testimony on cross-examination without objection or motion to strike.

2. **Homicide § 28— instruction on self-defense — explanation of "without fault" and "free from blame"**

In a prosecution for second degree murder or manslaughter, the trial court erred in not granting defendant's written request for clarification of the charge in order to relate the phrases "without fault" and "free from blame" to defendant's conduct at the time of the homicide and to dispel any idea that defendant's improper or unlawful conduct prior to the homicide, standing alone, would preclude his right of self-defense.

APPEAL by defendant from *Seay, Judge,* 31 January 1972 Session of Superior Court, GUILFORD County.

Defendant was indicted for the murder of Ray Douglas Bunton. The State elected to try defendant for murder in the

second degree or manslaughter. Defendant entered a plea of not guilty, was found by the jury guilty of voluntary manslaughter, and appeals from the judgment entered on the verdict.

Defendant offered no evidence and did not testify in his own behalf. The evidence offered at the trial tends to show, in summary, the following: Earl Joseph Reardon (Reardon), who was 19 years of age at the time of the killing, and Ray Bunton, the deceased, who was 13 years of age, left the home of the deceased about noon on Sunday, 22 August 1971. They, with a brother of deceased, went to Greensboro where they visited at the hospital, visited some boys at their place behind a filling station and went to a drive-in beer joint. Reardon drank some beer. Deceased did not. They left the beer joint after dark and decided to go to the General Greene and arrived there about eleven o'clock. They "had heard that homosexuals hung out at the General Greene" and that "if you let them have a homosexual act with you they would give you money." All three went into the General Greene but came back out. Deceased's brother met a friend in the parking lot and did not go back in with Reardon and deceased. Reardon had not previously been there. They sat at a booth and Reardon ordered a beer. Deceased did not drink a beer. They saw defendant and a companion sitting at a bar. Defendant was dressed in a wig and a woman's purple pants suit and carried a lady's pocketbook. Reardon knew defendant was a man and they motioned for defendant and his companion to come sit with them. Defendant said he had an apartment at the O'Henry Hotel across the street, that they "would get some beer, go there and have a party." The man with defendant was Raymond Bridges. The four of them went to defendant's room in the hotel. No conversation had been had with respect to homosexual activity. When they got into the room, defendant put the beer in an ice chest. Bridges and deceased got on the bed. Defendant went in the bathroom and Reardon followed him. They disrobed and Reardon allowed defendant to perform an homosexual act upon him. They remained in the bathroom about 30 minutes. When they came out deceased was sitting on the edge of the bed fully clothed. Bridges was seated in a chair. Reardon put his clothes on. Defendant remained undressed with only a towel around his waist. Reardon asked defendant for money. Defendant refused and replied that "we should give them money, and told us to get out of there." Reardon hit defendant in the face with the back of his hand. "I flew mad, I

guess, because he got smart with me. I hit him hard." A scuffle ensued with Reardon and defendant. Reardon's head hit the wall. Defendant got a knife from the bureau and cut Reardon on the head, shoulder and arm. Deceased got up from the bed and went toward defendant. At that time "I saw Wilson (defendant) make a motion toward Ray (deceased) with the knife." Both Reardon and deceased then left the room, Reardon a step or two ahead of deceased. A short distance down the hall deceased fell to the floor and Reardon realized he was badly injured and ran to the police station for help. The police officers arrived at the hotel at 2:45 and found the body of deceased lying in a pool of blood. Blood led to room 39 about 20 to 25 feet from the body. When the officers entered the room, defendant was seated in a chair dressed in a towel. He stood up when the officers entered. They saw no injuries, bruises, or lacerations on him. They warned him of his constitutional rights and he replied that he understood them. When the officer said that there must be a knife around, defendant said "You must mean this one" and reached into the top dresser drawer and withdrew a hunting knife. As he pulled it from the drawer he said "Let me show you how I did it." A statement was not taken from defendant at that time. There was blood on the floor, the bed and the walls. A stereo set had been turned over. "It looked like there had been a scuffle in the room."

The pathologist who performed the autopsy on the body of deceased testified that deceased had a superficial abrasion over the bridge of the nose and the right cheek. The main wound was in the right chest region. The wound extended from the chest wall back to the backbone lacerating the inferior vena cava. Death was caused by massive hemorrhage from the lacerated vein. "The sharp instrument went through the rib cage causing a complete transection or cutting across of the fifth rib on the right. The rib was cut in two pieces."

Attorney General Morgan, by Associate Attorney Earnhardt, for the State.

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

MORRIS, Judge.

Defendant assigns as error the failure of the court to allow his motion to dismiss as of nonsuit. The evidence was sufficient

for submission of defendant's guilt to the jury, and this assignment of error is overruled.

[1] Defendant brings forward only one exception to the evidence. To the solicitor's question: "What did he do with the knife?" the witness answered: "He cut me on my shoulder and head and this arm too. And about that time Ray got up from right here and went toward him, to help me out." Defendant objected in this form: "Object to what he was going to do. Just tell what happened." The court overruled the objection. On appeal defendant argues the answer was not responsive and was an impermissible statement by the witness as to deceased's intent and mental processes. The question was not objectionable. True the answer, in part, is not responsive. "It is well settled in this jurisdiction that defendant's objection should have been accompanied by a motion to strike the objectionable statement from the record if he deemed it incompetent and prejudicial." *State v. Gooding,* 196 N.C. 710, 711, 146 S.E. 806 (1929); *Highway Commission v. Black,* 239 N.C. 198, 79 S.E. 2d 778 (1954). There was no motion to strike any portion of the answer. Additionally, upon cross-examination, the witness gave the same testimony without objection or motion to strike. This assignment of error is without merit.

[2] Defendant also assigns as error the refusal of the court to give instructions tendered in writing by defendant and, in addition, contends that prejudicial error appears in certain portions of the charge as given.

Defendant contends that he was entitled to have the court instruct the jury that the fact that he had previously, even in the immediate past, been guilty of wrongful acts or of an unlawful homosexual act would not, standing alone, deprive him of his right of self-defense. We think defendant's position is well taken.

Ordinarily the words "without fault" and "free from blame" are words of such common usage that their use with respect to defendant's conduct in bringing on the controversy would not require definition or further explanation. Instructions to the jury using these words, or similar words of identical import, have frequently been approved in this jurisdiction. See *State v. Jennings,* 276 N.C. 157, 171 S.E. 2d 447 (1970).

In *State v. Jennings, supra,* at pp. 162-163, Justice Branch, writing for the majority of the Court, said:

> "Likewise, it is our opinion that conduct towards another must be evaluated within the framework of the surroundings, circumstances and parties, including their previous relations and the then existing state of their feelings. However, the fact that a person has previously been guilty of immoral conduct or wrongful acts, or has had past difficulties with the decedent, does not, standing alone, deprive a defendant of his right of self-defense. 40 C.J.S., Homicide, § 119, at 990. The requirement that a defendant must be free from fault in bringing on the difficulty before he can have the benefit of the doctrine of self-defense ordinarily means that he himself must not have precipitated the fight by assaulting the decedent or by inciting in him the reaction which caused the homicide. Usually, whether the defendant is free from blame or fault will be determined by his conduct at the time and place of the killing. Yet the fault in bringing on a difficulty which will deprive him of the right of self-defense is not confined to the *precise* time of the fatal encounter, but may include fault so closely connected with the difficulty in time and circumstances as to be fairly regarded as operating to bring it on. 40 Am. Jur. 2d, Homicide, § 145, at 434."

In that case, defendant had been engaged for a period of years in conduct with deceased's wife which, in the eyes of an average juror, would fix him with blame and fault. There the court held that under the particular facts of that case, the court should have amplified and explained the meaning of "without fault" and "free from blame" when defendant specifically requested such charge. In so doing, the Court said, "We wish to make it crystal-clear that we do not intend to overrule the line of cases which have used the words 'without fault' or 'free from blame' without further definition when there was no request for further instruction. We emphasize that this opinion must be read in connection with the facts of the case." *Jennings,* p. 163.

We think the facts in the case before us require the application of the rule of *Jennings.* We, therefore, conclude that the court, upon request of counsel, should have further clarified the charge in order to relate the phrases "without fault" and

"free from blame" to defendant's conduct *at the time of the homicide* and to dispel any idea that defendant's improper or unlawful conduct prior to the homicide, standing alone, would preclude his right of self-defense.

Defendant, therefore, must be given a

New trial.

Judges BROCK and HEDRICK concur.

STATE OF NORTH CAROLINA v. WILLIE EDWARD HARLOW, JR.

No. 7212SC689

(Filed 25 October 1972)

1. **Burglary and Unlawful Breakings § 4— list of merchandise — admissibility on issue of intent**

In a prosecution for felonious breaking and entering under G.S. 14-54(a), the trial court did not err in admitting an itemized list of merchandise allegedly found outside the building which defendants purportedly broke into, as such evidence was relevant on the issue of defendant's intent.

2. **Burglary and Unlawful Breakings § 5— sufficiency of evidence to withstand nonsuit**

There was sufficient evidence to withstand defendant's motion for nonsuit in a prosecution under G.S. 14-54(a) for felonious breaking and entering where the evidence tended to show that defendant was apprehended inside a grocery store which had been locked and secured earlier, that a broken window was the only means of entry, and that police discovered items of merchandise near the window on the outside of the store.

3. **Criminal Law § 116— charge on failure of defendant to testify — no prejudicial error**

The trial judge's statement in his charge to the jury that "defendants, as they have a right to do elected not to offer evidence, relying on the weakness or what they consider to be the weakness of the State's evidence," did not constitute prejudicial error since the charge, taken as a whole, did not give the jury the impression that defendant's failure to present evidence was to be taken against him.

APPEAL by defendant from *Clark, Judge,* 15 May 1972 Session of CUMBERLAND County Superior Court.

Defendant Harlow was charged in a three count indictment with (1) felonious breaking or entering, (2) felonious larceny, and (3) receiving stolen goods knowing them to have been stolen. Another defendant, Otis Lee Conyers, was charged in a similar bill of indictment and upon motion of the State, both cases were consolidated for trial. Defendant Harlow entered a plea of not guilty to the first two counts and the State took a *nolle prosequi* as to the third count.

At the trial the State introduced evidence which tended to show the following:

On the night of 18 and 19 January 1972, Vernon Horne, owner of Horne's Grocery, locked his store at about 11:30 p.m. At about 12:30 a.m. that night, Officer Gainey of the Fayetteville Police Department rode by the grocery and both the front door and window were closed and secure. At approximately 1:00 a.m. when Officer Gainey returned to the grocery in response to a call, he saw the figure of a man in the window. He went up to the window and caught the man by his coat, but the man pulled away and ran back in the building. The front window and screen had been broken out. After summoning assistance, Officer Gainey entered the grocery through the open window and apprehended defendant Harlow whom he found inside. Defendant Conyers was also apprehended inside by another officer. Another subject was seen running away from the store when Officer Gainey first drove up, but he eluded the officers.

Upon entering the store, the officers found certain items of merchandise and approximately $300 in cash lying on the floor. Officer Gainey found certain other items of merchandise (chewing gum, cigars, cigarettes, wine, etc.) stacked near the broken window on the outside of the store.

There was also testimony by Officer Riddle that he observed the same items of merchandise some 20-25 feet to the right of the broken window on the outside of the building and that the broken window was the only means of entry into the otherwise locked store. An itemized list of the merchandise found outside the store was made by Officer Riddle and was introduced into evidence at trial.

Defendant Harlow offered no evidence in his behalf.

The jury returned a verdict of "not guilty" as to the charge of larceny and a verdict of "guilty" as to the charge of feloni-

ous breaking or entering. From a suspended prison sentence of not less than three nor more than five years, defendant Harlow appealed.

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

Marion C. George, Jr., for defendant appellant.

MORRIS, Judge.

[1] Defendant contends that the trial court erred in admitting into evidence State's Exhibit No. 1, an itemized list of merchandise allegedly found outside the building and in denying defendant's motion to strike all evidence concerning such items at the close of all the evidence.

In order to convict the defendant under G.S. 14-54(a) for felonious breaking or entering, it is incumbent upon the State to prove beyond a reasonable doubt that the defendant did break into or wrongfully enter the building "with intent to commit any felony or larceny therein." Also, "[a]s a general rule, evidence, to be admissible, must have some bearing on the issues involved. It must tend to prove or disprove some fact material to the cause of action alleged, or to the defense interposed." *Corum v. Comer,* 256 N.C. 252, 254, 123 S.E. 2d 473 (1962). Clearly the disputed evidence is relevant on the issue of whether the defendant possessed the requisite intent to steal, and the State has presented ample testimony connecting such evidence in time and place with the defendant who was apprehended inside the grocery.

Defendant next contends that the trial court erred in denying his motions to dismiss the charges of larceny and felonious breaking or entering. As to his motion directed to the charge of felonious breaking or entering, defendant argues that the State offered no evidence to prove the specific and limited intent to steal as required by statute to sustain a conviction. As to his motion directed to the larceny count, defendant contends its denial was prejudicial even though the jury found him "not guilty" since the submission of that offense to the jury without facts to support it inadvertently invited their minds to surmise and conjecture on the issue of intent to steal in the breaking or entering count. We find these exceptions also without merit.

[2] Upon motion to nonsuit it is incumbent upon the trial court to consider the evidence in the light most favorable to the State, giving the State the benefit of every reasonable inference to be drawn from the evidence regardless of whether the evidence is direct, circumstantial, or both, and if there is evidence from which a jury could find that the offense charged has been committed and that the defendant committed it, the motion to dismiss should be overruled. *State v. Goines,* 273 N.C. 509, 160 S.E. 2d 469 (1968). Intent is a mental attitude and can seldom be proved by direct evidence and is most often proved by circumstances from which it can be inferred. *State v. Kendrick,* 9 N.C. App. 688, 177 S.E. 2d 345 (1970). Also in *State v. Smith,* 266 N.C. 747, 748-749, 147 S.E. 2d 165 (1966), it was stated: "Under G.S. 14-54, if a person breaks or enters one of the buildings described therein with intent to commit the crime of larceny, he does so with intent to commit a felony, without reference to whether he is completely frustrated before he accomplishes his felonious intent . . ." The State has offered proof that the defendant was apprehended inside a grocery which had been found locked and secure approximately 30 minutes earlier. A broken window, the only means of entry, was discovered by the police along with items of merchandise near the window on the outside of the store. We hold that there was sufficient evidence to withstand defendant's motions to dismiss, and the trial court committed no error.

Defendant also assigns as error the trial court's instructing the jury as if both defendants were charged in the same bill of indictment and in developing a conspiracy theory in his instruction which had not been alleged or proven by the State. If there was any error, it was cured by the trial court's instructions as to the elements of each of the crimes charged as they apply to each of the defendants.

[3] Defendant further assigns as error the following statement made by the trial judge in his charge to the jury:

> "The defendants, as they have a right to do elected not to offer evidence, relying on the weakness or what they consider to be the weakness of the State's evidence."

Defendant argues that it is prejudicial error to point out the failure of a defendant to testify even if done in the qualified manner above. G.S. 8-54, in relevant part, reads as follows:

> "In the trial of all indictments, complaints, or other proceedings against persons charged with the commission of crimes, offenses or misdemeanors, the person so charged is, at his own request, but not otherwise, a competent witness, and his failure to make such a request shall not create any presumption against him."

Also, in *Griffin v. California,* 380 U.S. 609, 14 L.Ed. 2d 106, 85 S.Ct. 1229 (1965), a state constitutional provision allowing a court to comment on defendant's failure to testify was held unconstitutional.

In *State v. Paige,* 272 N.C. 417, 158 S.E. 2d 522 (1968), an instruction similar to the one in the case at hand was upheld. The Court, speaking through Parker, C.J., stated:

> "Reading the challenged instruction in the instant case in its entirety, it seems manifest that the jury must have clearly understood that defendant had a legal right to elect to testify or not to testify in his own behalf, and that he had a right to rely upon the weakness of the State's case. The trial judge in his conclusion of the challenged instruction made an infelicitous choice of words, but we think considering the instruction as a whole the jury could not have gotten the impression, as he contends, that the trial judge instructed the jury that the failure of defendant to testify in his own behalf was a fact to be considered against him." *Paige,* at p. 423.

While the trial judge in this case might have made an "infelicitous choice of words," nevertheless, considering the charge as a whole, he did not give the jury the impression that defendant's failure to present evidence was to be taken against him. This is borne out by the jury's failure to find him guilty of larceny. What is constitutionally condemned are "instructions by the court that such silence is evidence of guilt." *Griffin, supra,* at p. 615. The instruction complained of here cannot be so interpreted. While we do not approve of the challenged instruction as a model of clarity, we do not perceive in it prejudicial error sufficient to justify a new trial.

We have examined defendant's remaining assignments of error and find them equally without merit. In the trial and judgment appealed from we find

No error.

Judges CAMPBELL and PARKER concur.

MARY JANE SPIVEY LEWIS, ADMINISTRATRIX OF THE ESTATE OF WAYNE HARRISON LEWIS, DECEASED v. GASTONIA AIR SERVICE, INC. AND COCKER MACHINE & FOUNDRY CO., INC.

No. 7220SC488

(Filed 25 October 1972)

1. **Aviation § 3— death in airplane crash — negligence of person who arranged flight — sufficiency of complaint**

Complaint was sufficient to state a claim for relief against defendant for the wrongful death of an airplane passenger where it alleged that plaintiff's intestate was killed when the airplane crashed into the side of a mountain, that defendant's agent arranged for the flight in an aircraft that was not equipped with deicing equipment or with instruments for instrument controlled flight, that defendant's agent knew that icing conditions existed along the flight path and that the weather and terrain were unsuitable for non-instrument controlled flights, but that defendant's agent nevertheless arranged for the flight in the ill-equipped aircraft and failed to cancel the flight, and that the acts of defendant's agent constituted one of the proximate causes of the crash and resulting death.

2. **Aviation § 3— person arranging airplane flight — duty to cancel**

It cannot be said as a matter of law that one who hires a flight has no authority to cancel it or postpone it, or that he has no duty to do so once it becomes obvious to him that the passengers for whom he arranged the flight would be subjected to unusual perils should the flight proceed.

3. **Principal and Agent § 1— allegations of agency**

In an action to recover for the wrongful death of an airplane passenger, an issue of agency arose on allegations that the person who arranged the flight was employed by defendant and was instructed by defendant to arrange the flight, and that such person was acting within the scope of his employment at all times alleged in the complaint.

APPEAL by plaintiff from *Collier, Judge,* 21 February 1972 Session of Superior Court held in UNION County.

Civil action to recover for the alleged wrongful death of plaintiff's intestate, Wayne Harrison Lewis, who was killed 14 November 1969 in the crash of an airplane in which he was a passenger. The airplane was owned by Gastonia Air Service, Inc., and was piloted by its employee. Cocker Machine & Foundry Co., Inc. (Foundry Co.) allegedly arranged the flight to transport certain of its employees, and also certain employees of McCoy-Ellison, Inc., from Gastonia and Monroe to White Sulphur Springs, West Virginia, where they were to repair machinery for their employers. Lewis, who was employed by McCoy-Ellison, boarded the airplane in Monroe as instructed by his employer. The flight continued from there to a point in the mountains of Virginia where, according to allegations in the complaint, the aircraft flew "on a level course and under full power straight into the side of the mountain. . . ."

Defendant Foundry Co. moved under G.S. 1A-1, Rule 12(b) (6) to dismiss the action as to it for failure of the complaint to state a claim upon which relief can be granted. Judgment was entered allowing the motion for the reason that "the Complaint in this action affirmatively discloses that the plaintiff has no cause of action or claim for relief" against Foundry Co. This appeal is from that judgment. Material factual allegations of the complaint are more fully summarized in the opinion.

Griffin and Clark by Thomas J. Caldwell for plaintiff appellant.

Carpenter, Golding, Crews & Meekins by James P. Crews for defendant appellee.

GRAHAM, Judge.

Under G.S. 1A-1, Rule 8(a), detailed fact-pleading is not required. "A pleading complies with the rule if it gives sufficient notice of the events or transactions which produced the claim to enable the adverse party to understand the nature of it and the basis for it, to file a responsive pleading, and—by using the rules provided for obtaining pretrial discovery—to get any additional information he may need to prepare for trial." *Sutton v. Duke,* 277 N.C. 94, 104, 176 S.E. 2d 161, 167. "Under 'notice pleading' a statement of claim is adequate if it gives sufficient notice of the claim asserted 'to enable the adverse party to answer and prepare for trial, to allow for the

application of the doctrine of *res judicata,* and to show the type of case brought.' " *Roberts v. Memorial Park,* 281 N.C. 48, 56, 187 S.E. 2d 721, 725. If a complaint meets these basic requirements, and does not show upon its face that there is an insurmountable bar to recovery on the claim alleged, it is not subject to dismissal under G.S. 1A-1, Rule 12(b)(6). *Sutton v. Duke, supra; Cassels v. Motor Co.,* 10 N.C. App. 51, 178 S.E. 2d 12.

[1] The complaint here unquestionably places Foundry Co. on notice as to the nature and basis of the claim being asserted against it. The claim is for the wrongful death of plaintiff's intestate and the basis of the claim is negligence.

We also find that the complaint is sufficiently specific to give notice of the events and transactions which give rise to the claim asserted. Allegations therein attribute the cause of the crash, among other things, to the aircraft's lack of suitable instruments and equipment for flight over mountainous terrain and through the weather conditions which prevailed. With respect to the negligence of Foundry Co., it is alleged in substance: Frederick Phillip Landman, acting at all times as the agent of Foundry Co., arranged for the flight in an aircraft that was not equipped with deicing equipment or with instruments for IFR (instrument flight rules) flights. Icing conditions existed along the flight path and the weather and terrain were unsuitable for non-instrument controlled flights. All of these factors were known to Landman, who was experienced in matters pertaining to flying. He nevertheless arranged for the flight in the ill-equipped aircraft and failed to cancel the flight when he knew, or in the exercise of ordinary care should have known, that the aircraft being used was not equipped to fly under the conditions that would be encountered along the flight path. It is further alleged that these acts of Landman constituted one of the proximate causes of the crash and resulting death.

It must be remembered that at this juncture we are dealing only with plaintiff's pleadings. Our concern is not what plaintiff may be able to show at trial, but whether her pleadings show conclusively that she can prove no facts which would permit recovery from Foundry Co. for the death of her intestate.

[2] One of plaintiff's theories of recovery is that Foundry Co.'s employee, Landman, arranged the flight, had the authority

to cancel it, and negligently failed to do so when he knew, or should have known, that injurious consequences would result if the flight proceeded. Foundry Co. contends that Landman had no duty to cancel the flight since the pilot, and only the pilot, had the final authority to decide whether flying conditions were safe in the type of aircraft employed. It is true that a pilot may not be absolved of responsibility imposed upon him by law for the operation and control of the aircraft. *Mann v. Henderson,* 261 N.C. 338, 134 S.E. 2d 626. However, plaintiff does not seek to have the pilot absolved of responsibility by shifting his responsibility to Landman. Her theory is that the pilot was negligent in flying into the face of known perils and that Landman was negligent in permitting him to do so. Certainly it cannot be said, as a matter of law, that one who hires a flight has no authority to cancel it or postpone it, or that he has no duty to do so once it becomes obvious to him that the passengers for whom he arranged the flight would be subjected to unusual perils should the flight proceed.

Foundry Co. argues that failing to cancel the flight had nothing to do with the crash since the conditions of weather and terrain, which allegedly required a more adequately equipped aircraft, were present only near the terminus of the flight, and that the pilot had numerous opportunities to land the aircraft or turn back. These are matters of speculation that are not affirmatively shown by plaintiff's pleadings. Whether a person of ordinary prudence in Landman's position should have reasonably foreseen that injurious consequences could result from his failure to cancel the flight is a question that cannot be determined at this stage. The case is simply not yet ripe for a determination that there can be no liability as a matter of law. See *Sutton v. Duke, supra.*

[3] Foundry Co.'s final contention is that the acts of Landman may not be imputed to it. The complaint alleges that Landman was employed by Foundry Co.; that he was instructed by Foundry Co. to arrange the flight, and that he was acting within the scope of his employment at all times alleged in the complaint. An issue of agency arises on these allegations.

We hold that the complaint is sufficiently specific to meet the requirements of G.S. 1A-1, Rule 8(a) and that it does not

show on its face that there can be no relief under any of the facts alleged.

Reversed.

Judges PARKER and VAUGHN concur.

MARY McLEMORE HARGETT, ADMINISTRATRIX OF THE ESTATE OF WILLIAM M. HARGETT v. GASTONIA AIR SERVICE, INC., AND COCKER MACHINE & FOUNDRY COMPANY

No. 7220SC490

(Filed 25 October 1972)

APPEAL by plaintiff from *Collier, Judge,* 21 February 1972 Session of Superior Court held in UNION County.

This is a civil action to recover for the alleged wrongful death of plaintiff's intestate, William M. Hargett, who was killed 14 November 1969 in the crash of an airplane in which he was a passenger. Plaintiff appeals from judgment allowing motion of defendant, Cocker Machine & Foundry Company, dismissing the action as to it under Rule 12(b)(6) for failure to state a claim against such defendant upon which relief can be granted.

Thomas & Harrington by L. E. Harrington for plaintiff appellant.

Carpenter, Golding, Crews & Meekins by James P. Crews for defendant appellee.

PARKER, Judge.

This case arose out of the same airplane crash involved in the case of *Lewis v. Air Service, Inc.,* and insofar as the question presented by this appeal is concerned the allegations in plaintiff's complaint in this case are substantially the same as those in the complaint in that case. For the reasons stated in the opinion of Graham, Judge, in *Lewis v. Air Service, Inc.,* the judgment appealed from in this case is

Reversed.

Judges VAUGHN and GRAHAM concur.

ROSCOE McNEIL, ADMINISTRATOR OF THE ESTATE OF WILLIAM EARL McNEIL v. JOHNNIE EDWARD WILLIAMS

No. 727SC343

(Filed 25 October 1972)

1. **Evidence § 51— alcohol content of blood — expert testimony**

Testimony by an expert that in his opinion a person whose blood showed an alcohol content of .17% was under the influence of alcohol was competent and admissible in an action for wrongful death.

2. **Appeal and Error § 30— testimony admitted over objection — similar testimony subsequently admitted without objection**

Plaintiff waived his objection to the admission of testimony by an expert witness with respect to the effects of alcohol upon a person under the influence when the same testimony and elaboration thereon were subsequently allowed into evidence without objection.

3. **Negligence § 12— fatal injury to pedestrian — applicability of last clear chance**

The trial court in a wrongful death action properly refused to submit the issue of last clear chance to the jury where the evidence tended to show that plaintiff's intestate, wearing dark clothes, was walking on the left side of the hard surface of the highway, that defendant pulled into the left lane to pass another vehicle proceeding in the same direction, that defendant was traveling at a speed within the posted limits, that defendant's vehicle was completely on the hard surface of the highway at the time of impact, and that defendant did not see decedent until the moment of impact.

APPEAL by plaintiff from *Cowper, Judge,* November 1971 Civil Session of Superior Court held in WILSON County.

This is an action for wrongful death brought by plaintiff administrator alleging that his intestate died as the result of being struck by a motor vehicle negligently operated by defendant.

Plaintiff's evidence pertinent to this appeal is summarized as follows: A portion of Rural Paved Road #1146 runs in an east-west direction in Edgecombe County. On 29 November 1969 at approximately 6:30 p.m., one Johnnie Lovely was driving his automobile in an easterly direction on said highway at about 35 or 40 m.p.h. He observed plaintiff's decedent on the north shoulder of said highway. Immediately thereafter a 1958 Chevrolet one-ton truck operated by defendant attempted to pass Lovely and struck plaintiff's decedent, who died shortly thereafter. In the area where decedent was struck, the high-

way was straight for approximately one mile, the pavement on the road was approximately 20 feet wide, and the north shoulder was two or two and one-half feet wide. Several house trailers were on each side of the road and the road was unlighted except from lights extending from the house trailers. The weather was clear and the speed limit was 55 m.p.h. The left front fender and headlight of defendant's truck sustained minor damage.

Defendant's evidence tended to show: Defendant, accompanied by his wife, was driving his truck in an easterly direction on said highway. As he approached the automobile being driven by Johnnie Lovely, he signaled to pass. While in the act of passing and as he reached a point adjacent to the Lovely automobile, defendant saw decedent walking in an easterly direction on the left edge of the pavement, but defendant did not have time to stop or attempt to stop before striking decedent. Defendant was driving not more than 45 m.p.h. at the time.

Further pertinent facts are set forth in the opinion.

Issues of negligence, contributory negligence and damage were submitted to the jury, who answered the negligence and contributory negligence issues in the affirmative. From judgment that plaintiff recover nothing of defendant, plaintiff appealed.

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

Battle, Winslow, Scott & Wiley, P. A. by Robert R. Spencer for defendant appellee.

PARKER, Judge.

Plaintiff's first assignment of error is stated as follows: "It is submitted that His Honor erred in allowing into evidence opinion testimony concerning intoxication and the effects that a certain percentage of alcohol in the blood would have on Plaintiff's intestate, when the witness had not observed the deceased, nor was there any evidence that the deceased acted in any way but normal. This evidence was included in the charge by the presiding Judge, all to the prejudice of the Plaintiff."

[1] This assignment of error relates to the testimony of Dr. McBay, who was stipulated to be an expert toxicologist. His

testimony followed the unchallenged testimony of a laboratory technician from the Department of Pathology of N. C. Memorial Hospital to the effect that a test of decedent's blood following his death disclosed an ethyl alcohol content of .17%. Over objection, Dr. McBay testified that in his opinion a person whose blood showed .17% of alcohol was definitely under the influence of alcohol. We hold that the evidence was competent. *Osborne v. Ice Company,* 249 N.C. 387, 106 S.E. 2d 573, and cases therein cited.

[2] Thereafter Dr. McBay was permitted to testify, over objection by plaintiff, that a person under the influence of alcohol would lack coordination, would have visual difficulties, particularly in the evening, and would lack judgment. Assuming, *arguendo,* that this testimony was inadmissible, the record reveals that the witness was then allowed, without objection, not only to repeat the testimony in substance but to elaborate on it. Exception to the admission of testimony is waived when testimony of the same import is thereafter admitted without objection. *Harvel's, Inc. v. Eggleston,* 268 N.C. 388, 150 S.E. 2d 786.

Plaintiff's first assignment of error is overruled.

By his second assignment of error, plaintiff contends that the trial court expressed an opinion unfavorable to plaintiff in the presence of the jury. We have carefully reviewed the record relating to the three exceptions included in this assignment and conclude that the court did not express an opinion. This assignment of error is overruled.

[3] By his third assignment of error, plaintiff contends the court erred in failing to submit to the jury the issue of last clear chance. In *Wade v. Sausage Co.,* 239 N.C. 524, 525, 80 S.E. 2d 150, 151, cited by plaintiff, Ervin, Justice, speaking for the Court said:

> "Where an injured pedestrian who has been guilty of contributory negligence invokes the last clear chance or discovered peril doctrine against the driver of a motor vehicle which struck and injured him, he must establish these four elements: (1) That the pedestrian negligently placed himself in a position of peril from which he could not escape by the exercise of reasonable care; (2) that the motorist knew, or by the exercise of reasonable care could

have discovered, the pedestrian's perilous position and his incapacity to escape from it before the endangered pedestrian suffered injury at his hands; (3) that the motorist had the time and means to avoid injury to the endangered pedestrian by the exercise of reasonable care after he discovered, or should have discovered, the pedestrian's perilous position and his incapacity to escape from it; and (4) that the motorist negligently failed to use the available time and means to avoid injury to the endangered pedestrian, and for that reason struck and injured him."

In *Wade* the Court held the doctrine of last clear chance applied, but we think the facts therein are clearly distinguishable from the facts in the case at bar. In *Wade,* the evidence was sufficient to show: Plaintiff was subject to dizzy spells of a disabling character; while walking on the main-traveled portion of a highway before 4:00 o'clock in the morning, plaintiff became dizzy, lost consciousness, fell, and came to rest athwart the center of the pavement with his feet and legs projecting into the southern traffic lane; while in this helpless position and visible to defendant driver for 225 feet, plaintiff was struck by defendant's vehicle. In the case at bar there was no evidence that decedent placed himself in a position of peril *from which he could not escape* by the exercise of reasonable care, or that defendant knew, or by the exercise of reasonable care could have discovered, decedent's perilous position and *his incapacity to escape from it,* or that defendant had the time and means to avoid injury to decedent by the exercise of reasonable care after he discovered, or should have discovered, decedent's perilous position and *his incapacity to escape from it.*

Plaintiff's witness Lovely testified that immediately before decedent was struck the witness saw decedent on the left shoulder of the road. Defendant testified that he did not see decedent until the moment of impact, and he and his wife testified that defendant's truck was completely on the hard surface at the time of impact. The investigating highway trooper, offered as a witness by plaintiff, testified that defendant told him immediately after the accident that "he was proceeding east and had just pulled out to pass another vehicle proceeding in the same direction" and did not see decedent who was walking on the left side of the hard surface of the highway until it was too late to stop. The trooper further testified that he

examined the shoulder of the road adjacent to the point of impact but did not find any tire marks or skid marks on the shoulder. Deceased was wearing dark clothes.

We hold that the trial court properly refused to submit the issue of last clear chance and the assignment of error relating thereto is overruled.

We have carefully considered the other assignments of error brought forward and argued in plaintiff's brief but finding them without merit, they are overruled.

No error.

Judges BRITT and HEDRICK concur.

MARILYN S. KOOB v. WILLIAM M. KOOB, ORIGINAL DEFENDANT; AND R. D. DOUGLAS, JR., TRUSTEE, AND JOSEPH P. SHORE, CLERK OF THE SUPERIOR COURT, GUILFORD COUNTY, ADDITIONAL DEFENDANTS

No. 7218DC696

(Filed 25 October 1972)

Divorce and Alimony § 21— action for alimony without divorce — surplus proceeds from sale of entirety property — authority of court

The trial court in an action to obtain alimony without divorce and child support had no jurisdiction to order the trustee in a deed of trust on property owned by plaintiff and original defendant by the entirety to pay the net surplus proceeds of a foreclosure sale to the clerk of court, and had no authority to order the clerk to pay one-half of the net proceeds to the plaintiff and the other half in accordance with the orders of the court; the trustee's payment of the proceeds to the clerk is deemed to have been made under the provisions of G.S. 45-21.31(b).

APPEAL by additional defendant, Joseph P. Shore, Clerk of Superior Court, Guilford County, from orders entered by *Alexander, District Judge,* GUILFORD County.

It is alleged that plaintiff and original defendant owned a home in Greensboro as tenants by the entirety. In September 1970 plaintiff moved to California, leaving original defendant living in the Greensboro home. On 17 August 1971 plaintiff instituted the present action seeking alimony without divorce,

alimony pendente lite, custody and support for two children, and counsel fees. Defendant was personally served with summons in this action on 17 August 1971 in Greensboro. Thereafter, defendant departed Greensboro and his present whereabouts are unknown. On 4 January 1972 the trial judge entered an order awarding alimony pendente lite, awarding to plaintiff custody and support for two children, and awarding plaintiff divers reimbursements for expenses and for her interest in personal property alleged to have been taken by defendant.

R. D. Douglas, Jr., an additional defendant, was named as trustee in a deed of trust, executed by plaintiff and defendant, conveying the Greensboro home property to secure the payment of the purchase price thereof. On 17 December 1971, R. D. Douglas, Jr., as trustee, because of default in payment of the obligation secured by the deed of trust, advertised the property for sale under the power of sale contained in the deed of trust.

On 4 January 1972, an order was entered in the present action making R. D. Douglas, Jr., Trustee, a party. The same order directed the trustee "to deliver one-half of the net proceeds from any foreclosure sale of the realty of the parties" to the plaintiff and to pay the other one-half to the clerk to be disbursed in accordance with the orders of the court. The trustee answered and requested that he be directed to pay the net surplus proceeds of the foreclosure to the Clerk of Superior Court of Guilford County under the provisions of G.S. 45-21.31(b). Judge Alexander heard arguments on the trustee's motion and entered an order on 13 March 1972 making the Clerk of Superior Court of Guilford County an additional party defendant. The same order directed R. D. Douglas, Jr., Trustee, to pay the net surplus proceeds of the foreclosure sale to the Clerk of Superior Court of Guilford County, not under the provisions of G.S. 45-21.31(b), but by virtue of the orders of the District Court. The order further directed the clerk to pay one-half of the net surplus proceeds to the plaintiff, and to pay the other one-half in accordance with the orders of the court.

The Clerk of Superior Court answered and requested that the trustee be directed to pay the net proceeds into the Clerk's office by virtue of G.S. 45-21.31(b), and not under the terms of the orders of the District Court.

The forecosure sale of the Greensboro home was completed and payment to the trustee of the purchase price was made on

14 April 1972. The net surplus proceeds of the sale amounted to $25,853.23. On 17 April 1972, the District Court entered an order confirming its prior orders with respect to the net surplus proceeds, directing disbursement of one-half thereof to plaintiff, and particularly directing the Clerk of Superior Court as to the manner of disbursements from the remaining one-half.

The Clerk of Superior Court appealed.

Turner, Rollins & Rollins, by Elizabeth Rollins, for plaintiff appellee.

Attorney General Morgan, by Assistant Attorney General Denson, and John Yeattes, for additional defendant Clerk of Superior Court, Guilford County, appellant.

BROCK, Judge.

The appellant clerk excepts to the provisions of Judge Alexander's order which requires the trustee to pay over to the clerk, under the terms of the order, the net surplus proceeds of the foreclosure sale, to the provisions for disbursement by the clerk of said funds, and to the portion making the clerk a party defendant in this action.

[1] An order of the judge as to a matter within his jurisdiction, even though erroneous in law, is nevertheless binding on the clerk, and he is bound to obey or render himself liable to attachment for contempt. *State v. Sawyer,* 223 N.C. 102, 25 S.E. 2d 443. However, an order void for lack of jurisdiction, though signed by a judge, gives the clerk no protection from personal liability in carrying out its terms. *State v. Sawyer, supra.* In this case it is the appellant clerk's contention that the court did not have jurisdiction of the *res* (the surplus proceeds from the foreclosure sale), and therefore had no authority to require the trustee to pay it to the clerk or to require the clerk to pay it to plaintiff. We agree with this contention.

Our statutes give the trial judge plenary means to enforce its orders for alimony, and its orders for support of children. In situations where the defendant's whereabouts are unknown, as in the present case, and defendant has real or personal property within the state, statutory remedies to enforce orders for alimony or child support are available. G.S. 50-16.7(e) respect-

ing the enforcement of a decree for alimony; G.S. 50-13.4(f)(4) respecting the enforcement of orders for support of children; and G.S. 1-440.2 respecting the enforcement of orders for alimony and for support of children each provides that the remedies of attachment and garnishment shall be available. Article 35 of Chapter 1 of the General Statutes (G.S. 1-440.1 through G.S. 1-440.46) provides the procedure in attachment and garnishment proceedings. In appropriate circumstances, the remedy of receivership for the enforcement of a judgment for alimony and child support is authorized in Article 38 of Chapter 1 of the General Statutes (G.S. 1-501 through G.S. 1-507). For discussions of supplemental proceedings for the enforcement of judgments and orders for alimony and child support, see McIntosh, N.C. Practice 2d, § 1991, and 2 Lee, N.C. Family Law, p. 247.

In this case no order of attachment or garnishment was entered, nor was a receiver appointed. The trial judge merely ordered summons served on the trustee and on the clerk. Neither the trustee nor the clerk qualified for necessary joinder under Rule 19 or for permissive joinder under Rule 20. Each of them should be dropped as parties to this action under Rule 21.

The summary procedure undertaken by the trial court in this case is not authorized in law or equity, and the court acquired no jurisdiction over the *res* (the surplus proceeds of the foreclosure sale). Therefore, all of its orders respecting the surplus proceeds from the foreclosure sale are void for want of jurisdiction.

The payment by R. D. Douglas, Jr., Trustee, of the surplus proceeds to the Clerk of Superior Court, Guilford County, in accordance with the trustee's report filed 13 July 1972 is deemed to have been paid by the trustee to the clerk under the provisions of G.S. 45-21.31(b) which, under the circumstances, was the trustee's only authority to pay the funds to the clerk. The Clerk of Superior Court, Guilford County, now holds the said surplus proceeds under the provisions of G.S. 45-21.31(b).

If she is so advised, the plaintiff may yet seek attachment under G.S. 1-440.1 *et seq.* of defendant's interest, whatever it may be, in the funds now held by the clerk.

The several orders of the trial court as entered to date, insofar as they adjudicate ownership of, or otherwise affect the surplus proceeds from the foreclosure sale, or the duties and obligations of the trustee with respect thereto, or the duties and obligations of the Clerk of Superior Court with respect thereto, are vacated and this cause is remanded for such further proceedings as may be appropriate.

Orders vacated in part.

Cause remanded.

Judges MORRIS and HEDRICK concur.

STATE OF NORTH CAROLINA v. DAVID HAMILTON

No. 7213SC667

(Filed 25 October 1972)

1. **Criminal Law §§ 53, 73— opinion evidence on cause of death — inadmissible as hearsay**

In a prosecution for second degree murder or manslaughter, testimony of an expert witness as to his opinion of cause of death was inadmissible as hearsay evidence where such opinion was based in part on something told him outside of court by the physician treating deceased at the time of his death.

2. **Death § 1— proof of cause of death**

A death certificate, when certified by the State Registrar, is *prima facie* evidence of the cause of death. G.S. 130-66.

APPEAL by defendant from *Bailey, Judge,* April 1972 Session, BLADEN Superior Court.

Defendant was tried under a bill of indictment charging him with first-degree murder of Burris Ludlum. On the call of the case for trial the State announced that the defendant would be tried for murder in the second degree or manslaughter as the evidence might justify. The defendant entered a plea of not guilty and the jury returned a verdict of guilty of manslaughter. From the imposition of a prison sentence of 20 years, defendant appealed.

The victim and defendant were neighbors. The defendant lived on a dirt road which ran beside the victim's home. The victim's daughter, Eleanora Ludlum, lived near the end of the dirt road beyond where the defendant lived.

On 21 January 1972, the defendant was working on an automobile which had been burned. The work was going on at a place some 30 feet from the trailer where Eleanora Ludlum lived. The victim, Burris Ludlum, walked down the dirt road to Eleanora's home, talked with her for a few minutes, and then returned along the dirt road within 15 or 20 feet of the defendant. The defendant and the deceased carried on a conversation in which they cursed each other and the defendant accused the deceased of being the person who had previously burned the automobile he was working on. During the course of the verbal altercation, the defendant took a pistol from his pocket and shot three times. One of the bullets struck the deceased Ludlum in the abdomen.

The deceased was taken to the Bladen County Hospital where he was examined and treated by Dr. Ralph F. Meinhardt until 26 January 1972. During this time the deceased responded well to treatment. From 27 January 1972 until his death on 30 January 1972, the deceased was treated by Dr. A. F. Pumphrey who was the partner of Dr. Meinhardt. The death certificate was signed by Dr. Pumphrey.

Over objection the trial court permitted testimony that the cause of death as stated in the death certificate and as given by opinion of Dr. Meinhardt, was pneumonia as a consequence of peritonitis, which was due to a gunshot wound of the abdomen.

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

Moore & Melvin by Reuben L. Moore, Jr., for defendant appellant.

CAMPBELL, Judge.

The defendant assigns as error the admission of the death certificate and the admission of the testimony of Dr. Meinhardt as to the cause of death.

[1] Dr. Meinhardt testified as to his education and training in the medical field of surgery. There was no finding by the court that he was an expert, but the record would establish this. Dr. Meinhardt, over objection, testified that "As outlined in the Death Certificate, I feel that his death was due to the gunshot wound complicated by peritonitis and pneumonia." Likewise, over objection, Dr. Meinhardt testified, "This death certificate bears the name of my partner, Dr. A. F. Pumphrey. This was filled out with Dr. Pumphrey and I in consultation."

On cross-examination Dr. Meinhardt testified that he had no knowledge of any post-mortem examination of the deceased. He further testified:

> "Q. Doctor, can you state to a medical certainty that the cause of death as stated in the death certificate, that is, pneumonia, was directly related to peritonitis on the basis of any examination that you made?
>
> A. Well, as I stated, I did not attend him the last three or four days of his life, but after consulting with Dr. Pumphrey, it is our opinion that the pneumonia was secondary to the peritonitis which was secondary to the gunshot wound."

It is obvious that the opinion of Dr. Meinhardt as to the cause of death was based, at least in part, upon what he learned from his partner, Dr. Pumphrey. Dr. Pumphrey himself did not testify and thus the testimony of Dr. Meinhardt is based upon hearsay.

In the case of *State v. David,* 222 N.C. 242, 22 S.E. 2d 633 (1942), it is stated:

> "There are two avenues through which expert opinion evidence may be presented to the jury: (a) Through testimony of the witness based on his personal knowledge or observation; and (b) through testimony of the witness based on a hypothetical question addressed to him, in which the pertinent facts are assumed to be true, or rather, assumed to be so found by the jury. That an expert witness may base his opinion partly on facts of his own observation and partly on factual (as opposed to opinion) evidence of other witnesses, hypothetically presented, is, of course, within the rule.

It is clear that if in his testimony Dr. Taylor had reference to information concerning the Forbus finding obtained extrajudicially—that is, in any other manner than from the evidence given in court—the testimony is objectionable as based on a hearsay statement. If it had reference to the testimony of Dr. Forbus which immediately preceded his own, it is equally objectionable because it was not hypothetically presented—that is, was not predicated on an assumption that the jury should find the purported facts in the Forbus statement to be true. *Dempster v. Fite,* 203 N.C., 697, 167 S.E., 33; *Summerlin v. R.R.,* 133 N.C., 551, 45 S.E., 898; *Martin v. Hanes Co.,* 189 N.C., 644, 646, 127 S.E., 688; *Yates v. Chair Co.,* 211 N.C., 200, 189 S.E., 500.

Our practice and procedure does not permit an expert witness to sit in, overhear the evidence and give the jury his opinion or conclusions thereupon, without regard to what might be the attitude of the jury toward the credibility and weight of the evidence with which the witness is dealing and upon which his opinion is based. The assumption of its truth in the mind of the witness, however self-satisfying, cannot be substituted for the finding of the jury, and necessarily invades the province of the jury. It invades the province of the jury not because it gives an opinion as to the ultimate facts to be found by the jury, which is sometimes permissible, but because it permits the witness to determine for himself the weight and credibility of the evidence of these facts, which ought always to be left to the jury. . . . "

In that case it was held incompetent and a new trial given where Dr. Taylor, an expert witness, based his opinion in part on what Dr. Forbus, another expert witness, had already testified to. In the instant case Dr. Meinhardt based his opinion in part on something Dr. Pumphrey had told him outside of court.

It is also noted that Dr. Meinhardt was called upon to express an opinion as to the cause of death based upon what was stated in the death certificate. At that time the death certificate had not been introduced into evidence. Since the death certificate had not been signed by Dr. Meinhardt and it was not in evidence, the introduction of this testimony was improper.

[2] A purported death certificate was subsequently introduced into evidence as State's Exhibit No. 5. At the time this exhibit was introduced, no objection was made to it as shown by the record. We note, however, that the purported death certificate was certified to as a true and correct copy by the Register of Deeds of Bladen County, and it does not appear to have been certified by the State Registrar. G.S. 130-66 provides that the State Registrar is authorized to certify copies of death certificates and a reproduction of the original records on file in the office of the State Registrar "when certified by him, shall be considered for all purposes the same as the original and shall be prima facie evidence of the facts therein stated."

In *Branch v. Dempsey,* 265 N.C. 733, 145 S.E. 2d 395 (1965), in reference to a similar statute, G.S. 130-73 (now recodified as G.S. 130-66(b)), it is stated, "The purpose of the statute appears to be to permit the death certificate to be introduced as evidence of the fact of death, the time and place where it occurred, the identity of the deceased, the bodily injury or disease which was the cause of death, the disposition of the body and possibly other matters relating to the death." In view of this, the death certificate, when properly certified, would be prima facie evidence of the cause of death.

As pointed out above, the evidence of Dr. Meinhardt in which he expressed his opinion as to the cause of death based upon his consultation with Dr. Pumphrey was error, and the defendant is entitled to a new trial.

New trial.

Judges MORRIS and PARKER concur.

STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION AND DUKE POWER COMPANY v. HUNT MANUFACTURING COMPANY, INC.

No. 7210UC688

(Filed 25 October 1972)

1. **Utilities Commission § 4— municipality as primary supplier of electricity — direct service to businesses by secondary supplier — authority of Utilities Commission**

A power company which was a "secondary supplier" of electricity within a municipality, the "primary supplier," was authorized to continue selling electricity directly to seven businesses within the municipality which it served prior to and continuously since 20 April 1965, and the Utilities Commission was without authority to order the municipality to cease serving a manufacturer within its corporate limits, to order the power company to cease selling electricity to the seven businesses within the municipality, or to order the power company to charge the seven businesses the same rates for electricity as the manufacturer pays the municipality. G.S. 160A-332; G.S. 160A-334; G.S. 62-3(23).

2. **Utilities Commission § 4— electricity — direct service by secondary supplier — statutory authority — unreasonable advantage**

The fact that a power company which is a "secondary supplier" directly serves seven customers within a municipality pursuant to the provisions of G.S. 160A-332 but does not directly serve other customers within the municipality does not constitute an "unreasonable preference or advantage" within the meaning of G.S. 62-140.

APPEAL by Hunt Manufacturing Company, Inc., from an order of the North Carolina Utilities Commission dated 1 May 1972.

On 15 October 1971 Hunt Manufacturing Company, Inc., (Hunt, also referred to as complainant) filed a complaint for relief against Duke Power Company. Hunt is a corporation engaged in the business of manufacturing with a principal place of business in Statesville, North Carolina. Hunt purchases electric power from the City of Statesville, which, in turn, purchases power at wholesale rates from Duke Power Company. The City of Statesville retails the power to customers such as Hunt at a rate which provides a profit to the city. By virtue of G.S. 160A-332, Duke Power Company sells electric power directly to seven other manufacturing businesses within the corporate limits of Statesville at rates less than those paid by Hunt to the City of Statesville.

Complainant alleged that the profit from the sale of electric power by Statesville becomes a part of the revenues of the city, and affects the ad valorem tax imposed upon real and personal property. Hunt further alleged that the rate difference was unreasonably discriminatory; and, to the extent the other seven businesses buy directly from Duke Power at reduced rates, complainant is carrying a disproportionate share of the cost of governing the city.

Hunt prayed that Duke Power Company be required to stop selling electricity to the other seven manufacturers in Statesville; or be required to cease its practices which result in maintaining unreasonable rate differences between Hunt and the seven other manufacturers in Statesville; or be required to provide the same electrical service to Hunt as the other seven receive.

On 20 March 1972 Duke Power Company filed a motion to dismiss the proceedings on the grounds that the Commission did not have jurisdiction, or, in the alternative, that complainant had failed to state a claim upon which relief could be granted. After a hearing on the motion, the Commission issued an order on 1 May 1972 dismissing the complaint. In its order, the Commission found that Hunt had not alleged any acts of discrimination contemplated by the provisions of G.S. 62-140; and that the Commission was without authority or jurisdiction to order Statesville to cease serving Hunt, or to order Duke to serve Hunt at its present premises. Complainant appealed.

Pope, McMillan & Bender, by William P. Pope and W. H. McMillan for Hunt Manufacturing Company, Inc.

Edward B. Hipp and William E. Anderson for North Carolina Utilities Commission.

William H. Grigg, William I. Ward, Jr. and George W. Ferguson, Jr. for Duke Power Company.

BROCK, Judge.

Complainant assigns as error the Utility Commission's 1 May 1972 order dismissing the complaint.

The parties have admitted the following facts in their pleadings: The City of Statesville is a "primary supplier" of

electric service within the purview of G.S. 160A-331 *et seq.*, maintaining an electric distribution system within its corporate limits; Duke Power Company is a "secondary supplier" of electric service within the purview of G.S. 160A-331 *et seq.*, operating within the corporate limits of Statesville; the City of Statesville presently furnishes electric service to complainant, which operates a manufacturing facility within the corporate limits of the city; Duke Power presently furnishes electric service to a total of seven customers (Duke customers) within the corporate limits of Statesville; all the Duke customers are located within the corporate limits of the city, as such limits existed on 20 April 1965, and all have been continuously furnished electric service by Duke since that date, and for many years prior to that date.

[1] G.S. 160A-332(a)(7), concerning electric service within city limits, prohibits "secondary suppliers" from furnishing electric service inside the corporate limits of a municipality as such limits existed on 20 April 1965, unless it first obtains the written consent of the city and the primary supplier. This section enumerates certain exceptions to this prohibition [G.S. 160A-332(a)(1), (2), (3), (5), (6)].

G.S. 160A-332(a)(1) provides: "The secondary supplier shall have the right to serve all premises being served by it, or to which any of its facilities are attached, on the determination date." The "determination date" with respect to areas within the corporate limits of any city is set by G.S. 160A-331(1) as 20 April 1965. The clear language of G.S. 160A-332 expressly grants Duke Power the right to continue furnishing electric power to the seven Duke customers within the Statesville corporate limits, which it had served prior to, and continuously since, the 20 April 1965 determination date. None of the exceptions to the statutory prohibition, however, apply to Hunt.

The provisions of G.S. 160A-332 both authorize Duke to continue service to the seven Duke customers, and require the written consent of the City of Statesville before Duke may serve a post-determination-date customer (as Hunt) within the corporate limits. G.S. 160A-334 does not confer on the Commission any additional jurisdiction in this situation. Section 1 of that statute applies only to primary suppliers within the jurisdiction of the Utilities Commission. Municipal corporations, as Statesville, are specifically excluded from the definition of a

"public utility" in G.S. 62-3(23): "Consequently, a municipal corporation distributing and selling electric energy to its inhabitants . . . is not subject to regulation by the North Carolina Utilities Commission, and the provisions of Chapter 62 of the General Statutes do not apply to it . . . . " *Dale v. Morganton,* 270 N.C. 567, 155 S.E. 2d 136. Section 2 of G.S. 160A-334, by its terms, is not applicable in this case.

[2] It would be anomalous for this court to say Duke Power is guilty of discrimination, in violation of G.S. 62-140, for not serving Hunt, and, at the same time, to recognize that G.S. 160A-332 clearly prohibits Duke from serving Hunt without the written permission of the City of Statesville. The fact that Duke Power serves the seven Duke customers within the corporate limits of Statesville, and does not serve Hunt, pursuant to the express provisions of G.S. 160A-332, is not an "unreasonable preference or advantage" contemplated by G.S. 62-140.

The Commission was without authority to order Statesville to cease serving Hunt, or to order Duke to serve Hunt at its present premises, or to order Duke to increase its rates to its seven customers in Statesville over rates charged for the same service outside of Statesville. Since complainant failed to allege facts upon which the relief prayed for could be granted, the complaint was properly dismissed.

The complainant additionally assigns as error the failure of the Commission to allow the motion to strike part of Duke Power's Further Answer. While parts of the Further Answer may have stated conclusions rather than allegations, the complainant has failed to show how the failure to allow its motion to strike was prejudicial to it in the Commission's consideration of its complaint.

Affirmed.

Chief Judge MALLARD and Judge BRITT concur.

STATE OF NORTH CAROLINA v. LILA GREENE BELLAR

No. 7226SC691

(Filed 25 October 1972)

1. **Clerks of Court § 10; Criminal Law § 160— expunction of record in criminal case — statutory protection**

There is no statutory authority for the expunction of the files in a criminal case, except to the limited extent provided in G.S. 90-113.14 and in G.S. 121-5, but there are statutes specifically providing for protection of court records. G.S. 14-76.

2. **Clerks of Court § 10; Criminal Law § 160— correct court record — expunction improper**

A court has inherent power to keep its files free from scandalous matter, or to strike such matter from the record, but a court will not annul, change, or expunge an absolutely correct record made in accordance with the requirements of law.

3. **Clerks of Court § 10; Criminal Law § 160— expunction of record — order in excess of judge's authority**

The trial judge exceeded his authority in ordering the records in a criminal case involving obtaining money by false pretenses permanently removed from the clerk's office and delivered to the one charged with the crime.

4. **Criminal Law § 80— trial court's order to destroy police files**

The trial judge's order requiring delivery of police investigative files to the party charged with the crime was improperly entered, though made after defendant's motion for nonsuit was granted, where no notice was given to the State, no opportunity was afforded it to be heard, and no findings of fact were made to support the action taken.

ON writ of *certiorari* to review two orders entered by *McLean, Judge,* one on 2 June 1972 and one on 14 or 15 June 1972. The writ of certiorari was issued at the instance of the State.

Defendant was charged in a warrant with obtaining $10,000 by false pretense and was arrested on 9 April 1970. Subsequently, a bill of indictment charging the defendant with obtaining $10,000 by false pretense was returned by the grand jury as a true bill at the 10 May 1971 Session of Superior Court held in Mecklenburg County.

Prior to the return by the grand jury of the bill of indictment, Judge McLean entered the following order setting the case for trial as the first case for trial in his court:

"In the above-entitled Cause, the Court having heretofore in the presence of the defendant and the solicitor ordered that this cause be set down for trial as the first case on Monday, May 10, 1971, at 10:00 o'clock, and it now appearing to the Court that the solicitor has made a calendar and left this case off;

"It is now, therefore, ORDERED that this cause be and the same is hereby set down for trial as the first case on Monday, May 10, 1971, at 10:00 o'clock a.m. preceding case No. 71-CR-3292, the first case placed on the calendar by the solicitor.

"This the 29th day of April, 1971.

W. K. MCLEAN
Judge Presiding"

On 10 May 1971, after the case came for trial before Judge McLean, the following order dismissing the action was entered:

"In this case wherein the defendant stands charged with the offense of Obtaining money by false pretense and in open Court through counsel enters a plea of not guilty to said charge and a jury having been duly sworn and empaneled to try the issue between the State and the defendant; at the close of the State's evidence the defendant through counsel demur's to the evidence and moves for judgment of nonsuit; Motion Allowed.

"This 10th day of May, 1971.

W. K. MCLEAN
Presiding Judge"

Approximately a year later the following order, dated 2 June 1972, was entered in this cause by Judge McLean:

"In Case No. 70-CR-22168, it appearing to the undersigned Judge presiding that this Cause was tried May 10, 1971, at which time the Court adjudged that there was no probable cause and insufficient evidence to go to the jury; it further appearing to the Court that petition has been made that the record be expunged in this cause and that the papers appearing therein be delivered to the party charged;

"It is now, therefore, ORDERED that the Clerk of the Superior Court shall forthwith deliver to the party charged the entire file, with the exception of the case number and this order, together with the index card.

"This the 2nd day of June, 1972.

W. K. MCLEAN
Judge Presiding"

Thereafter, the following order, dated 14 or 15 June 1972, was entered in this cause by Judge McLean:

"In Case No. 70 CR 22168, it appearing to the undersigned Judge presiding that this Cause was tried May 10, 1971, at which time the Court adjudged that there was no probable cause and insufficient evidence to go to the jury; and it further appearing to the Court that petition has been made that the police records concerning this matter be expunged in this cause and that the papers appearing therein be delivered to the party charged.

"It is now, therefore, ORDERED that the Chief of Police of the Charlotte Police Department or any police clerk or police officer having the same in his or her possession, control or custody, shall deliver forthwith to the party charged the entire file and any and every other record of complaint, arrest, fingerprinting and investigation together with the index card connected with the above-captioned arrest.

"This the 14th day of June, 1972.

W. K. MCLEAN
Judge Presiding"

The State was given no notice of a petition for the two latter orders, nor notice of the hearing, or entry of the orders. On 19 June 1972 the State, at the instance of the Solicitor for the Twenty-Sixth Solicitorial District, filed a petition in this court asking that a writ of supersedeas be issued to stay the orders of Judge McLean, and asking this court to issue a petition for writ of certiorari to review the two orders. On 5 July 1972 this court issued a writ of supersedeas directing that the order of Judge McLean to the Clerk of Court and the order of Judge McLean to the Charlotte Police Department be stayed pending a review of the orders by the appellate division.

In the meantime, in compliance with the two orders entered in June 1972, the Clerk of Superior Court turned over to the defendant the entire contents of the file in the case, and the Charlotte Police Department turned over to the defendant so much of its file as was in its possession at that time. In the defendant's reply to the State's petition, she states that she has destroyed all the records which were turned over to her.

The Clerk of Superior Court of Mecklenburg County advised the Clerk of this Court that although he had complied with Judge McLean's order with respect to turning over to defendant the contents of the file in the case, that the contents of the file had been microfilmed prior to the entry of the order and that the contents thereof could be reproduced from the microfilm. This was done and the contents were certified to this Court.

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

Lila Bellar, pro se.

BROCK, Judge.

Order concerning the court file:

[1] G.S. 7A-180 charges the Clerk of Superior Court with custody and maintenance of records of all judicial proceedings, including criminal actions. There is no statutory authority for the expunction of the files in a criminal case, except to the limited extent provided in G.S. 90-113.14 and in G.S. 121-5. Other statutes specifically provide for protection of court records. G.S. 14-76 provides in pertinent part: "If any person * * * shall unlawfully and maliciously obliterate, injure or destroy any record, writ, return, panel, process, interrogatory, deposition, affidavit, rule, order or warrant of attorney or any original document whatsoever, of or belonging to any court of record, or relating to any matter, civil or criminal, begun, pending or terminated in any such court * * * every such offender shall be guilty of a misdemeanor."

The Clerk of Superior Court is a public officer, and the records he is required by law to keep are public records. G.S. Chapter 132 establishes the method for control and disposition of public records, and G.S. 132-3 provides a penalty for wrongful disposition.

[2] "It is universally recognized that a court of record has the inherent power and duty to make its records speak the truth. It has the power to amend its records, correct the mistakes of its clerk or other officers of the court, or to supply defects or omissions in the record, and no lapse of time will debar the court of the power to discharge this duty." *State v. Old,* 271 N.C. 341, 156 S.E. 2d 756. "And a court has inherent power to keep its files free from scandalous matter, or to strike such matter from the record. But a court will not annul, change, or expunge an absolutely correct record made in accordance with the requirements of law. Thus, the correct record of testimony will not be expunged from the record because it is alleged that the testimony is false and constitutes a slander against a party to the suit. An innocent person arrested through mistake has no right to have canceled a record of the arrest." 45 Am. Jur., Records and Recording Laws, § 11, p. 424.

"The custodian of a public record cannot destroy it, deface it, or give it up without authority from the same source which required it to be made. Thus, an indictment duly filed cannot be removed legitimately by anyone, including the district attorney, except for purposes of the trial thereon, or for purposes of evidence under a subpoena duces tecum or an order of court." 45 Am. Jur., *supra,* § 12, p. 425.

[3] Judge McLean exceeded his authority in ordering the records in a criminal case to be permanently removed from the Clerk's office. The order dated 2 June 1972 directing the Clerk to deliver the file records to the defendant is reversed.

Order concerning the police files:

[4] Except for the possible application of G.S. 90-113.14, there is no statutory authority in North Carolina for the destruction of police investigative files containing fingerprints and photographs of an accused. Should it be conceded that in extraordinary circumstances a remedy is available to have such files destroyed or expunged, it would require notice, an opportunity to be heard, and findings of fact supporting the action taken. In the action taken by Judge McLean there was no notice given, no opportunity was afforded to be heard, and no findings of fact were made to support the action taken. The order dated 14 or 15

June 1972 directing the Charlotte Police Department to deliver its entire investigative file to the defendant is reversed.

Reversed.

Chief Judge MALLARD and Judge CAMPBELL concur.

STATE OF NORTH CAROLINA v. ROCKY A. GARCIA, ROBERT E. BURGESS AND JOHNNY RAY McGEE

No. 7212SC648

(Filed 25 October 1972)

1. **Criminal Law § 92— identical charges against three defendants — consolidation proper**

The trial court did not err in consolidating for trial the cases of three defendants who were charged in identical bills of indictment with possession with intent to distribute marijuana. G.S. 15-152.

2. **Criminal Law § 98— sequestration of witnesses**

The trial court did not abuse its discretion in denying defendant's motion to sequester the witnesses.

3. **Criminal Law § 32; Narcotics § 3— prima facie evidence — no deprivation of presumption of innocence**

The statutory provision that possession of more than five grams of marijuana shall be presumptive or *prima facie* evidence of possession for sale constitutes a rule of evidence only and does not deprive defendants of the presumption of their innocence nor relieve the State of its burden to prove their guilt beyond a reasonable doubt, as the establishment of a *prima facie* case supports, but does not compel, a finding of guilty. G.S. 90-94(f)(3).

4. **Arrest and Bail § 3; Highways and Cartways § 3— driver's license and vehicle registration check — authority of officer to stop vehicle**

Seizure of marijuana from defendants' car and their arrest for its possession did not amount to an unconstitutional invasion of defendants' rights where officers discovered the marijuana in plain view after lawfully stopping defendants' vehicle to check driver's license and vehicle registration. G.S. 20-183(a).

5. **Criminal Law § 175— findings of fact supported by evidence — no review on appeal**

The trial court's findings of fact and conclusions that marijuana was admissible in evidence against defendants will not be disturbed on appeal where the evidence supported the court's findings and these supported the conclusion.

State v. Garcia

APPEAL by defendants from *Hall, Judge,* 10 April 1972 Session of Superior Court held in CUMBERLAND County.

The three defendants were charged in identical bills of indictment with possession with intent to distribute 58.6 grams of marijuana, a felony. The three cases were consolidated for trial.

The evidence for the State tends to show that four officers assigned to the Cumberland County Inter-Agency Bureau of Narcotics and Dangerous Drugs were on patrol in an unmarked car near Fayetteville State University. They stopped the car in which the three defendants were riding and, while checking the operator's license and vehicle registration, one of them observed a beaded blue bag on the floor from which a plastic bag was protruding. The plastic bag contained a green vegetable matter which in the officer's opinion was marijuana. The three defendants were placed under arrest and further search of the vehicle revealed two manila bags on the back seat containing marijuana, and additional bags of marijuana were found under the front seat. Defendant Garcia was driving and defendant Burgess was riding in the front on the passenger side. Defendant McGee was in the back seat.

Defendants Garcia and Burgess offered evidence which tended to show that defendant McGee had been seen with a blue beaded bag in his home with marijuana in it, and that he had offered the bag to a visitor and told him to "go ahead and roll a joint." They offered evidence which tended to show that on the night in question they went to defendant McGee's house looking for one Ricky Warrick; that Warrick was not there but McGee asked them to take him to a friend's house; and they were in the process of giving McGee a ride when they were stopped by the officers. They further offered evidence which tended to show that they had no knowledge of the marijuana being in the car.

Defendant McGee offered evidence which tended to show that he and Garcia and Burgess had smoked marijuana together, but not on the day in question. He offered evidence which tended to show that the blue beaded bag was not his; that he had never seen it before the officer took it out of the car; and that he had no knowledge of the marijuana in the car. He offered evidence which tended to show that defendants Garcia

and Burgess came to his house about 8:30 p.m. and wanted him to take them to "where they could cop some drugs." He agreed to go with them to help find where they could buy some, but did not get any before they were stopped by the officers.

The jury found the three defendants guilty as charged. They appealed.

Attorney General Morgan, by Associate Attorney Poole, for the State.

Sol G. Cherry, Public Defender, for defendants Rocky A. Garcia and Robert E. Burgess.

Robert F. Page for defendant Johnny Ray McGee.

BROCK, Judge.

[1] Defendants assign as error that the trial judge allowed consolidation of the cases for trial over defendants' objections. When two or more defendants are charged in separate bills of indictment with identical crimes and the offense charged against each is so connected in time and place as to constitute one continuous criminal offense, the trial court may order the cases consolidated for trial, G.S. 15-152, and his decision will not be disturbed in the absence of a showing of abuse of discretion. *State v. Bass,* 280 N.C. 435, 186 S.E. 2d 384. Defendants have failed to show an abuse of discretion in the consolidation.

[2] Defendant McGee assigns as error the denial of his motion to sequester the witnesses. This motion was addressed to the discretion of the trial judge. No abuse of discretion appears upon the record. This assignment of error is overruled. *State v. Yoes,* 271 N.C. 616, 157 S.E. 2d 386.

[3] Defendants assign as error the denial of their motions to quash the three bills of indictment upon the grounds that the statute under which they were drawn is unconstitutional for creating a presumption of guilt.

G.S. 90-95(f)(3) provides that possession of more than five grams of marijuana shall be presumed to be possession for the purpose of violating G.S. 90-95(a)(1), which makes it unlawful for a person to possess marijuana with intent to distribute it. Under the terms of the statute, evidence of possession of more than five grams of marijuana constitutes presumptive

or prima facie evidence of possession of marijuana with intent to distribute it.

> "It is well established that it is competent for a legislative body to provide by statute or ordinance that certain facts shall be prima facie or presumptive evidence of other facts. This power is not confined to civil cases, but applies to criminal prosecutions as well, there being no vested right to the rule of evidence that everyone shall be presumed innocent until proved guilty, which prevents the legislature from making the doing of certain acts prima facie proof of guilt or of some element of guilt. In other words, the mere fact that a criminal statute creates a presumption from certain facts does not of itself render the statute unconstitutional." 29 Am. Jur. 2d, Evidence, § 10, p. 46.

There are numerous cases sustaining the validity of statutes providing that evidence of certain facts shall be presumptive or prima facie evidence of facts which constitute a violation of the law: possession of intoxicating liquor as presumptive or prima facie evidence of possession for sale, Annot., 31 A.L.R. 1222, *State v. Russell,* 164 N.C. 482, 80 S.E. 66; percentage of alcohol in a person's blood as presumptive or prima facie evidence of intoxication, Annot., 16 A.L.R. 3d 748, *State v. Cooke,* 270 N.C. 644, 155 S.E. 2d 165; possession of fish or game, or of specified hunting or fishing equipment as presumptive or prima facie evidence of violation of game laws, Annot., 81 A.L.R. 2d 1093; the finding of merchandise concealed upon a person which had not theretofore been purchased by such a person as constituting presumptive or prima facie evidence of willful concealment in violation of G.S. 14-72.1, *State v. Hales,* 256 N.C. 27, 122 S.E. 2d 768. For a general discussion of the constitutionality of statutes making one fact presumptive or prima facie evidence of another, see Annot., 51 A.L.R. 1139.

The statutory provisions of which defendants complain merely constitute a rule of evidence for the establishment of a prima facie case; it does not deprive defendants of the presumption of their innocence nor relieve the State of its burden to prove their guilt beyond a reasonable doubt. The establishment of such a prima facie case will support, but it does not compel, a finding of guilty. Clearly there is a rational connection between the fact proved (possession of more than five grams of marijuana) and the ultimate fact to be established (posses-

sion of marijuana with the intent to distribute). We hold the challenged provisions of the statute to be constitutional. It follows that denials of defendants' motions to quash were not error.

[4] Defendants assign as error the admission into evidence of the fruits of the search of the automobile in which defendants were riding. Defendants argue that the officers had no right to stop defendants, and, therefore, the seizure of the marijuana and their arrest therefor under the "plain view" doctrine was an unconstitutional invasion of their rights. It is defendants' position that because the officers were assigned to the narcotics investigation division and that discovery and arrest of narcotics law violators were their prime concern, their stopping defendants to check driver's license and vehicle registration was merely a ruse.

This argument is without merit. G.S. 20-183(a) provides among other things that all law enforcement officers "within their respective jurisdictions shall have the power to stop any motor vehicle upon the highways of the State for the purpose of determining whether the same is being operated in violation of any of the provisions of this article." The officers had plenary authority to stop defendants' vehicle to check license and registration.

[5] Defendants further argue that the evidence on the hearing to determine the admissibility of the marijuana found in defendants' vehicle was conflicting and that the trial judge gave no weight to defendants' evidence. The trial judge heard and observed, and he made his findings of fact from the evidence presented. His findings of fact support the conclusion that the marijuana was admissible in evidence against defendants and his findings will not be disturbed.

Defendants' remaining assignments of error are overruled. In our opinion defendants had a fair trial free from prejudicial error.

No error.

Chief Judge MALLARD and Judge BRITT concur.

STATE OF NORTH CAROLINA v. FRANCES PERSON McKOY, ALIAS FRANCES SMITH

No. 7212SC649

(Filed 25 October 1972)

1. **Searches and Seizures § 3— reliability of confidential informer**

An affiant's statement that a confidential informer had given "this agent good and reliable information in the past . . . that had been checked by the affiant and found to be true" was a sufficient statement of circumstances supporting informant's reliability to sustain the issuance of a search warrant.

2. **Constitutional Law § 31— failure of affiant to reveal identity of alleged narcotics users — no error**

On *voir dire* to determine whether there was sufficient evidence before the magistrate issuing a search warrant to justify a finding of probable cause, the trial court did not err in refusing to compel the affiant to reveal the identity of the alleged narcotics users whom he had seen entering the defendant's home.

APPEAL by defendant from *Clark, Judge,* 1 May 1972 Criminal Session of Superior Court held in CUMBERLAND County.

Defendant was charged in a bill of indictment, proper in form, with the felonious possession of a quantity of heroin.

The evidence for the State tended to show the following: On 30 July 1971 Officer H. B. Parham of the Inter-Agency Bureau of Narcotics, acting pursuant to information received from a confidential informant, obtained a warrant for the search of defendant's trailer on 1034 Bernadine Street in Fayetteville, North Carolina. Officer Parham and other members of the Inter-Agency Bureau of Narcotics immediately proceeded to 1034 Bernadine Street where they executed the search warrant at about 3:00 p.m. Inside the residence, Officer Parham found the defendant and one Louis Brown. The search warrant was read to the defendant and a search was made of the premises. During the search, Officer Parham observed that one of the window panes in the rear bedroom had been broken and the screen pushed out. Officer Parham had heard the sound of breaking glass as he was approaching the trailer, and, upon investigation, saw through the broken window a Falstaff beer can lying on the ground behind the trailer at the end of the bedroom with a white cloth sticking in the top of it. Inside the can were plastic bags with small tinfoil packs. The packs contained powder

which was identified as heroin. The defendant's fingerprints were found on the beer can and on one of the tinfoil packs.

Defendant offered evidence which tended to show the following: On the morning of 30 July 1971 defendant was visited by Louis Brown, who rented the trailer and lived there on weekends. Defendant left the trailer for a short time and found the trailer door locked when she returned. When Brown let her in, defendant saw drugs spread out on the kitchen table. Defendant asked Brown to remove them, and knocked them on the floor when he refused. Brown made defendant pick the drugs up and put them back in their container, a Falstaff beer can. After an argument, Brown took a nap, setting the drugs beside him. While Brown was asleep, defendant took the drugs outside and threw them behind the trailer. Defendant did not throw the beer can through the window, which had been broken a month earlier. Defendant testified that she did not use or sell drugs.

From a jury verdict of guilty as charged and a judgment imposing an active prison sentence, defendant appealed.

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

Sol G. Cherry, Public Defender, for the defendant.

BROCK, Judge.

[1] Defendant's principal assignment of error concerns the refusal of the trial court to suppress the evidence seized in the search of the premises located at 1034 Bernadine Street on 30 July 1971. She contends that the affidavit of Officer Parham, upon which the search warrant was issued, was insufficient to enable the magistrate to make an independent determination of probable cause in accord with the requirements of *Aguilar v. Texas,* 378 U.S. 108, 12 L.Ed. 2d 723, 84 S.Ct. 1509 (1964) and *Spinelli v. U.S.,* 393 U.S. 410, 21 L.Ed. 2d 637, 89 S.Ct. 584 (1969). Defendant argues, in particular, that the supporting affidavit does not present the magistrate with the underlying circumstances from which the affiant concluded that the informant is credible or his information trustworthy.

When this issue was raised in the Superior Court, the jury was sent out, and a voir dire hearing was conducted. Defendant concedes that there was sufficient testimony on voir dire exami-

nation for the issuance of a search warrant. However, defendant properly notes that the determinative point for finding probable cause is the time of the issuance of the warrant and not at the time of the voir dire examination. The record indicates that the sole basis for the magistrate's finding of probable cause was the supporting affidavit.

The challenged portion of the affidavit attached to the search warrant, as appears in the record on appeal, reads as follows:

"That a confidential informant who has given this agent good and reliable information in the past stated that on this date, July 30, 1971, he has been to the above address and seen a large quantity of heroin. That the above named subject is selling the heroin, one-half spoon and spoon quantity, for twenty dollars and forty dollars. This agent has received other information on the above address and has seen known narcotics dealers going to and from the above address. This confidential informant is knowledgeable of the narcotic traffic in the Fayetteville and Cumberland County area, and has furnished the affiant information in the past that has been checked by the affiant and found to be true."

G.S. 15-26 provides that an affidavit signed under oath by the affiant *indicating* the basis for the finding of probable cause must be a part of or attached to the warrant. While an affidavit does not have to reflect the personal observations of the affiant, *Aguilar v. Texas, supra,* requires a two-pronged test to sustain such a warrant. The first requirement, that the magistrate be informed of some of the underlying circumstances from which the informant concluded that narcotics were present, is clearly met in this case, and that part of the affidavit has not been challenged. We find that the second standard, that the magistrate be informed of the underlying circumstances from which affiant concluded that the informant was credible and reliable, is also met.

This court has already established the "irreducible minimum" circumstances that must be set forth in support of an informant's reliability to sustain a warrant. *State v. Altman,* 15 N.C. App. 257 (filed 12 July 1972). In *Altman,* the affiant's statement that the confidential informant "has proven reliable and credible in the past" was held to meet the minimum stand-

ards to sustain a warrant. In the present case, the affiant's statement that the confidential informant had given "this agent good and reliable information in the past . . . that had been checked by the affiant and found to be true" also meets this minimum standard.

Since the affidavit in question meets the *Aguilar* requirements, it clearly meets the less technical requirements of *U.S. v. Harris,* 403 U.S. 573, 29 L.Ed. 2d 723, 91 S.Ct. 2075 (1971). We have considered defendant's exception to the trial judge's finding of facts on voir dire and find no merit in that assignment. We hold that the affidavit was sufficient on its face, and the search warrant, being adequate in all other respects, was valid.

[2] Defendant assigns as error the failure of the trial judge on voir dire to compel the affiant to reveal the identity of the alleged narcotics users whom he had seen entering the defendant's home. We find no authority, and are cited to none, that supports the contention that the identity of these alleged users should be revealed. There is no showing that the identity of these users would be sufficiently relevant or helpful to the defendant's case to warrant exposing the names of these alleged users, some of whom the record indicates aid the police in narcotics investigations. *State v. Johnson,* 13 N.C. App. 323, 185 S.E. 2d 423, *Roviaro v. United States,* 353 U.S. 53, 1 L.Ed. 2d 639, 77 S.Ct. 623.

This information is of no use in challenging the sufficiency of the affidavit. On voir dire, the trial judge determines only whether there was sufficient evidence before the issuing magistrate to justify a finding of probable cause. The magistrate is entitled to rely upon the sworn statement of the affiant, a police officer, in concluding that the affiant was correctly reciting his own observations, and what had been told him by his informer. *State v. Foye,* 14 N.C. App. 200, 188 S.E. 2d 67.

No error.

Chief Judge MALLARD and Judge BRITT concur.

STATE OF NORTH CAROLINA v. THOMAS MICHAEL HANFORD
— AND —
STATE OF NORTH CAROLINA v. JEFFREY MARTINDALE

No. 7215SC701

(Filed 25 October 1972)

1. **Conspiracy § 3— conspiracy to commit felony**
Conspiracy to commit a felony is a felony.

2. **Conspiracy § 4; Property § 4— conspiracy to damage property by explosives — indictment**
Indictment alleging that defendant wilfully, feloniously and maliciously conspired with named persons "to damage occupied real property by the use of an explosive device, to wit: the dwelling and residence of O. F. Hoggard while said dwelling was being occupied by Detective O. F. Hoggard, Mrs. O. F. Hoggard and their three (3) children" *held* sufficient to charge the offense punishable under G.S. 14-50.

3. **Criminal Law § 33; Indictment and Warrant § 13— reliance on theory at preliminary hearing — solicitor's statement — admission of evidence not presented at preliminary hearing**
Although defendant's motion for a bill of particulars had been denied upon the solicitor's statement that the State would rely on the theory of the case as disclosed in the preliminary hearing, the trial court did not err in the admission of testimony not presented at the preliminary hearing where defendant failed to object thereto and it was not shown that such evidence is inconsistent with the theory of the case in the preliminary hearing.

4. **Constitutional Law § 33— co-defendant's refusal to testify**
The trial court properly ruled that a co-defendant on trial could not be required over his own objection to testify as a witness for defendant. G.S. 8-54.

5. **Arrest and Bail § 9— revocation of bail — discretion of court**
The trial court acted within its discretion in revoking defendant's bail out of the jury's presence after the State had rested its case and court had adjourned for the day.

APPEAL from *McKinnon, Judge,* 23 February 1972 Session of Superior Court held in ALAMANCE County.

Defendants were charged with conspiring to damage property belonging to another by the use of explosive devices. The cases were consolidated for trial.

The State's evidence tended to show that, motivated by a desire to discourage certain State's witnesses from testifying

in a drug case then pending against defendant Martindale, Martindale agreed to pay John Smith $500.00 to take action against the witnesses. Smith went to Martindale's drug trial seeking a pistol to use on the witnesses. Discouraged from taking such action in the courtroom, Smith left and later returned carrying one stick of dynamite. The trial concluded that afternoon with Smith having taken no action and the witnesses in question both having testified. Smith was then driven by Martindale to Smith's home where he obtained four more sticks of the explosive. Both Smith and Martindale then drove to the home of a mutual friend where they met with defendant Hanford. Smith showed Hanford the explosive, told him that it was to be used to bomb the home of police detective O. F. Hoggard, one of the witnesses in question, and asked Hanford's assistance in preparing the dynamite for explosion. Hanford agreed to forgive an earlier loan of $100.00 made to Smith if Smith would go ahead with the plan. After an unsuccessful experiment and acting on a suggestion from Martindale, Smith and Hanford finally secured the dynamite into a bundle containing a firecracker which was expected to detonate the explosives. Martindale had left the scene during this packaging and Smith telephoned him to be assured about Martindale's promise to pay Smith even though the drug trial had been concluded. Martindale renewed his promise. Smith and another individual, Faulkner, borrowed an automobile, drove to O. F. Hoggard's house and, after several attempts, managed to cause the firecracker to explode. The dynamite did not detonate. Both Smith and Faulkner were witnesses for the State.

Defendant Martindale's evidence tended to show that Martindale saw Smith at the home of a mutual friend and talked to Smith about repaying $7.00 Martindale had borrowed from Smith at an earlier date. Martindale denied ever having any conversation with Smith regarding the bombing of either witness involved in Martindale's trial for drug offenses. He denied seeing any dynamite or bomb on the day in question. He admitted taking Smith to a house where Smith picked up a paper bag but denied knowing what was in the bag.

Defendant Hanford's evidence tended to show that Hanford did assist Smith in packaging the sticks of dynamite together with a firecracker but Hanford denied that he knew of the plan to damage the policeman's house with the explosives until after Smith and Faulkner returned from placing the bomb.

Hanford denied offering to forgive a debt of $100.00 owed him by Smith if Smith would blow up the detective's house. Hanford stated that Smith owed him no money at that time but later borrowed $100.00 from Hanford in the presence of co-defendant Bill Stollings and others.

The jury returned a verdict of guilty as charged against both defendants. Hanford was sentenced to 10 to 15 years imprisonment and Martindale was sentenced to 13 to 15 years.

Attorney General Robert Morgan by C. Diederich Heidgerd, Associate Attorney for the State.

W. R. Dalton, Jr., for defendant appellant Hanford.

John D. Xanthos for defendant appellant Martindale.

VAUGHN, Judge.

We first respond to the arguments directed to the sufficiency of the bill of indictment and possible variance between the offense charged, the evidence and the judgment. The indictment, in material part, charges that defendants ". . . on the 29th day of November 1971 . . . did unlawfully, wilfully, feloniously and maliciously conspire, confederate and agree with (persons named) to damage occupied real property by the use of an explosive device, to wit: the dwelling and residence of O. F. Hoggard while said dwelling was being occupied by Detective O. F. Hoggard, Mrs. O. F. Hoggard and their three (3) children, against the form of the statute. . . ."

[1, 2] Conspiracy to commit a felony is a felony. Conviction of a felony for which no specific punishment is provided is punishable by fine, by imprisonment for a term not exceeding 10 years or by both in the discretion of the court. G.S. 14-2. Among other things, however, G.S. 14-50 provides specific punishment when one "conspires with another wilfully and maliciously to damage any real or personal property of any kind or nature belonging to another by the use of any explosive or incendiary device or material." The specific punishment provided for such conspiracy is imprisonment for not more than 15 years, without regard to whether the subject property is occupied. The statute does not require that the owner of the property be named in the indictment but only that it be property belonging to one other than defendant. In *State v. Conrad,* 275 N.C.

342, 168 S.E. 2d 39, the court discusses the differences between G.S. 14-49 and G.S. 14-49.1 and states if the property was occupied at the time of the explosion, the indictment should describe the property and name the occupant and also list any other property also injured. This was directed to be done so that if proof of occupancy failed, the jury could consider the lesser included offense of malicious injury to unoccupied property under G.S. 14-49. In the present case, however, defendants are charged with conspiracy under G.S. 14-50(b) and not with the actual wilful and malicious injury to the real property in question. We hold that the indictment properly charges the offense punishable under G.S. 14-50. There is no variance between the indictment and the evidence and judgment was properly entered on the verdict.

[3] Several weeks prior to trial, an order was entered disposing of a number of pre-trial motions made by defendants. The following was included in the order (to which no objection was made or exception taken prior to the preparation of the case on appeal): "4. Upon the statement of the Solicitor that the State relies upon the theory of the case as disclosed in the preliminary hearing, and it appearing that counsel for each defendant has been furnished a transcript of the preliminary hearing, the motion of each defendant for a bill of particulars is denied."

Defendants contend that it was error to allow the State to offer evidence tending to show that defendants paid or offered money as an inducement to Smith to go forward with the plan to dynamite the property when such testimony had not been offered at the preliminary hearing. Assignments of error brought forward in support of this contention are overruled. The State is not required to present its entire case at a preliminary hearing and there is no showing that such evidence, though not offered at the preliminary hearing, is inconsistent with the "theory of the case as disclosed in the preliminary hearing." Moreover, defendants did not raise this question at trial and cannot first do so on appeal.

[4] During the course of the trial, counsel for defendant, Hanford, announced that he would like to call Stollings, a co-defendant. Counsel for co-defendant Stollings promptly objected and the jury was excused. The court then ruled that Stollings, a defendant on trial, could not be required to testify

over his own objection. Nothing was put in the record to show what the testimony of the witness would have been and there was no request that this be done. The jury returned to the courtroom and the trial proceeded. Stollings was a defendant on trial in a criminal action. As such, he could be a competent witness only at his own request and not otherwise. G.S. 8-54. Assignment of error directed to the failure of the court to compel defendant Stollings to testify is overruled.

[5] Defendant Hanford's 13th assignment of error calls attention to the fact that after the State rested its case and after court had adjourned for the day and out of the presence of the jury, the court revoked Hanford's bail and ordered him placed into custody. Such actions are within the discretion of the court and the record discloses no error. *State v. Best*, 11 N.C. App. 286, 181 S.E. 2d 138; cert. denied, 279 N.C. 350, 182 S.E. 2d 582.

Numerous other assignments of error are brought forward and ably argued by counsel for defendants. We hold, however, that defendants were given a fair trial, free of prejudicial error.

No error.

Judges HEDRICK and GRAHAM concur.

STATE OF NORTH CAROLINA v. FRANK STARNES

No. 7211SC716

(Filed 25 October 1972)

1. **Criminal Law § 50; Homicide § 15— nonexpert witness — opinion as to cause of death admissible**

An opinion given by the officer who investigated the shooting as to cause of death of the victim was properly admitted in a second degree murder trial where the gunshot wounds as described by the officer were of such a character that any person of ordinary intelligence would know that they caused the death.

2. **Homicide § 28— second degree murder — right of defendant to protect home — instructions proper**

In a prosecution for second degree murder the trial court's failure to instruct the jury on defendant's "right to protect his home" did not constitute error where no such issue arose on the evidence.

State v. Starnes

APPEAL by defendant from *Martin (Robert M.), Judge,* June 1972 Criminal Session of Superior Court held in JOHNSTON County.

Defendant was indicted for the first-degree murder of Larry Darrell Bryant. The solicitor announced that the State would not prosecute defendant for first-degree murder but only for second-degree murder or manslaughter as the evidence might justify. Defendant pleaded not guilty. The State's evidence in substance showed the following: In May 1971 defendant lived as a boarder in the home of one Naomi Battle, renting one of the bedrooms in her four bedroom house. His landlady's 16-year-old daughter, Emma Frances Battle, also resided in the house. About 3:00 a.m. on 30 May 1971, Emma Frances and her boyfriend, 19-year-old Larry Bryant, were in the kitchen of her mother's home where, with her mother's permission, they were preparing to cook pork chops. Defendant, standing outside of the house, fired a shotgun through the kitchen window, striking Larry Bryant in the face and neck. Larry ran to Emma Frances's bedroom, where he fell face down on the floor, bleeding. A second shotgun blast came through the bedroom window, striking the bedpost and the side of the door. Naomi and Emma Frances Battle ran out on the front porch and observed defendant with his gun, standing in the path beside the house. Defendant said, "There is one more I am going to get." After making that statement, defendant ran away.

The deputy sheriff who investigated the shooting and who arrived at the Battle residence at approximately 3:45 a.m. on 30 May 1971, testified:

> "I saw Larry Bryant. Upon entering the house at Naomi Battle's residence, I went in the front bedroom of the house which is in the north part of the house. The deceased, Larry Bryant, was lying face down on the floor beside the bed. Upon examining Larry Bryant I saw he had what appeared to be a gunshot wound in the left portion of his neck and there was a large amount of blood under the deceased on the floor. The gunshot wound was right in the middle of his neck, about one and one-half inch deep was cut out of his neck. The left side of his neck. About three inches long and about one and one-half inch deep, just gashed right out.

". . . I contacted Larry Bryant's parents and ascertained from them which funeral home they wanted to get the deceased."

Defendant was arrested by an S.B.I. agent in Monroe, N. C., on 2 March 1972. After being warned of his rights, defendant admitted that while standing outside the house he had fired the shots into the house but "didn't really know whether he shot Larry," that he had overheard Emma and Larry talking in the kitchen and "thought they were trying to get him," and "since they were going to get him he should get them first."

After the State rested its case, defendant testified in substance as follows:

He had had some difficulty with Larry Bryant regarding money which Larry had gotten from him. Earlier on the night of the shooting Naomi Battle had received a head injury for which she had been treated at the hospital. Defendant had been told that "somebody had knocked Naomi in the head." When defendant got to the Battle house and while he was on the porch, he heard Emma Frances say, "You ought not to hit house and heard Emma Frances say, "You ought not to hit mother so hard." Defendant testified: "I didn't know what they were up to so I figured I was going to shoot and maybe they would get out and wouldn't kill me. . . . I shot into the house because I was afraid of him. He had my money from me. He wanted to kill me to keep from paying me my money. I didn't shoot at anybody. I didn't see anybody. I wanted to go in the house but I didn't know if they would knock me in the head when I went in the house."

The jury found defendant guilty of second-degree murder, and from judgment imposing a prison sentence, defendant appealed.

Attorney General Robert Morgan by Assistant Attorney General I. Beverly Lake, Jr., for the State.

Robert A. Spence for defendant appellant.

PARKER, Judge.

Evidence concerning defendant's in-custody statements to the officers was admitted only after the trial court, on the basis of evidence presented at a *voir dire* examination, had deter-

mined that defendant's statements had been freely and voluntarily made after defendant had been fully advised of his constitutional rights. The evidence presented at the *voir dire* examination fully supports the trial court's findings and determination, and on this appeal the appellant does not further contest the admissibility of his in-custody statements.

[1] The deputy sheriff who investigated the shooting was permitted to testify, over defendant's objections, that in his opinion the victim's death was caused by the gunshot wound in his neck. Appellant assigns this ruling as prejudicial error. In this contention we find no merit. Before expressing this opinion, the witness had described to the jury in some detail the position in which he had found the deceased's body and the nature and extent of the wound which he observed in the deceased's neck. It did not require a medical expert to conclude that the wounds described had caused the death. Any intelligent person who examined the body could have testified to that fact. "In any event, where the injuries are of such a character that any person of ordinary intelligence would know that they caused the death, the witness' expressed opinion cannot be held for prejudicial error." *State v. Howard,* 274 N.C. 186, 162 S.E. 2d 495.

[2] We also find appellant's remaining assignments of error without merit. Defendant's motions for nonsuit were properly overruled as there was ample evidence to require submission of the case to the jury, and his contention that the court erred in failing to instruct the jury on his "right to protect his home" is without merit as no such issue arose on the evidence. The court's charge to the jury considered in its entirety was free from prejudicial error. In defendant's trial and in the judgment appealed from we find

No error.

Judges CAMPBELL and MORRIS concur.

MATTHEW CROSS AND MAGGIE O. CROSS v. JAMES W. BECKWITH

No. 7210SC651

(Filed 25 October 1972)

1. **Cancellation and Rescission of Instruments § 9; Fraud § 10— confidential relationship — burden of proof — instructions**

In an action to set aside three deeds on grounds of mental incapacity, fraud, and undue influence, the trial court committed prejudicial error in instructing the jury that a letter from plaintiffs to defendant created a confidential relationship between the parties as a matter of law, notwithstanding the court thereafter correctly instructed the jury that plaintiffs had the burden to satisfy the jury by the greater weight of the evidence as to the existence of the confidential relationship.

2. **Appeal and Error § 50— conflicting instructions — material aspect — prejudicial error**

Conflicting instructions on a material aspect of the case must be held prejudicial error since it cannot be determined that the jury was not influenced by the incorrect portion of the charge.

APPEAL by defendant from *Braswell, Judge,* 14 February 1972 Session of WAKE Superior Court.

Plaintiffs brought this civil action to rescind three deeds conveying property to defendant Beckwith, a cousin of Mrs. Cross, on the grounds of insufficient mental capacity, fraud and undue influence. The jury found that Matthew Cross did possess sufficient mental capacity to execute the deeds, that Maggie Cross did not possess sufficient mental capacity, and that the execution of the deeds was procured by undue influence on the part of defendant Beckwith.

Harris, Poe, Cheshire & Leager by W. Brian Howell for plaintiff appellee.

Broughton, Broughton, McConnell & Boxley by Charles P. Wilkins for defendant appellant.

CAMPBELL, Judge.

Maggie Cross did not testify as a witness in the case. Matthew Cross did testify, and it is quite apparent from the record that, due to his age and infirmities, he was somewhat confused in his testimony. Nevertheless, he denied that he had ever appointed the defendant as agent to handle his affairs. Plaintiffs' Exhibit A was a letter dated 10 February 1966, addressed

to the defendant Beckwith and purporting to be signed by both Matthew Cross and Maggie Cross, wherein defendant Beckwith was appointed a trustee to look after the affairs of Matthew and Maggie Cross "including the renting of our land and doing any and all other acts which would be to our betterment." Matthew Cross testified that he was not able to see the letter "good" and that he did not recognize the signatures on the letter.

The trial judge charged the jury:

"I charge you that it is also the law that where one occupies a confidential relationship with another and benefits from a transaction that such circumstances create a strong suspicion that undue influence has been exercised. Then the law casts upon him to remove the suspicion and prove by removing the suspicion over that the deed was free and voluntarily act of the grantor.

The term confidential relationship implies preferential position. When one is general manager of the affairs of another who relies upon him as a friend and advisor and has entire management of his affairs a presumption of undue influence arises from a transaction between them wherein the general manager is benefited.

The burden of proof is upon the general manager to show you by the greater weight of the evidence when the transaction is disputed that it was an open and honest affair.

There is evidence in this case which tends to show that the defendant James W. Beckwith and Matthew Cross and Maggie Cross the plaintiffs were together in Holly Springs area on February 10, 1966, and that on that date a document referred to as Plaintiff's Exhibit A was drawn up and signed. In substance it says, it is addressed to the defendant James W. Beckwith and says, we, Maggie O. Cross and Matthew Cross do hereby appoint you our trustee to look after our affairs including the renting of our land and doing any and all other acts which would be to our benefit. You will aid us in any of our business affairs when we call upon you.

The Court instructs you that the evidence tends to show, both from the plaintiff and defendant, that this

letter exhibited took place and transpired in February of 1966 as dated.

The Court instructs you as a matter of law that this document, the exhibit does create a confidential or fiduciary relationship between the parties, plaintiffs and defendant, to this lawsuit."

[1] The defendant assigns the above portion of the charge as error. We think this assignment of error is well taken for that it denied the defendant his right to have the jury find the facts and consider the weight and credibility of the evidence on a very crucial point in the trial.

As stated in *McNeill v. McNeill,* 223 N.C. 178, 25 S.E. 2d 615 (1943):

"The law is well settled that in certain known and definite 'fiduciary relations, if there be dealing between the parties, on the complaint of the party in the power of the other, the relation of itself and without other evidence, raises a presumption of fraud, as a matter of law, which annuls the act unless such presumption be rebutted by proof that no fraud was committed, and no undue influence or moral duress exerted.' *Lee v. Pearce,* 68 N.C., 76. Among these, are, (1) trustee and *cestui que trust* dealing in reference to the trust fund, (2) attorney and client, in respect of the matter wherein the relationship exists, (3) mortgagor and mortgagee in transactions affecting the mortgaged property, (4) guardian and ward, just after the ward arrives of age, and (5) principal and agent, where the agent has entire management so as to be, in effect, as much the guardian of his principal as the regularly appointed guardian of an infant. *Abbitt v. Gregory,* 201 N.C., 577 (at p. 598); *Harrelson v. Cox,* 207 N.C., 651, 178 S.E., 361; *Hinton v. West,* 207 N.C., 708, 178 S.E., 356; *McLeod v. Bullard,* 84 N.C., 515, approved on rehearing, 86 N.C., 210; *Harris v. Carstarphen,* 69 N.C., 416; *Williams v. Powell,* 36 N.C., 460.

'When one is the general agent of another, who relies upon him as a friend and adviser, and has entire management of his affairs, a presumption of fraud, as a matter of law, arises from a transaction between them wherein the agent is benefited, and the burden of proof

is upon the agent to show by the greater weight of the evidence, when the transaction is disputed, that it was open, fair and honest.' *Smith v. Moore,* (7th syllabus), 149 N.C., 185, 62 S.E., 892."

Where no such peculiar fidicuary relationship exists, then the same burden of proof is not placed upon the defendant. This is clearly revealed in the case of *In re Will of Atkinson,* 225 N.C. 526, 35 S.E. 2d 638 (1945).

The learned trial judge subsequently in the charge gave a correct instruction on this issue when he stated:

"You will remember that in considering this same issue that if the plaintiffs have satisfied you from the greater weight of the evidence that a confidential relationship did exist between the parties and that the defendant became the general manager or trustee as said in the letter of February 10th, 1966, then the burden of proof is upon the defendant to show by the greater weight of the evidence that the three deeds were obtained in open affair [*sic*] and honest manner."

In this latter instruction the trial judge correctly placed the burden upon the plaintiffs to satisfy the jury by the greater weight of the evidence as to the existence of the confidential relationship of general manager.

[2] Since the trial judge gave an instruction highly prejudicial to the defendant on a crucial issue, the correct instruction subsequently given cannot be held to correct the error. Conflicting instructions on a material aspect of the same case must be held prejudicial error since it cannot be determined that the jury was not influenced by the portion of the charge which is incorrect. *Hardee v. York,* 262 N.C. 237, 136 S.E. 2d 582 (1964); *Talbert v. Honeycutt,* 12 N.C. App. 375, 183 S.E. 2d 274 (1971).

We have refrained from a discussion of the evidence and other assignments of error in view of the fact that there must be a retrial of the case.

New trial.

Judges MORRIS and PARKER concur.

STATE OF NORTH CAROLINA v. DOUGLAS RAY BRADY

No. 7211SC734

(Filed 25 October 1972)

1. **Criminal Law § 166— abandonment of exceptions**

Exceptions not set out in defendant's brief or in support of which no argument is stated or no authority cited are deemed abandoned. Court of Appeals Rule 28.

2. **Burglary and Unlawful Breakings § 5; Larceny § 7— sufficiency of evidence to withstand nonsuit**

State's evidence was sufficient to withstand nonsuit in a prosecution for breaking and entering, larceny of chain saws and larceny of an automobile where such evidence tended to show that defendant and three others planned to commit the crimes charged, that they stole a car, that defendant kept a lookout while the breaking and entering and larceny of the chain saws were taking place, that defendant and his accomplices who were in the stolen car then drove to another county where the saws were transferred to defendant's car, that defendant attempted to sell the saws, and that defendant gave each of his accomplices $150, promising to pay them the rest of the money when he collected it.

3. **Criminal Law § 117— instruction on accomplice's testimony — failure to request special instructions**

The defendant's contention that the trial court's jury charge with respect to accomplice testimony should have included instructions that the witness had been promised immunity, had other charges pending against him in Guilford County, and had been interrogated without benefit of counsel was without merit where defendant failed to request such instruction.

APPEAL by defendant from *Robert M. Martin, Judge,* 29 May 1972 Session, Superior Court, LEE County.

Defendant was charged in one indictment with felonious breaking and entering the Bright and Williams Saw Company and the larceny therefrom of chain saws of the value of $4,787.62. He was charged in another indictment with the larceny of an automobile. Through retained counsel, defendant entered a plea of not guilty. The jury found him guilty of all three charges. He appeals from the judgments entered on the verdict.

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

Bell, Ogburn and Redding, by J. Howard Redding, for defendant appellant.

MORRIS, Judge.

[1] Although the record contains ten assignments of error, defendant brings forward and argues in his brief only two of them. Those exceptions not set out in his brief or in support of which no argument is stated or no authority cited are deemed abandoned. Rule 28, Rule of Practice in the Court of Appeals of North Carolina.

[2] Defendant first contends that his motion for dismissal should have been granted. The evidence for the State tends to show the following: Defendant asked Thomas Lee Holt (Holt) if he wanted to make some money along with Larry Smith (Smith) and Roy Lee Leonard (Leonard), saying he knew where there were some chain saws. After the lapse of some three hours they went to Sanford in defendant's car. On the way, the plan was made. They would steal a car to transport the saws. Leonard, Smith and Holt were to break in the store, steal the saws and load them in the stolen car. Defendant would stay on the highway to notify the others if anyone was coming or if anyone got up in the house. They went to the Saw Company and looked it over. There was a light in the store but not in the house in front of the store. Defendant said he had been there before and knew how the saws were arranged and knew the means of entry; that the saws were on metal racks toward the front of the building; and that there was a front door, a door on each side, and a window at the back. If anyone came, the three were to run through the woods behind the building and defendant would pick them up on a secondary road. They then went on downtown to find a car to steal. They found a Ford. Smith and Leonard drove the Ford and defendant and Holt followed in defendant's car. They took the back seats out of the Ford to make room for the saws. When they went back to the building Holt refused to break in because the building was so well lighted. He stayed with Leonard and Smith about 30 minutes and walked back to the highway, caught defendant when he came by, and got in the car. They drove past the place four or five times and then parked for about 45 minutes until they saw the Ford coming out. They followed the Ford into Chatham County and both cars stopped. They unloaded the saws from the Ford and put them in defendant's car. They all got in defendant's car and left. Defendant said he knew a man in Eden who would take the saws. He then went to a house in Burlington, stayed a few minutes, and carried two saws and

put them on the man's porch. They went to a restaurant in Eden where Smith, Leonard, and Holt were told to wait for Brady who said he was going to sell the saws. This was about eight o'clock a.m. Defendant was gone about 45 minutes. When he returned, he said he got part of the money but not all and gave Leonard, Smith and Holt $150 each promising to pay the rest when he collected it. Holt drove defendant's car back to Greensboro.

Unquestionably the evidence was sufficient for the jury to consider the question of defendant's guilt or innocence of the offenses charged. This assignment of error is without merit.

[3] Defendant next contends that the court failed properly to instruct the jury with respect to accomplice testimony. As to this the court instructed:

> "Members of the jury, there is evidence which tends to show that the witness, Mr. Holt, was an accomplice in the commission of the crimes charged, and an accomplice is a person who joins with another in the commission of a crime. The accomplice may actually take part in the acts necessary to accomplish a crime or he may knowingly help or encourage another in the crime, either before or during its commission. An accomplice is considered by the law to have an interest in the outcome of the case. If you find that the witness was an accomplice you should examine every part of his testimony with the greatest care and caution. If, after doing so, you believe his testimony in whole or in part, you should treat what you believe the same as any other believable evidence."

Almost identical language was approved in *State v. Mitchell*, 1 N.C. App. 528, 162 S.E. 2d 94 (1968). See also *State v. Smith*, 267 N.C. 659, 148 S.E. 2d 573 (1966). Defendant, however, argues that in addition the court should have instructed the jury that the witness had been promised immunity, had other charges pending against him in Guilford County, and had been interrogated without benefit of counsel. Defendant requested no such instruction, and cannot now complain. "The rule is that in the absence of a special request, the failure of the court to charge the jury to scrutinize the testimony of an accomplice will not be held for error, the matter being a subordinate and not a substantive feature of the case." *State v. Brinson*, 277

N.C. 286, 296, 177 S.E. 2d 398 (1970), and cases there cited. This assignment of error is overruled.

Defendant had a fair and impartial trial, free from prejudicial error.

No error.

Judges CAMPBELL and PARKER concur.

THE STATE OF NORTH CAROLINA v. JAMES MONROE BOONE

No. 727SC687

(Filed 25 October 1972)

1. **Automobiles § 114— manslaughter trial — failure to instruct on proximate cause — prejudicial error**

In a prosecution for manslaughter arising from the death of two individuals in an automobile collision involving defendant, the trial court committed prejudicial error in failing to require the jury to find that defendant's manner of driving was a proximate cause of the collision.

2. **Automobiles § 114; Homicide § 23— manslaughter trial — crossing yellow line on highway — failure to explain the law relating to the facts**

The trial court's instruction in a manslaughter case that the jury should find defendant guilty if it found beyond a reasonable doubt that defendant "intentionally or recklessly . . . drove an automobile across the center line at a point where the law prohibited driving across the center line" constituted prejudicial error in that it failed to explain to the jury where and under what circumstances it is unlawful to drive an automobile across the center line, and thus allowed the jury to speculate.

APPEAL by defendant from *Tillery, Judge,* 31 May 1971 Session of Superior Court held in NASH County.

Defendant was tried upon two charges of involuntary manslaughter. Both deaths resulted from the same automobile collision and the two charges were consolidated for trial.

The State's evidence tended to show that police officers of the City of Rocky Mount undertook to stop the car defendant was driving, a white 1966 Dodge, but that defendant accelerated

and tried to elude them. A high speed chase through parts of Rocky Mount was followed by a high speed chase on the old highway from Rocky Mount to Nashville. During the course of the chase defendant ran through stop signs, skidded out of the street, drove on the left side of the roadway, and at times exceeded a speed of one hundred miles per hour.

As defendant was driving east on the old Nashville Road the scene was described by the pursuing officer as follows:

"We proceeded down that road to approximately two and a half to three miles. At that point, went around a little curve, dip, the defendant on the left-hand side of the road, I saw headlights go straight up in the air. When that happened, the defendant was driving to the left-hand side of the road, straddling the center line. I slammed on brakes, jerked the patrol car to the right and saw a Buick come rolling directly down the center of the highway; two people fell out of the automobile. I slowed the patrol car, radioed to the car behind me to stop and render assistance. I continued my direction of travel and some eighth to a quarter of a mile further down the road, I found the Dodge laying (sic) on the left ditch bank, up on its right side, the engine still revving . . . . At the time I observed the defendant drive around the curve straddling the center line, in my opinion, his motor vehicle was being driven approximately seventy-five to eighty miles per hour, the speed limit being fifty-five on that particular highway."

It was stipulated that two of the occupants of the Buick automobile died as a result of injuries received in the collision.

The jury found defendant guilty on both counts of involuntary manslaughter and judgments imposing active prison sentences were entered. Defendant appealed the two manslaughter cases.

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

Battle, Winslow, Scott & Wiley, by Samuel S. Woodley, for the defendant.

BROCK, Judge.

[1] Defendant assigns as error that the trial judge failed to require the jury to find that defendant's conduct was a proximate cause of the collision.

In defining involuntary manslaughter the trial judge correctly stated that the death must be the natural and probable result of an act of the defendant. Also, in defining culpable negligence the trial judge correctly stated that it must be such recklessness or carelessness, proximately resulting in injury or death, that imports a heedless indifference to the rights and safety of others.

As noted above in the statement of facts, defendant stipulated that each deceased died as a result of injuries received in the collision. However, this is not a stipulation that defendant's conduct was a proximate cause of the collision. Nevertheless, the trial judge treated the stipulation as a stipulation that defendant's conduct was the proximate cause of the collision, and that the collision was the proximate cause of the deaths of two of the occupants of the Buick automobile. The instructions to the jury were as follows:

> "Now, in this case, gentlemen, the State and the defendant, have stipulated; that is, have agreed, as I have already said, that each of these men came to their death as a result—as a proximate result of a collision between these two automobiles.
>
> "So, the proximate cause of death, so far as the vehicles are concerned, is not a matter that you must concern yourself with. But, you must concern yourself with whether or not the defendant was operating that motor vehicle at the time of the collision.
>
> "And, to that extent, you are concerned with proximate cause of death. If you find from the evidence and beyond a reasonable doubt, the burden being upon the State to so satisfy you, that at the time of the collision between these two vehicles, the defendant, Mr. Boone, was operating this 1966 Dodge, then you would have no further concern with the proximate cause of the death of whichever man you would be thinking about at the time you are deliberating on it."

Clearly, the foregoing instruction required the jury only to find that defendant was operating the Dodge automobile at the time of the collision. It was error prejudicial to defendant for the court to fail to require the jury to find that defendant's manner of driving was a proximate cause of the collision.

[2] Defendant also assigns as error the instructions given by the trial judge with respect to defendant's driving across the center line. The evidence in the case tended to show that, approaching and continuing beyond the accident scene, the highway was marked with a broken white line in the middle enclosed on both sides by a solid yellow line. The trial judge instructed the jury that it should find defendant guilty if it found, beyond a reasonable doubt, that defendant "intentionally or recklessly drove an automobile at a speed in excess of the posted speed, *or drove an automobile across the center line at a point where the law prohibited driving across the center line*" (emphasis added).

The trial judge failed to explain to the jury where and under what circumstances it is unlawful to drive an automobile across the center line. The jury was allowed to speculate. From the phrasing of the instruction it seems that the trial judge had in mind the provisions of G.S. 20-150. However, this statute applies to vehicles overtaking and passing another vehicle traveling in the same direction. In this case, all of the evidence indicates that defendant and the Buick were traveling in opposite directions. Under the evidence presented in this case questions were raised as to whether defendant was violating G.S. 20-146, requiring a vehicle to drive upon the right half of the highway, or G.S. 20-148, requiring vehicles proceeding in opposite directions to pass to the right and yield one-half the roadway to the other. No instructions were given the jury upon the requirements of either of these statutes.

Because of errors in the charge the defendant is entitled to a

New trial.

Judges MORRIS and HEDRICK concur.

SUSAN DURHAM SPENCE v. JAMES ROBERT DURHAM AND WIFE, FAYE MUNDY DURHAM, RONALD KENNETH SPENCE, RICHARD T. SPENCE AND WIFE, FRANCES HAWKINS SPENCE

No. 7221DC564

(Filed 25 October 1972)

1. **Constitutional Law § 26— foreign custody order — full faith and credit**

The trial court erred in finding that a child custody order entered in Georgia was not entitled to full faith and credit.

2. **Divorce and Alimony § 22— foreign custody order — child physically present in this State — jurisdiction of courts in this State**

Even if a child custody order entered in another state is entitled to full faith and credit, the courts of this State have jurisdiction to enter orders providing for the custody of children affected by such order when they are physically present in this State. G.S. 50-13.5(c)(2)a; G.S. 50-13.7.

3. **Divorce and Alimony § 22— modification of custody order — changed circumstances**

A child custody order may be modified upon appropriate findings of fact showing changed circumstances substantially affecting the welfare of the child.

4. **Divorce and Alimony § 24— modification of foreign custody order — error**

The evidence does not support the findings of fact and the findings of fact do not support the court's judgment modifying a child custody order which had been entered in another state.

APPEAL by defendants from *Clifford, District Judge,* 13 December 1971 Session of District Court held in FORSYTH County.

Plaintiff instituted this action on 25 May 1971 seeking custody of two children born of her marriage to defendant, Ronald Spence.

In January of 1969, Ronald Spence instituted an action in the Superior Court of Cobb County, Georgia, seeking a divorce from plaintiff and custody of the children. In February 1969, a temporary order was entered in that court placing the children in the custody of their paternal grandparents, defendants Richard Spence and Frances Spence. The maternal grandparents, James Robert Durham and Faye Mundy Durham, were allowed to intervene in the Georgia action insofar as it related to custody of the children. On 2 June 1969, judgment was en-

tered in the Superior Court of Cobb County, Georgia. The divorce was granted. The court ordered that the custody of the children be taken from both parents and placed in the custody of their maternal and paternal grandparents. All the parties were represented by counsel and the judgment was signed as approved and consented to by attorneys for each of the parties. All of the parties except the Durhams were residents of Cobb County, Georgia. The Durhams reside in Winston-Salem, North Carolina. The Georgia judgment generally placed custody of the children in the paternal grandparents (Spences) during vacation periods and gave the Durhams custody during the school months, with provisions for interim visitation.

Plaintiff continued to reside in Georgia until the Fall of 1970. She consulted attorneys about a suit in the Georgia court to regain custody of the children. Plaintiff testified that she was advised by counsel to move elsewhere and that she did, in the Fall of 1970, moved to Winston-Salem for the purpose of obtaining custody of the children.

The complaint in the present action was filed on 25 May 1971, just a few days before the children were due, under the terms of the Georgia judgment, to return to the home of their paternal grandparents in Georgia. Judge Clifford, without notice to defendants, apparently heard plaintiff or her attorneys *ex parte* and on 24 May 1971, signed an order which, among other things in effect forbade compliance with the order of the Georgia court in that it specifically prohibited the removal of the children from Forsyth County. The order also ordered that all pleadings be impounded and revealed to no one except parties to the action. The complaint and order were filed the following day. On 20 July 1971, Judge Clifford signed an order placing the children in the custody of plaintiff pending trial and final disposition of the controversy.

The case came on for hearing before Judge Clifford on 13 December 1971. Judgment was entered on 31 January 1972, awarding exclusive custody of the children to plaintiff and forbidding the removal of the children from the State of North Carolina by any person other than the plaintiff. Defendants, James Robert Durham and Faye Mundy Durham, did not appeal, having previously filed answer in which they expressed their willingness to comply with the order of the Georgia court or such changes in that order as the District Court of Forsyth County might deem to be in the best interest of the children.

Defendants, Ronald Kenneth Spence, Richard T. Spence and Frances Hawkins Spence, appealed.

Hudson, Petree, Stockton, Stockton & Robinson by Norwood Robinson and White and Crumpler by Fred G. Crumpler for plaintiff appellee.

Womble, Carlyle, Sandridge & Rice by W. P. Sandridge, Jr., for Mr. and Mrs. James Robert Durham, appellees.

Hatfield, Allman and Hall by Roy G. Hall, Jr. for defendant appellants.

VAUGHN, Judge.

[1, 2] Among other things, the trial judge held that "the document entered on June 2, 1969 in Cobb County, Georgia does not constitute a judgment entitled to full faith and credit. . . . " To so hold constituted patent error. However, the judge did correctly conclude that, even if the judgment was entitled to full faith and credit, the courts of this State have jurisdiction to enter orders providing for the custody of minor children when they are physically present in this State. G.S. 50-13.5 (c) (2) a and G.S. 50-13.7.

[3] It is well settled that upon appropriate findings of fact showing changed circumstances substantially affecting the welfare of the children, the court may modify a prior order awarding custody. The burden is upon the party seeking modification of the order to show the changed circumstances which substantially affect the welfare of the children.

[4] The record on appeal in this proceeding consists of 403 pages. It is neither necessary nor desirable to review the evidence set out in this record and, because of its nature, we have elected not to do so. It suffices to say that the evidence does not support the findings of fact and that the findings of fact do not support the judgment. The judgment of the Superior Court of Cobb County, Georgia remains in full force and effect. The judgment and orders of the District Court of Forsyth County purporting to modify the same are reversed.

Reversed.

Judges PARKER and GRAHAM concur.

CLARK C. MAYBERRY AND WIFE, NINA M. MAYBERRY v. WELDON CAMPBELL AND WIFE, ERIE CAMPBELL

No. 7223DC586

(Filed 25 October 1972)

Judgments § 37— title to land — dismissal of defendants' prior action — judgment not res judicata in plaintiff's action

Where present plaintiffs did not put their title in issue by way of counterclaim in a prior action instituted by present defendants to remove cloud from title, and determination of plaintiffs' title was not necessary for disposition of that action, judgment dismissing the prior action for failure of defendants to prove their title is not *res judicata* in an action by plaintiffs for a permanent injunction, damages and judgment declaring them owners of the land in controversy upon allegations that they are the owners in possession of the land and that defendants are trespassing thereon.

APPEAL by plaintiffs from *Osborne, District Judge,* 15 March 1972 Session of District Court held in WILKES County.

Plaintiffs allege that they are the owners in possession of a 13.95 acre tract of land and that defendants are trespassing thereon. Plaintiffs seek a permanent injunction, damages and judgment declaring them to be the owners of the land. A temporary injunction was issued on 17 February 1972. Defendants answered and admitted cutting timber on the land. Defendants denied plaintiffs' title, alleged ownership in themselves and, as an additional defense, pleaded a prior judgment between the parties as *res judicata.*

On 15 March 1972, the cause came on for hearing on the temporary injunction. The trial judge considered the pleadings, the judgment in the prior action and the opinion of this court on appeal from the prior judgment which is reported as *Campbell v. Mayberry,* 12 N.C. App. 469, 183 S.E. 2d 867. The judge then concluded that all matters between the parties were finally adjudicated in the prior action, that defendants' plea of *res judicata* was a meritorious defense and entered judgment dismissing the action.

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

Franklin Smith for defendant appellees.

VAUGHN, Judge.

The complaint in the prior action makes no reference to possession by plaintiffs (Campbell) or trespass by defendants (Mayberry). It was an action to remove cloud from title cast under the provisions of G.S. 41-10. In the prior action, the Campbells alleged ownership of the land in question and that the Mayberrys were asserting a claim thereto which constituted a cloud on the Campbell title. Mayberrys filed answer denying Campbells' title and alleging title in themselves. Mayberrys' plea of title constituted an affirmative defense and not a counterclaim. *Edwards v. Arnold,* 250 N.C. 500, 109 S.E. 2d 205. They sought no affirmative relief and simply prayed that Campbells' action be dismissed. In the prior action the burden was on the Campbells to prove (1) that they owned the land in controversy or some estate therein and (2) that defendants asserted some claim to the land adverse to their title. *Wells v. Clayton,* 236 N.C. 102, 72 S.E. 2d 16. That the Mayberrys were asserting a claim adverse to the Campbells' title affirmatively appears on the face of the Mayberrys' answer and no further proof thereof would have been required. The Campbells were not required to prove the invalidity and wrongfulness of the Mayberrys' claim; such claim was necessarily wrongful if adverse to the true owner. *Wells v. Clayton, supra.* Therefore, the only question requiring answer which was necessary for determination of the prior action was whether the Campbells had proved title. As is set out in the opinion on the prior appeal, *Campbell v. Mayberry, supra,* plaintiffs failed to do so and the judgment dismissing their action was affirmed. The trial judge's additional conclusion that the Mayberrys were the owners in fee was ordered stricken in accordance with the well-established principle that "[a] failure of one of the parties to carry his burden of proof on the issue of title does not, *ipso facto,* entitle the adverse party to an adjudication that title to the disputed land is in him." *Cutts v. Casey,* 278 N.C. 390, 180 S.E. 2d 297. That this court ordered the conclusions that the Mayberrys were the owners in fee stricken from the judgment does not estop the Mayberrys from pursuing their present action.

It is true, of course, that a different question would be presented if a determination of the Mayberrys' title had been necessary for disposition of the prior action or if they had put their title in issue by way of a counterclaim. If the Mayberrys

had put their title in issue by way of a counterclaim, however, alternatives would have been available to them that were not available to them in the prior action. Although all the pleadings were filed prior to the effective date of the new Rules of Civil Procedure, the trial occurred thereafter. Among other things, the Mayberrys, on their counterclaim, could have availed themselves of the provisions of Rule 41 relating to voluntary and involuntary dismissals. See Rule 41(c). On appeal, upon determination that their evidence was insufficient as a matter of law, the case would have been remanded and the Mayberrys would have been entitled to move for a voluntary dismissal of their counterclaim without prejudice. *King v. Lee,* 279 N.C. 100, 181 S.E. 2d 400.

We further observe that, in this day of notice pleadings, the occasions will be very rare when a trial judge can make a determination as to whether a particular action is barred as *res judicata* by an examination of the pleadings and the prior judgment as was attempted here.

Reversed.

Judges PARKER and GRAHAM concur.

STATE OF NORTH CAROLINA v. ALLEN LASSITER

No. 7214SC621

(Filed 25 October 1972)

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

The trial court in a robbery prosecution did not err in the denial of defendant's motion for a continuance made on the ground that one of his witnesses was absent from the State at the time of the trial where the absent witness could testify only as a character witness for defendant and concerning certain statements which the victim made to him as to the events of the night of the robbery.

2. **Criminal Law § 34— robbery case — evidence showing another crime — relevancy**

Evidence that a defendant charged with robbery told his victim shortly before the taking that he had "just shot a man" was relevant as showing a design on the part of defendant to put his victim in fear.

3. Robbery § 4— aiding and abetting in robbery — sufficiency of evidence

The State's evidence was sufficient for submission to the jury on the issue of defendant's guilt of armed robbery where it tended to show that, while defendant himself may not have offered violence to the victim, he entered her premises in company with two men who did, stood by while they choked her and threw her to the floor and while they threatened her life with a gun, "piled on" the cash register with them while they took money from it, fled the premises immediately after they did, and shortly thereafter was found by the arresting officers in the company of one of the men.

APPEAL by defendant from *Cooper, Judge,* 3 April 1972 Session of Superior Court held in DURHAM County.

Defendant was tried on his plea of not guilty to an indictment charging armed robbery. The State's evidence in substance showed the following:

Between 7:00 and 8:00 p.m. on 21 January 1972 defendant and two other men, one David Gilliard and the other believed to be Bluford, entered "Elvira's Blue Dinette," a cafe operated by Elvira Watson in Durham. Elvira had known defendant previously. Defendant left a message with her for George Husketh, saying: "Tell George I am in trouble again, he will have to come up there and get me. . . . I just shot a man on Enterprise Street." Elvira expressed doubt, but defendant assured her it was true, saying that he shot the man because "[h]e asked me for a cigarette and I told him I didn't have one, and he jumped on me to take my cigarettes from me, and I shot him." The three men then left, but returned about ten minutes later. Defendant asked Elvira for a beer. When she turned to get it, she felt Gilliard's fingers "crammed down" her throat. Gilliard slung her to the floor. When she started screaming, Gilliard told Bluford, who had what looked like a sawed-off gun, to shoot her. She screamed, "Henry (another name for defendant) don't let him kill me, don't let him kill me."

Elvira testified that then "they" dived on the cash register, taking fifteen to twenty dollars, that she "couldn't see whose hands were actually going into the cash register, but all three of them piled on it, including Mr. Lassiter," and that Gilliard and Bluford then ran out. Defendant stayed behind and said: "Miss Elvira, call the police." She told him to close the door so that she could call, but when he got to the front door, he ran out. Elvira did not know whether defendant got any of the money, but he was standing there with the other two. He did

not touch her and he did not have a gun. When the police came, she named defendant as one of the robbers.

Defendant was arrested shortly after the robbery when the police found him with Gilliard sitting at a table in a piccolo room at a bootleg house, the first place the officers went in trying to locate him. He denied having been at Elvira's, but on the following day admitted having been there with Gilliard and a man he called "Butch Odom," though he denied knowing anything about a robbery.

Defendant offered no evidence. The jury found defendant guilty of common-law robbery. From sentence imposed, defendant appealed.

Attorney General Robert Morgan by Associate Attorney Thomas E. Kane for the State.

Felix B. Clayton for defendant appellant.

PARKER, Judge.

[1] Defendant assigns error to denial of his motion for a continuance made on the grounds that one of his witnesses, George Husketh, was absent from the State at the time of trial. "A motion for continuance is ordinarily addressed to the discretion of the trial judge and his ruling thereon is not subject to review absent abuse of discretion." *State v. Stepney,* 280 N.C. 306, 185 S.E. 2d 844. None was here shown. The absent witness was not an eyewitness. He could testify only as a character witness for defendant and concerning certain statements which the State's witness, Elvira Watson, made to him as to events of the night of the robbery. Defendant has failed to show either that the trial judge abused discretion in denying his motion for a continuance or how he was prejudiced thereby.

[2] Defendant next assigns error to the overruling of his objections to questions which the solicitor asked of the prosecuting witness concerning statements which defendant made to her shortly prior to the robbery to the effect that he "was in trouble again" and had "just shot a man on Enterprise Street." Defendant contends that this testimony was irrelevant to the issue of his guilt of the offense for which he was being tried and that it was prejudicial to him as tending to show that he

was guilty of a criminal offense other than that for which he was being tried. "It is well settled that in the trial of one accused of a criminal offense, who has not testified as a witness in his own behalf, the State may not, over objection by defendant, introduce evidence to show that the accused has committed another independent, separate criminal offense where such evidence has no other relevance to the case on trial than its tendency to show the character of the accused and his disposition to commit criminal offenses." *State v. Perry*, 275 N.C. 565, 169 S.E. 2d 839. But it is equally well settled that if such evidence "tends to prove any other relevant fact it will not be excluded merely because it also shows him to have been guilty of an independent crime." Stansbury, N. C. Evidence 2d, § 91, p. 210. Here, one of the essential elements of the offense for which defendant was being tried was the taking of property against the will of its owner by violence or putting her in fear. *State v. Lawrence*, 262 N.C. 162, 136 S.E. 2d 595. Evidence that one charged with robbery told his victim shortly before the taking that he had "just shot a man" was certainly relevant as showing a design on the part of defendant to put his victim in fear. That the victim may not have believed the statement and therefore was not rendered fearful by it does not destroy its relevancy to show an intent on the part of defendant to frighten his victim. There was no error in overruling defendant's objections to the solicitor's questions.

[3] Defendant's motions for nonsuit were properly overruled. Viewed in the light most favorable to the State, the evidence disclosed that while defendant himself may not have offered violence to the victim, he entered her premises in company with two men who did, stood by while they choked her and threw her to the floor and while they threatened her life with a gun, "piled on" the cash register with them while they took fifteen or twenty dollars from it, fled the premises immediately after they did, and shortly thereafter was found by the arresting officers in the company of one of the men. This evidence was amply sufficient to warrant the jury finding defendant was present, aiding and abetting, and that he was guilty of all essential elements of the crime for which he was tried.

We have carefully examined all of appellant's remaining assignments of error, all of which relate to the court's charge

to the jury, and find them without merit. Considered as a whole, the charge was free from prejudicial error.

No error.

Judges CAMPBELL and MORRIS concur.

CHARLOTTE LIBERTY MUTUAL INSURANCE COMPANY v. STATE OF NORTH CAROLINA EX REL. EDWIN S. LANIER, COMMISSIONER OF INSURANCE

No. 7210SC598

(Filed 25 October 1972)

1. **Insurance § 1— judicial powers of Insurance Commissioner**

The General Assembly is empowered to confer on the Commissioner of Insurance only those judicial powers reasonably necessary as an incident to the accomplishment of the purposes for which the Department of Insurance was created.

2. **Administrative Law § 3— powers of administrative agency**

An administrative agency must find within the statutes justification for any authority which it purports to exercise.

3. **Insurance § 1— powers of Insurance Commissioner — enjoining lease agreement by insurance company**

The Commissioner of Insurance had no authority to enjoin an insurance company from entering into an agreement to lease property owned by the company's president and treasurer.

APPEAL by petitioner, Charlotte Liberty Mutual Insurance Company (insurance company), from *Braswell, Judge,* 13 March 1972 session of Superior Court held in WAKE County.

This is an appeal from a judgment of the Superior Court affirming an order of Edwin S. Lanier, North Carolina Commissioner of Insurance (Commissioner) written in the form of a letter dated 26 January 1972 as follows:

Mr. George H. Talbot, President
Charlotte Liberty Mutual Insurance Company
125 East Fourth Street
Charlotte, North Carolina 28202

Re: Proposed Lease of real property owned by George H. Talbot, President & Treasurer of Charlotte Liberty Mutual Insurance Company to and for the use by the aforesaid insurance company as home office property

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Dear Mr. Talbot:

At a conference held in my office on December 23, 1971, you and Mr. Thomas R. Eller, Jr., Counsel for Charlotte Liberty Mutual Insurance Company advised me of a proposed lease arrangement whereby the Charlotte Liberty Mutual Insurance Company would lease certain real property located at the corner of South Tryon and Stonewall Street, Charlotte, North Carolina, from you while you serve in the capacity of President and Treasurer of the Insurance Company. All the circumstances surrounding the proposed lease arrangement by the Insurance Company were fully presented. I carefully considered all the facts and arguments of counsel with respect to this matter and I advised you at the conference that under the circumstances outlined such an acquisition by the Charlotte Liberty Mutual Insurance Company would be, in my opinion, a violation of the provisions of GS 58-79(b)(3).

It has now come to my attention that a policyholder's meeting was held in January, 1972, at which time certain policyholders of Charlotte Liberty Mutual Insurance Company acted in furtherance of consummating the proposed lease transaction which I advised you, in my opinion, was contrary to the Laws of this State.

Therefore, in accordance with the powers vested in my [sic] by the General Statutes of North Carolina, I hereby Order Charlotte Liberty Mutual Insurance Company not to acquire any interest in the aforesaid property under any circumstances in which an officer or director of the company receives either directly or indirectly money or other consideration from the aforesaid insurance company.

Issued under my hand and the Seal of this Department, this the 26th day of January, 1972.

EDWIN S. LANIER
Commissioner of Insurance

cc: Mr. Thomas R. Eller, Jr.
Counsel for Charlotte Liberty Mutual
Insurance Company

Attorney General Robert Morgan and Associate Attorney General Benjamin H. Baxter, Jr., for respondent appellee (North Carolina Commissioner of Insurance).

Cansler, Lockhart & Eller, P.A., by Thomas R. Eller, Jr., and Richard D. Stephens for petitioner appellant.

HEDRICK, Judge.

We express no opinion as to whether the proposed lease between the insurance company and George H. Talbot, President and Treasurer of the company, would be in violation of the provisions of G.S. 58-79(b)(3).

[1] Article IV of the North Carolina Constitution provides:

> Section 1. *Judicial power.* The judicial power of the State shall, except as provided in Section 3 of this Article, be vested in a Court for the Trial of Impeachments and in a General Court of Justice. The General Assembly shall have no power to deprive the judicial department of any power or jurisdiction that rightfully pertains to it as a co-ordinate department of the government, nor shall it establish or authorize any courts other than as permitted by this Article.
>
> . . . .
>
> Sec. 3. *Judicial powers of administrative agencies.* The General Assembly may vest in administrative agencies established pursuant to law such judicial powers as may be reasonably necessary as an incident to the accomplishment of the purposes for which the agencies were created. Appeals from administrative agencies shall be to the General Court of Justice.

The General Assembly is empowered to confer on the Commissioner of Insurance only those judicial powers reasonably neces-

sary as an incident to the accomplishment of the purposes for which the Department of Insurance was created. *State ex rel. Lanier v. Vines,* 274 N.C. 486, 164 S.E. 2d 161 (1968).

[2] Express powers delegated by statute and implied powers reasonably necessary for its proper functioning are the only powers which an administrative agency possesses. In *Great American Insurance Company v. Gold,* 254 N.C. 168, 173, 118 S.E. 2d 792, 796 (1961) it is stated, "Administrative boards have only such authority as is properly conferred upon them by the Legislature." Thus, it is clear that administrative agencies must find within the statutes justification for any authority which they purport to exercise. In 2 Am. Jur. 2d *Administrative Law* § 463 (1962) it is stated:

> "What orders and decisions an administrative agency may make is dependent upon its statutory purposes and powers and the validity of the acts conferring such powers. An order cannot be made without power or authority, or for an unauthorized purpose, and if made without authority it may be regarded as a nullity."

The Commissioner of Insurance of North Carolina is charged with the duty under G.S. 58-9 with administering the laws of the State with regard to the insurance industry. Specific powers and duties are statutorily conferred upon the Commissioner to aid him in the administration of the insurance laws. G.S. 58-38 provides:

> "If, upon examination, the Commissioner of Insurance is of the opinion that any domestic insurance company is insolvent, or has exceeded its powers, or failed to comply with any provision of law, or that its condition is such as to render its further proceeding hazardous to the public or to its policyholders, he shall revoke its license, and, if he deems it necessary, shall apply to a judge of the superior court to issue an injunction restraining it in whole or in part from further proceeding with its business. The judge may issue the injunction forthwith, or upon notice and hearing thereon, and after a full hearing of the matter may dissolve or modify the injunction or make it permanent, and may make all orders and judgments needful in the matter, and may appoint agents or a receiver to take possession of the property and effects of the company

and to settle its affairs, subject to such rules and orders as the court from time to time prescribes."

[3] The "letter order" dated 26 January 1972, merely reflecting the opinion of the Commissioner that the contemplated lease would be in violation of the provisions of G.S. 58-79(b)(3), purports to enjoin the insurance company from entering into the lease. Clearly the statutes creating the Department of Insurance and prescribing the powers and duties of the Commissioner, do not purport to grant him the power of issuing restraining orders and injunctions. In administering the laws relative to the insurance industry, the Commissioner, if he deems it necessary, may apply to the courts for restraining orders and injunctions under the provisions of G.S. 58-38. Obviously, the Commissioner having consulted with the company regarding the contemplated lease, had a right to form and express an opinion as to whether the lease was in violation of the statute; however, we think it is equally clear that the Commissioner exceeded his statutory authority when he undertook to enjoin the company from entering into the lease. It is fundamental that, "An administrative agency does not have the inherent powers of a court, particularly of a court of equity." 1 Am. Jur. 2d *Administrative Law* § 184 (1962).

For the reasons herein stated, the order of 26 January 1972, attempting to enjoin the insurance company from entering into the lease described in the Commissioner's letter to the insurance company, is hereby declared to be null and void and of no effect.

The judgment of the Superior Court is reversed and the order of the Commissioner of 26 January 1972 is vacated.

Reversed and vacated.

Judges VAUGHN and GRAHAM concur.

GENTRY BROTHERS, INC. v. BYRON DEVELOPMENT CORPORATION, ROYAL OAKS COUNTRY CLUB, INC., D. ST. PIERRE DUBOSE, AND WIFE VALINDA HILL DUBOSE

No. 7215SC611

(Filed 25 October 1972)

1. **Laborers' and Materialmen's Liens § 1— labor performed under contract with party having option to purchase — option not exercised — no lien**

A contractor may not enforce a lien on real property for labor performed in constructing a golf course upon the land pursuant to a contract with a party who had an option to purchase the land but never exercised the option or otherwise acquired any ownership in the land.

2. **Laborers' and Materialmen's Liens § 1— knowledge of work by owner — lien**

Mere knowledge by a property owner that work is being done or material furnished does not enable the person furnishing the work or material to obtain a lien.

APPEAL by plaintiff from summary judgment entered by *McKinnon, Judge,* for defendants D. St. Pierre DuBose and wife Valinda Hill DuBose, 27 March 1972 Session of Superior Court held in ORANGE County.

Civil action instituted 13 March 1970 to enforce a lien in the amount of $31,755.00 against a 158.9069 acre tract of land owned by defendants DuBose and situated in Orange County. A notice of claim of lien was filed by plaintiff on 17 September 1969.

Plaintiff alleges in substance: Defendants DuBose granted an option to one M. B. Smith III to purchase the tract of land in question. Smith assigned the option to defendant Byron Development Corporation. Byron entered a contract with plaintiff wherein it was agreed that plaintiff would do grading work for the construction of a golf course on the subject property. Plaintiff was to receive compensation in the sum of $253,000.00, with payments to be made as the work progressed. Work started in December 1968 and payments were made as agreed until the project was 96% complete. At that time, Byron was behind in payments in the amount of $31,755.00, and on 16 September 1969 the work was stopped. During the construction Byron assigned the option to defendant Royal Oaks Country Club. Plaintiff is still owed $31,755.00 for work performed, and de-

spite demand on all defendants, this sum has not been paid. All of the defendants knew of the work plaintiff was performing.

Defendants DuBose filed answer in which they deny that they are indebted to plaintiff or that plaintiff is entitled to a lien against their property.

Plaintiff moved for judgment on the pleadings and defendants DuBose moved for summary judgment. In support of their motion, Mr. and Mrs. DuBose filed an affidavit in which they aver: The option to purchase the land in question was never exercised, and at all times involved the land was owned by them as tenants by the entireties. Neither of them entered a contract with plaintiff nor authorized any agent to act in their behalf in connection with any of the work allegedly performed by plaintiff. They had no oral or written communication with any representative of plaintiff concerning the work done on their land until 16 September 1969. Plaintiff also filed an affidavit; however, nothing alleged therein controverts any of the material facts set forth in the DuBose affidavit.

Judgment was entered denying plaintiff's motion for judgment on the pleadings and allowing the motion of defendants DuBose for summary judgment.

Nelson and Clayton by George E. Clayton, Jr., for plaintiff appellants.

Bryant, Lipton, Bryant & Battle by F. Gordon Battle and Theodore H. Jabbs for defendants D. St. Pierre DuBose and wife, Valinda Hill DuBose.

GRAHAM, Judge.

Plaintiff does not challenge the portion of the judgment which holds that it is not entitled to a money judgment against defendants DuBose. Its contentions relate only to the action of the court in declaring null and void the notice of lien filed against the DuBose property.

[1] No issue of fact exists as to who owned the land at the time plaintiff made the improvements thereon, or as to who contracted for the improvements. It is undisputed that Mr. and Mrs. DuBose owned the land at all times involved in the suit—and they still do. It is also undisputed that it was Byron, and

not Mr. and Mrs. DuBose, who contracted with plaintiff for the improvements and agreed to pay for them. Evidence was offered through the affidavit of defendants DuBose that Byron was not acting as their agent. Plaintiff offered no evidence to the contrary. Thus, the only question before the trial court was a question of law: May a contractor enforce a lien on real property for labor performed pursuant to a contract with a party who has an option to purchase the land but never exercises the option or otherwise acquires any ownership in the land? We hold that the trial court correctly decided this question in the negative.

" 'The law seems to be settled in this State that there must be a debt due from the owner of the property before there can be a lien. The debt is the principal, the basis, the foundation upon which the lien depends. The lien is but an incident, and cannot exist without the principal.' " *Brown v. Ward,* 221 N.C. 344, 346, 20 S.E. 2d 324, and cases cited therein. In accord: *Supply Co. v. Clark,* 247 N.C. 762, 102 S.E. 2d 257; *Air Conditioning Co. v. Douglass,* 241 N.C. 170, 84 S.E. 2d 828; *Leffew v. Orrell,* 7 N.C. App. 333, 172 S.E. 2d 243; *Clark v. Morris,* 2 N.C. App. 388, 162 S.E. 2d 873.

Plaintiff argues that the land in question is subject to a lien because in the option contract, the optionee was given the right to construct a golf course prior to executing the option, provided assurances were given that money was available for the completion thereof, and provided further that expenditure of funds for this purpose would be subject to "reasonable joint control or certification as to purpose of expenditure." This contention cannot be sustained. These contractual provisions in no way authorized the optionee to enter into a contract on behalf of the owners. Furthermore, it is not contended that Byron acted for the owners in employing plaintiff to improve the property, or that the owners ever expressly, or by implication, assumed Byron's obligation to pay for the work plaintiff was employed to do.

[2] The fact defendants DuBose may have known that plaintiff was engaged in work on the property is of no significance. Mere knowledge by a property owner that work is being done or material furnished in the improvement of his property does

not enable the person furnishing the labor or material to obtain a lien. *Air Conditioning Co. v. Douglass, supra; Brown v. Ward, supra; Price v. Gas Co.*, 207 N.C. 796, 178 S.E. 567.

Affirmed.

Judges VAUGHN and HEDRICK concur.

STATE OF NORTH CAROLINA v. JAMES E. GRAVES

No. 7215SC660

(Filed 25 October 1972)

Searches and Seizures § 3— warrant to search for LSD — insufficiency of affidavit

Affidavit of a police officer stating that he has received information from a confidential informant that defendant has LSD in described premises, that the informant has given affiant information in the past leading to the arrest of alleged drug violators, that the affiant has received information in the past that defendant is pushing drugs, and that affiant has a sample of the drug and that a test has been run on the sample, *held* insufficient to support a finding of probable cause for issuance of a warrant to search defendant's premises for LSD, as the affidavit contains no allegation that either the affiant or the confidential informant has personal knowledge that LSD is on defendant's premises.

APPEAL from *McKinnon, Judge,* 1 May 1972 Criminal Session, Superior Court, ALAMANCE County.

Defendant was charged with possession of 90 tablets of LSD. The jury returned a verdict of guilty, and defendant appeals from the judgment entered on the verdict.

Attorney General Morgan, by Associate Attorney Witcover, for the State.

Donnell S. Kelly for defendant appellant.

MORRIS, Judge.

Defendant's only assignment of error is addressed to the ruling of the court that the affidavit upon which the search warrant was based was constitutionally sufficient for the issu-

ance of the search warrant and that the evidence obtained as a result thereof was admissible against the defendant. All exceptions taken by defendant are embraced in this assignment of error.

We quote verbatim from the affidavit:

"The facts which establish reasonable grounds for issuance of a search warrant are as follows:

The undersigned Det. O. F. Hoggard has received information that James Graves, CM has L.S.D. in his home located on Avon Ave. at 512 Avon Ave. The undersigned received this information from a confidential reliable informant that has given the undersigned information in the past that has led to (the arrest) of drug violations in the past. He has proven to the undersigned to be very reliable. The drug in question is a purple tablet containing L.S.D. The tablet is referred to as purple haze.

The undersigned has received information in the past that James Graves was pushing drugs. The undersigned has a sample of the drug and a test has been run in the lab at the police department by *Mr. Hambright at 3:00 P.M. 7-30-71. James Graves operates a 1968 Opel color white, License #FS-4976. This vehicle was parked in the driveway at the residence at 3:00 p.m., 7-30-71. This vehicle is listed to Ella M. Graves, 512 Avon Ave., Burlington, N. C. The house at 512 Avon Ave. is *a frame house with fake brick siding on it located the second house on the left on Avon Ave. after crossing S. Mebane St. headed south."

The affidavit adequately describes the premises to be searched. It adequately describes the automobile operated by defendant, although what connection that has with the defendant's possession of LSD is not disclosed. It states that affiant "has a sample of the drug" and that a test had been run on the sample. No information is given as to when, nor from where, nor from whom the sample was obtained. The contraband is described as a purple tablet, referred to as purple haze, containing LSD. This information, while no doubt accurate, adds nothing to the probable cause requirements for the affidavit. In actuality the only information which could be considered as a basis for the finding of probable cause is the statement that affiant had received information from a reliable confidential

informant who had given information in the past leading to the arrest of alleged drug violators; that the informant had proved to be very reliable; that the affiant had received information in the past that defendant was pushing drugs.

This affidavit falls short of providing a sufficient basis for a finding of probable cause. Not only does it fail to contain an allegation that affiant spoke with personal knowledge, but there is no allegation that the affiant's unidentified source spoke with personal knowledge. The magistrate could not judge for himself the persuasiveness of the facts relied on to show probable cause.

> "Although an affidavit may be based on hearsay information and need not reflect the direct personal observations of the affiant, *Jones v. United States,* 362 US 257, 4 L ed 2d 697, 80 S Ct 725, 78 ALR 2d 233, the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed, see *Rugendorf v United States,* 376 US 528, 11 L ed 2d 887, 84 S Ct 825, was 'credible' or his information 'reliable.' Otherwise, 'the inferences from the facts which lead to the complaint' will be drawn not 'by a neutral and detached magistrate,' as the Constitution requires, but instead, by a police officer 'engaged in the often competitive enterprise of ferreting out crime,' *Giordenello v United States, supra,* 357 US at 486, 2 L ed 2d at 1509; *Johnson v United States, supra,* 333 US at 14, 92 L ed at 440, or, as in this case, by an unidentified informant." *Aguilar v. Texas,* 378 US 108, 114-115, 12 L. ed. 2d 723, 729, 84 S.Ct. 1509, 1514 (1964).

In *State v. Shirley,* 12 N.C. App. 440, 183 S.E. 2d 880 (1971), cert. denied 279 N.C. 729 (1971), the facts sworn to in the affidavit *as being within the personal knowledge* of the affiant were held to be at least minimally sufficient to satisfy constitutional requirements for supporting the magistrate's independent determination that the information given by the informer to affiant was probably accurate. There the affiant stated that a reliable informer, who had given information in the past which had proved to be correct and resulted in the arrest of at least two other persons, stated that defendant had

marihuana in his possession and that he, the informer, *saw it and was offered it for a price.* The affiant further stated that he, the affiant, had made an investigation and had found that defendant was an associate of persons *known to the affiant* to be users and possessors of marihuana.

The affidavit now before us contains no facts of similar underlying circumstances.

We conclude, therefore, that the affidavit did not provide a sufficient basis for a finding of probable cause by the magistrate who issued the search warrant and that the evidence obtained as a result of the search warrant was not admissible against defendant. Defendant is, therefore, entitled to a

New trial.

Judges CAMPBELL and PARKER concur.

RAYMOND C. CROTTS v. CAMEL PAWN SHOP, INC.

No. 7219SC662

(Filed 25 October 1972)

1. **Rules of Civil Procedure § 55— setting aside entry of default — good cause**

In order to set aside an entry of default, all that need be shown is good cause, there being no necessity for a showing of excusable neglect. G.S. 1A-1, Rule 55(d).

2. **Rules of Civil Procedure § 55— setting aside entry of default — good cause — discretion of court**

The determination of whether good cause exists to vacate an entry of default rests in the sound discretion of the trial judge.

3. **Appeal and Error § 42; Rules of Civil Procedure § 55— setting aside entry of default — evidence not in record on appeal — presumption**

The appellate court will presume that the trial judge acted within his discretion on evidence showing good cause in vacating an entry of default where appellant failed to bring forward the evidence heard by the trial judge.

APPEAL by plaintiff from *McConnell, Judge,* 21 February 1972 Session of Superior Court held in RANDOLPH County.

Plaintiff instituted this action to recover damages for personal injury alleged to have been caused by negligence of the defendant corporation in failing to maintain, in a reasonably safe condition, the chairs and floors used by the patrons of its pawn shop business in Winston-Salem, North Carolina.

Plaintiff filed this action on 15 September 1971. Defendant filed answer on 27 October 1971, twelve days after expiration of the time allowed by Rule 12(a)(1) for filing answer. On 24 January 1972, an entry of default signed by the clerk was filed. On 1 February 1972, defendant moved to set aside the entry of default under Rule 55(d). Judge McConnell entered an order on 24 February 1972, setting aside the entry of default. Plaintiff appealed.

John Randolph Ingram for the plaintiff appellant.

Womble, Carlyle, Sandridge & Rice, by Allan R. Gitter, for defendant appellee.

BROCK, Judge.

Plaintiff appeals from the trial judge's order vacating an entry of default.

An entry of default is only an interlocutory act looking toward the subsequent entry of a final judgment by default and is more in the nature of a formal matter; 6 J. Moore, Federal Practice, par. 55.10 [1], p. 1827 (2d Ed. 1966); and a court might feel justified in setting aside an entry of default on a showing that would not move it to set aside a default judgment. Moore, *supra,* par. 55.10 [2], p. 1831; see *Whaley v. Rhodes,* 10 N.C. App. 109, 177 S.E. 2d 735.

When an entry of default has been made by the Clerk of Superior Court, a motion to vacate that entry is governed by the provisions of Rule 55(d) of the North Carolina Rules of Civil Procedure, which provides as follows:

"(d) Setting aside default.—For *good cause* shown the court may set aside an entry of default, and, if a judgment by default has been entered, the judge may set it aside in accordance with Rule 60(b)." (Emphasis added.)

[1] This court has previously stated that to set aside a default all that need be shown is good cause: "There is no neces-

sity for a finding of excusable neglect in granting a motion to set aside and vacate the entry of default." *Whaley v. Rhodes, supra.*

[2] The trial judge in this case granted the motion vacating the entry of default after a hearing before counsel for plaintiff and defendant. The determination of whether a good cause exists rests in the sound discretion of the trial judge. *Whaley v. Rhodes, supra.* It is well settled that action by the trial judge as to a matter within his judicial discretion will not be disturbed unless a clear abuse of discretion is shown. *Whaley v. Rhodes, supra; Mull v. Mull,* 13 N.C. App. 154, 185 S.E. 2d 14.

[3] Appellant has not favored us with the evidence heard by the trial judge upon defendant's motion to vacate the entry of default. Where appellant fails to bring the evidence up for review, we presume the trial judge acted within his discretion on evidence showing good cause to vacate the entry of default. *In re Warrick,* 1 N.C. App. 387, 161 S.E. 2d 630; *Cobb v. Cobb,* 10 N.C. App. 739, 179 S.E. 2d 870.

Before depositing its answer with the clerk defendant did not move under Rule 6(b) for enlargement of time to file answer, therefore, its tardily deposited answer did not constitute a bar to the entry of default. Under the circumstances, the answer was merely proffered for filing. Defendant has not yet made a motion under Rule 6(b) for enlargement of time to file answer, and, therefore, no answer has been filed. The portion of the judgment which states "so that the case may be decided on its merits" constitutes surplusage and is disregarded.

Insofar as the order appealed from vacates the entry of default the same is

Affirmed.

Judges MORRIS and HEDRICK concur.

JOE LEWIS v. JAMES MALCOLM PIGGOTT AND HARRIETT PIGGOTT

No. 7213SC715

(Filed 25 October 1972)

1. **Automobiles § 44— automobile leaving road — applicability of res ipsa loquitur**

If an automobile skids off the roadway for no apparent cause, the doctrine of *res ipsa loquitur* will apply to make out a *prima facie* showing of driver negligence; the doctrine of *res ipsa loquitur* will not apply, however, when the cause of the accident is shown.

2. **Automobiles § 44— automobile leaving road — wet spot in road — inapplicability of res ipsa loquitur**

The doctrine of *res ipsa loquitur* was inapplicable in an action by a passenger to recover for injuries received in a one-car accident where there was evidence that the car left the road when it struck a wet spot in the road, and a verdict was properly directed for defendant where plaintiff's evidence was insufficient to show negligence on the part of the driver of the car.

3. **Rules of Civil Procedure § 41— denial of motion for dismissal without prejudice**

In an action to recover for personal injuries received in an automobile accident, the trial court did not err in the denial of plaintiff's motion for dismissal without prejudice under Rule 41(a)(2) made after plaintiff rested his case and the trial court indicated its intent to grant defendant's motion for directed verdict under Rule 50.

APPEAL by plaintiff from *Godwin, Special Judge,* 22 May 1972 Session of COLUMBUS Superior Court.

This is a civil action to recover for personal injuries sustained in a one-car accident while plaintiff was a passenger in an automobile owned by feme defendant and driven by her son, James, under circumstances making the mother, owner, responsible. Plaintiff's evidence showed that he spent the evening riding around with defendant in the automobile. Plaintiff was married to James' sister. The plaintiff and James were the only occupants of the automobile. James was driving the plaintiff home about midnight on a paved rural highway. The car hit a place where some water was running across the road. When he hit that spot, the car went to the right of the road and then crossed the road hitting a tree on the left side. A directed verdict, with prejudice, was entered, and the motion of plaintiff for a voluntary dismissal, without prejudice, was denied.

R. C. Soles, Jr., for plaintiff appellant.

Williamson & Walton by Benton H. Walton III for defendant appellees.

CAMPBELL, Judge.

It has been held in North Carolina that the skidding of a vehicle does not itself constitute negligence of the driver. The skidding, however, may be the basis of liability for injury if it is caused by the negligence of the driver. In *Clodfelter v. Wells,* 212 N.C. 823, 195 S.E. 11 (1938) it was held that since skidding alone is not evidence of negligence, the doctrine of *res ipsa loquitur* cannot apply to a skidding case in order to infer driver negligence from the mere fact of skidding. This case, however, and the case of *Springs v. Doll,* 197 N.C. 240, 148 S.E. 251 (1929), upon which *Clodfelter* relied, held against the application of *res ipsa loquitur* on the facts rather than as a general legal principle; *res ipsa* does not apply to the skidding of an automobile when all facts causing the accident are known and testified to by the witnesses at the trial.

[1] In the case of *Greene v. Nichols,* 274 N.C. 18, 161 S.E. 2d 521 (1968), the North Carolina Supreme Court held that when a motor vehicle leaves the highway *for no apparent cause* the doctrine of *res ipsa loquitur* will apply to make out a prima facie showing of driver negligence. The *Greene* case cited *Springs v. Doll* without any comment on the conclusion in *Springs* that *res ipsa* does not apply to a skidding automobile. To the extent, therefore, that the cause of an accident is shown, the *Clodfelter* and *Springs* cases are still valid law. However, if an automobile skids off the roadway *for no apparent cause,* the *Greene* rule infers prima facie negligence from the occurrence, and the *Clodfelter* decision would not be controlling.

Under *Greene* and related cases, the inference of negligence does not arise from the mere fact of injury; it arises from the manner in which it occurred. When there is no apparent reason for the manner in which it occurred, driver negligence may be inferred. Although no presumption of negligence arises from the mere fact there has been an accident and injury, if the evidence construed in the light most favorable to the party with the burden of proof is sufficient to make out a prima facie case of actionable negligence, a motion for a directed verdict (formerly nonsuit) should be denied and the issue submitted to

the jury. Direct evidence of negligence is not required (due to application of *res ipsa loquitur);* it may be inferred from the attendant facts and circumstances when a motor vehicle leaves the highway for no apparent reason. Here the reason was known and testified to by the plaintiff.

The facts in the instant case show that the defendant was driving on a clear night on a rural paved road at a speed estimated by the plaintiff to be about "30 or 25" miles per hour—within the maximum speed limit. It had not rained that night or during the day; the visibility was good. Defendant had not been drinking, and there was no evidence of automobile defect. In fact, the plaintiff himself testified that, "[t]here wasn't exactly anything wrong with his [defendant's] driving." Plaintiff saw a "wet spot in the road," and upon running over the "wet spot," the car went to the right of the road and then to the left of the road, where it hit a tree.

[2] *Res ipsa loquitur* cannot apply in this case. The cause of the accident was testified to be water in the road which caused the car to skid. An inference of driver negligence cannot be made from an accident when the plaintiff's own testimony is that there was nothing wrong with the defendant's driving.

Res ipsa loquitur not being applicable in this case, it is necessary for the plaintiff to plead and prove facts which constitute negligence. The plaintiff's evidence does not show that the defendant was operating the automobile improperly or that there existed a situation in the roadway which he should have seen, and which constituted a threat of foreseeable harm. The plaintiff failed in his proof.

[3] Plaintiff also assigned as error the failure of the trial court to grant his motion for dismissal without prejudice under Rule 41(a)(2), which motion was made after plaintiff rested his case and after the trial court indicated its intent to grant defendant's motion for directed verdict under Rule 50. A dismissal under Rule 41(a)(2) is granted or denied solely within the discretion of the trial judge and may be conditionally granted or granted upon such terms as justice requires. *King v. Lee,* 279 N.C. 100, 181 S.E. 2d 400 (1971); *Cutts v. Casey,* 278 N.C. 390, 180 S.E. 2d 297 (1971); *Kelly v. Harvester Co.,*

278 N.C. 153, 179 S.E. 2d 396 (1971). The plaintiff shows no abuse of discretion by the trial judge, and we find no merit in this assignment of error.

No error.

Judges MORRIS and PARKER concur.

IN THE MATTER OF THE WILL OF CARY T. HOLLAND, DECEASED

No. 7314SC11

(Filed 25 October 1972)

Wills § 22— caveat proceeding — mental capacity — consideration of physician's testimony — instructions

The trial court in a caveat proceeding erred in instructing the jury that it could attach more importance to a physician's testimony as to testator's mental capacity than to the testimony of another witness without requiring that the jury first find that the physician's testimony was based on his personal observation and knowledge. G.S. 1A-1, Rule 51.

APPEAL by caveators from *Webb, Judge,* 20 March 1972 Session of Superior Court held in DURHAM County.

Issue of *devisavit vel non* arose upon caveat to the attested document, dated 22 January 1958, presented for probate as the will of Cary T. Holland, who died 31 January 1970. The sole grounds of caveat was that at the time of execution of the document the testator lacked testamentary capacity by reason of old age, disease, and mental infirmity. Upon the trial the caveators called and were permitted to examine as a hostile witness Dr. D. R. Perry, who testified that he had attended testator as his personal physician from 1955 until his death in 1970. The parties stipulated and the court found Dr. Perry to be an expert in internal medicine. On cross-examination by propounders, Dr. Perry testified that in his opinion the testator did have sufficient mental capacity at the time he executed the document offered for probate to know the persons who were the natural objects of his bounty and to know the nature and extent of his property. A number of other witnesses, presented both by caveators and by propounders, testified to facts relevant to the issue of testator's mental capacity.

The jury answered issues in favor of the propounders, finding that Cary T. Holland at the time of execution of the document offered for probate did have sufficient mental capacity to make a will. From judgment on the verdict admitting the will to probate in solemn form, caveators appealed, assigning as errors various portions of the court's instructions to the jury.

Murdock & Jarvis by Jerry L. Jarvis, Felix B. Clayton and Edward G. Johnson for propounders, appellees.

Powe, Porter & Alphin, P.A. by James G. Billings for caveators, appellants.

PARKER, Judge.

Appellants except and assign error to the following in the court's charge to the jury:

> "The propounders have offered Dr. Perry's opinion that in his opinion he did have sufficient mental capacity to know the nature and extent of his property and who were the natural objects of his bounty, and the effect of his act in making a Will thereby disposing of his property.
>
> "In connection with Dr. Perry's testimony, I will instruct you that you can give some importance to his opinion, perhaps more than you would to another witness, because he is a doctor, although again you are the triers of the facts and not the witness—even an expert witness. So after listening to Dr. Perry's testimony—you are not bound by it, however, you can give some weight to the facts that he was a doctor who was expressing an opinion."

In giving this instruction the judge invaded the province of the jury and violated the prohibition of G.S. 1A-1, Rule 51(a), that in charging the jury "no judge shall give an opinion whether a fact is fully or sufficiently proved, that being the true office and province of the jury." It has long been an established principle in the jurisprudence of this State that "[t]he slightest intimation from a judge as to the strength of the evidence, or as to the credibility of a witness, will always have great weight with a jury, and, therefore, we must be careful to see that neither party is unduly prejudiced by any expression from the bench which is likely to prevent a fair and impartial trial." *State v. Ownby,* 146 N.C. 677, 61 S.E. 630.

Propounders cite *Flynt v. Bodenhamer,* 80 N.C. 205, to sustain the charge in this case. In that case the trial judge instructed the jury that "the law likewise attaches peculiar importance to the opinion of medical men *who have the opportunity of observation* upon a question of mental capacity, as by study and experience in the practice of their profession they become experts in the matter of bodily and mental ailments." (Emphasis added.) In finding no error in this instruction under the evidence which had been presented in that case, our Supreme Court said:

> "But the opinion of a well instructed and experienced medical man upon a matter within the scope of his profession, *and based on personal observation and knowledge,* is and ought to be carefully considered and weighed by the jury in rendering their verdict; *and this substantially is the comment of the court.*" (Emphasis added.)

In the later case of *In re Peterson,* 136 N.C. 13, 48 S.E. 561, our Supreme Court was careful to confine the holding of *Flynt v. Bodenhamer* to cases in which the witness was testifying from personal knowledge and observation. The trial judge in the case now before us failed to note this limitation. While Dr. Perry's testimony in the present case would fully warrant a jury finding that his opinion was based on his personal observation and knowledge of Mr. Holland, it was for the jury, not for the court, to make such a determination. The trial judge here did not leave that determination to the jury, but by applying to the evidence in this case the principle of *Flynt v. Bodenhamer* simply assumed that it had been fully and sufficiently proved as a fact that the witness had personally observed the testator and that his opinion as to the testator's mental capacity was based on his personal observation and knowledge. In so doing the trial judge violated G.S. 1A-1, Rule 51(a).

We do not find it necessary to pass upon appellants' remaining assignments of error, all of which are directed to the charge and some of which appear to have merit. For the error noted above there must be a

New trial.

Judges CAMPBELL and MORRIS concur.

STATE OF NORTH CAROLINA v. SALVATORE LoSICCO

No. 7212SC639

(Filed 25 October 1972)

1. **Criminal Law § 155.5— failure to docket case on appeal in time**

For failure to docket the case on appeal within the time prescribed, defendant's appeal is subject to dismissal. Court of Appeals Rule 5.

2. **Criminal Law § 166— failure to file brief in time**

For failure properly to file a brief as required by the rules, defendant is deemed to have abandoned his objections and exceptions and his appeal is subject to dismissal. Court of Appeals Rules 28 and 48.

APPEAL by defendant from *Clark, Judge,* 3 April 1972 Criminal Session of Superior Court held in CUMBERLAND County.

On his trial in superior court, the defendant was represented by James F. Van Norman, 106 Third Street, Mineola, New York (who was permitted by the court to appear in this case), and Neil Fleishman, 120 Gillespie Street, Fayetteville, North Carolina.

Defendant was tried upon two bills of indictment, proper in form, charging him with armed robbery. The jury returned a verdict of guilty as charged in each indictment. From judgments imposing concurrent prison sentences on each charge and a recommendation of work release, the defendant appealed to the Court of Appeals.

Attorney General Morgan and Associate Attorney Conely for the State.

No brief was filed for defendant within the time allowed by the rules of this court.

MALLARD, Chief Judge.

[1] Judgments were entered in this case on 6 April 1972. Rule 5 of the Rules of Practice in the Court of Appeals requires that the record on appeal be docketed in this court by the appellant within 90 days after the date of the judgment. Rule 5 has a proviso allowing the trial tribunal to extend the time (not exceeding 60 days) in which to docket a record on appeal.

In this case there was an order extending the time for service of the case on appeal, but no order appears in this record extending the time for docketing the record on appeal. The Rules of Practice in the Court of Appeals are mandatory and not merely directory. See 3 Strong, N.C. Index 2d, Criminal Law, § 155.5 (Supp. 1972). For failure to docket the case on appeal as required by the rules, this appeal is subject to dismissal.

[2] The brief of the defendant in this case, pursuant to Rule 28 of the Rules of Practice in the Court of Appeals, was due to be filed by noon of 29 August 1972. No appellant's brief was filed in this court on or before 29 August 1972. Appellee's brief, pursuant to the rules, was due to be filed, and was filed, before noon on 5 September 1972. The case appeared on the calendar for oral argument on 19 September 1972. On 12 September 1972, appellant's New York counsel, James F. Van Norman, filed in this court what was designated as a "MOTION TO EXTEND TIME FOR FILING APPELLANT'S BRIEF." This motion appears on plain legal paper and although the attorney's name appears in typewritten form at the bottom of the page, it does not bear the signature of anyone. This motion was accompanied by what was designated as "ATTORNEYS AFFIDAVIT IN SUPPORT OF MOTION TO EXTEND THE TIME FOR FILING THE APPELLANT'S BRIEF." This undated "affidavit" appears to have been signed with the name of "James F. Van Norman," but it was not sworn to by anyone before any official. In 3 Am. Jur. 2d, Affidavits, § 1, it is stated, "An affidavit is any voluntary ex parte statement reduced to writing and sworn to or affirmed before some person legally authorized to administer an oath or affirmation." The "Motion to Extend Time for Filing Appellant's Brief" was denied by this court in conference on 13 September 1972. On 18 September 1972 at 3:32 p.m., the defendant, notwithstanding this court's denial of his motion for an extension of time to file a brief, attempted to file a brief herein signed by the aforesaid James F. Van Norman and one James Godwin Taylor. Mr. Taylor did not represent the defendant at the trial of this case and according to this record is not now associated with either of the attorneys who appeared at the trial. There appears on this paper writing after the name of James Godwin Taylor the following: "A member in Good Standing of the Bar of the State of North Carolina—34 White Oak Drive, Smithtown, New York 11787." Mr. Taylor appeared

when the case was reached on the call of the calendar on 19 September 1972 and informed this court that although he had been granted a license to practice law in North Carolina and was now practicing in New York, he had not paid the North Carolina State license tax required of all attorneys for the privilege of practicing law in North Carolina and had not sought permission from this court to appear in this case as an out-of-state attorney. Under the circumstances of this case, Mr. Taylor was not permitted to orally argue the case before this court. For failure to properly file a brief as required by the rules, the defendant is deemed to have abandoned his objections and exceptions and his appeal is subject to dismissal under Rules 28 and 48 of the Rules of Practice in the Court of Appeals. *State v. Kirby,* 276 N.C. 123, 171 S.E. 2d 416 (1970); *State v. Dingle,* 209 N.C. 293, 183 S.E. 376 (1936); *LeRoy, Wells, et al v. Taylor,* 9 N.C. App. 66, 175 S.E. 2d 324 (1970); *Bost v. Bank,* 1 N.C. App. 470, 162 S.E. 2d 158 (1968), *cert. denied,* 274 N.C. 274.

Before dismissing the appeal, we have examined the record proper and find no prejudicial error therein.

Appeal dismissed.

Judges BROCK and BRITT concur.

STATE OF NORTH CAROLINA v. MICHAEL STEVEN BOGGS

No. 7215SC753

(Filed 25 October 1972)

1. **Criminal Law § 145.1— revocation of order of probation — grounds for attack**

After revocation of an order suspending sentence and placing a defendant upon probation on specified conditions, a defendant may attack only the order of revocation, entered after notice duly served and a proper hearing thereon, upon the grounds that there is no evidence to support a finding of the breach of the conditions of suspension or that the condition broken is invalid because it is unreasonable or is imposed for an unreasonable length of time.

2. Criminal Law § 145.1— probation condition — avoiding persons of disreputable character — reasonableness

Defendant could not complain that the condition of his probation judgment that he "avoid persons or places of disreputable or harmful character" was unreasonably vague where such condition was specifically permitted by statute and where the persons with whom he associated obviously belonged to that category as they were users of heroin and marijuana and had been convicted of a conspiracy to bomb an occupied building. G.S. 15-199(2).

APPEAL by defendant from *McKinnon, Judge,* 5 June 1972 Session of Superior Court held in ALAMANCE County for the trial of criminal cases.

In June 1970, the defendant was arraigned on a bill of indictment charging him with the felonies of breaking and entering and larceny. He pleaded guilty to the misdemeanors of breaking or entering, a violation of G.S. 14-54(b), and misdemeanor larceny which is a violation of G.S. 14-72(a). Judge Braswell consolidated the two counts for the purpose of judgment and imposed a prison sentence of two years. The prison sentence was suspended for five years, and the defendant was placed on probation as provided in Chapter 15, Article 20 [G.S. 15-197, *et seq.*]. The defendant did not appeal.

In the instant case, defendant was charged with violating the terms of the probation judgment requiring him to avoid persons or places of disreputable or harmful character. The defendant, represented by privately employed counsel, was afforded a hearing on this charge. On 9 June 1972, Judge McKinnon revoked the probation judgment after finding, among other things:

> "The Court finds as a fact that at the March, 1972, session of the Alamance County Superior Court, at a time when the defendant and others were being tried for conspiracy to damage occupied property by the use of explosives, the defendant in his testimony admitted that he frequented an apartment where people did use narcotic drugs and did testify he took part in assembling the explosive device, but he denied any knowledge of the purpose for which the explosive was to be used. He was acquitted of the charges of conspiracy to damage occupied property by use of explosives.
>
> The Court finds that the probationer has previously been reported for two previous violations of probation,

once for Public Drunk and once for Moving his Residence Without Permission and was Continued on probation after those reports.

2. That the defendant has wilfully violated the terms and conditions of the Probation Judgment . . . . "

The defendant appealed to the Court of Appeals from the order entered that he be required to serve the prison sentence theretofore imposed.

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

Donnell S. Kelly for defendant appellant.

MALLARD, Chief Judge.

The defendant's only assignment of error is that the trial judge committed error "in revoking defendant's probation for knowingly and wilfully failing to avoid persons or places of disreputable or harmful character."

A person convicted of crime is not given a right to probation by the United States Constitution nor by the North Carolina Constitution. *State v. Hewett,* 270 N.C. 348, 154 S.E. 2d 476 (1967). Probation or suspension of sentence comes as an act of grace to one convicted of crime, and the offender's rights in a proceeding to revoke his conditional liberty under probation are not coextensive with the constitutional rights of one on trial in a criminal prosecution. *State v. Hewett, supra; Escoe v. Zerbst,* 295 U.S. 490, 79 L.Ed. 1566 (1935) ; *Burns v. U.S.,* 287 U.S. 216, 77 L.Ed. 266, 53 S.Ct. 154 (1932). It is the law in North Carolina that a condition of probation which is in violation of the defendant's constitutional rights, and, therefore, beyond the power of the court to impose, is *per se* unreasonable and subject to attack by defendant upon the State's subsequent motion to put the sentence into effect for violation of that condition. *State v. Caudle,* 276 N.C. 550, 173 S.E. 2d 778 (1970).

[1] After revocation of the order suspending sentence and placing a defendant upon probation on specified conditions, a defendant may attack only the order of revocation, entered after notice duly served and a proper hearing thereon, upon the grounds that (1) there is no evidence to support a finding of

the breach of the conditions of suspension or (2) that the condition broken is invalid because it is unreasonable or is imposed for an unreasonable length of time. *State v. Cole,* 241 N.C. 576, 86 S.E. 2d 203 (1955); *State v. Smith,* 233 N.C. 68, 62 S.E. 2d 495 (1950).

[2] The defendant does not contend that there was insufficient evidence to support the factual findings made by the trial judge. Neither does he contend that the condition imposed was for an unreasonable length of time. However, he does contend that the condition he is accused of violating is invalid because it is unreasonable in that it is so vague that he could not reasonably understand the conduct proscribed.

This condition or requirement of the probation judgment, that he shall "[a]void persons or places of disreputable or harmful character," was specifically permitted by the statute, G.S. 15-199(2). We hold that this requirement, as a condition of probation, was within the power of the court to impose. It was found as a fact that the defendant had been associating with persons who were using heroin and marijuana and who were convicted of the crime of conspiracy to bomb an occupied building. His contention that persons conspiring to bomb an occupied building, and using heroin and marijuana, were not persons who would be reasonably classified as persons of disreputable or harmful character is fatuous. Any individual should know, in the exercise of common reasoning in the interpretation and understanding of the meaning of the English language, that persons who use heroin and marijuana and who have been convicted of a conspiracy to bomb an occupied building are "persons of a disreputable or harmful character." See *State v. Barrett,* 243 N.C. 686, 91 S.E. 2d 917 (1956); *United States v. Ball,* 358 F. 2d 367 (4th Cir. 1966), *cert. denied,* 384 U.S. 971; and *United States v. You,* 159 F. 2d 688 (2d Cir. 1947).

Under the facts found in this case, the trial judge did not err in holding that the defendant had wilfully violated a valid condition upon which the execution of the prison sentence was suspended.

Affirmed.

Judges BROCK and BRITT concur.

GEORGE C. HAYNES v. STATE OF NORTH CAROLINA

No. 7216SC765

(Filed 25 October 1972)

1. **Criminal Law § 138— credit on prison sentence — confinement awaiting trial**

The trial judge properly denied petitioner's request for credit upon his sentence for life imprisonment for time spent in custody awaiting trial since the statute providing for such credit is applicable only to trials commenced after 19 July 1971, defendant's trial having taken place in June 1969, and since the statutory relief is not available to a defendant whose sentence of life imprisonment is affirmed on appeal, as in this defendant's case. G.S. 15-176.2.

2. **Criminal Law § 138— credit on prison sentence — confinement pending appeal**

Petitioner's request for credit upon his sentence for life imprisonment for time spent in custody pending appeal was properly denied where statutes in effect at the time of his appeal specifically prohibited such relief in cases where the sentence was death or life imprisonment. 1969 Session Laws, Chap. 266, and 1969 Session Laws, Chap. 888.

3. **Criminal Law § 138— credit on prison sentence — relief controlled by state legislature**

Credit for time spent in custody pending appeal is not required by decision of the Fourth Circuit Court of Appeals; rather, statutory prohibition as provided by the state legislature is controlling.

Chief Judge MALLARD concurring in result.

ON *certiorari* to review an order of *Hobgood, Judge,* entered during the second week of the 21 February 1972 Session of Superior Court held in ROBESON County.

Petitioner was tried and convicted of murder at the 2 June 1969 Session of Superior Court held in Robeson County; the jury recommended life imprisonment. On 6 June 1969 he was sentenced by the presiding judge to imprisonment for life. Petitioner appealed to the Supreme Court which found no error. *State v. Haynes,* 276 N.C. 150, 171 S.E. 2d 435 (filed 6 January 1970).

On 1 February 1972 petitioner filed the present petition in the Superior Court seeking credit for the time (1) spent in custody awaiting trial, and (2) spent in custody pending his appeal to the Supreme Court of North Carolina. It is stipulated in the record on appeal:

"That the petitioner was in custody subsequent to indictment in October, 1968, until June 6, 1969, in lieu of bond.

"That the petitioner was in custody from June 6, 1969, until January 20, 1970, in lieu of bond pending appeal."

Judge Hobgood denied relief and petitioner sought review in this Court by petition for writ of certiorari. This Court allowed the petition and issued the writ.

Attorney General Morgan, by Special Counsel Ralph W. Moody, for the State.

Dickson McLean and William S. McLean for the petitioner.

BROCK, Judge.

[1] Time spent in custody awaiting trial:

Until the enactment of G.S. 15-176.2, ratified 19 July 1971, North Carolina did not allow credit on a sentence of imprisonment for time spent in custody awaiting trial. See, *State v. Walker,* 277 N.C. 403, 177 S.E. 2d 868, and cases cited therein. However, the allowance of credit for time spent in custody awaiting trial as provided by G.S. 15-176.2 is not available to defendant. The statute, by its terms, applies only to trials commenced after its ratification, i.e., 19 July 1971. Defendant was tried and sentenced in June 1969. Also, it appears that the statute would not avail defendant relief because of another of its terms: "In the event the defendant is convicted of a crime the punishment of which is either death or life imprisonment, such credit shall not be available for pretrial confinement if the sentence of death or life imprisonment is affirmed upon appeal."

We hold, therefore, that the trial judge was correct in denying petitioner's request for credit upon his sentence for time spent in custody awaiting trial.

[2] Time spent in custody pending appeal:

Defendant was tried and sentenced in June 1969. The opinion of the Supreme Court of North Carolina *(State v. Haynes,* 276 N.C. 150, 171 S.E. 2d 435) was filed 6 January 1970 and certification thereof was received in the Superior Court on 20 January 1970. Therefore, G.S. 15-186.1 as rewritten in 1971

has no application to the time petitioner spent in custody pending appeal. His rights are governed by 1969 Session Laws, Chap. 266, and 1969 Session Laws, Chap. 888.

1969 Session Laws, Chap. 266, amended G.S. 15-184 by inserting provisions which included the following:

> "The sentence shall begin as of the date of the commitment in the event the defendant has been admitted to bail pending the appeal. If the defendant has not been admitted to bail pending the appeal, the defendant shall receive credit towards the satisfaction of the sentence for all the time the defendant has spent in custody pending the appeal, *except when the sentence is death or life imprisonment.*" (emphasis added.)

The foregoing provision of Chapter 266 became effective on 22 April 1969 and remained in effect until 16 June 1969. Therefore, petitioner having appealed on 6 June 1969, it was in effect for the first ten days petitioner was in custody pending appeal.

Effective 16 June 1969, Chap. 888 of the 1969 Session Laws was enacted which repealed Chapter 266. 1969 Session Laws, Chap. 888, after repealing Chap. 266, made provisions which included the following:

> "In the event the defendant has 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.*" (emphasis added.)

Chapter 888 of the 1969 Session Laws, including the foregoing provision, was codified as G.S. 15-186.1 and remained in effect until it was rewritten in 1971. Therefore, petitioner's appeal having terminated on 20 January 1970, the foregoing provision of Chapter 266, having been carried forward into Chapter 888, was in effect throughout the time petitioner was in custody pending appeal. The provisions, by their clear terms, do not allow credit for time spent in custody pending appeal when the sentence is life imprisonment.

[3] Defendant cites us to *Wilson v. North Carolina*, 438 F. 2d 284 (4th Cir. 1971) as authority that credit should be allowed to petitioner despite our statutory prohibition. This court is

not bound by the pronouncements of the United States Circuit Courts. *State v. Barber,* 278 N.C. 268, 179 S.E. 2d 404. We recognize the authority of our legislature to provide the punishment for crimes.

The order of the Superior Court denying petitioner credit for time spent in custody awaiting trial and denying petitioner credit for time spent in custody pending appeal is

Affirmed.

Judge BRITT concurs.

Chief Judge MALLARD concurs in the result.

Chief Judge MALLARD concurring in the result.

On the basis of what was said by this court in *Pinyatello v. State,* 14 N.C. App. 706, 189 S.E. 2d 574 (1972), I concur in the result reached that the superior court was correct in denying petitioner credit for time spent in custody awaiting trial and denying petitioner credit for time spent in custody pending appeal.

While I agree that *ordinarily* this court is not bound by the "pronouncements" of the United States Circuit Courts, I do not agree with the broad statement in the majority opinion that "(t)his court is not bound by the pronouncements of the United States Circuit Courts." For some exceptions to such rule, see 21 C.J.S., Courts, §§ 538, 543.

I do not agree that *State v. Barber,* 278 N.C. 268, 179 S.E. 2d 404 (1971), is authority for the all-inclusive and broad statement in the majority opinion that "(t)his court is not bound by the pronouncements of the United States Circuit Courts." What the Supreme Court did hold in *State v. Barber, supra,* was that the ruling of the Fourth Circuit Court of Appeals in a specific Maryland case was not binding on the Supreme Court of North Carolina.

STATE OF NORTH CAROLINA v. ALBERT LEE WRENN

No. 7218SC590

(Filed 25 October 1972)

Homicide § 30— question of guilt of voluntary manslaughter — submission to jury proper

The trial court properly submitted to the jury the question of defendant's guilt of voluntary manslaughter where the evidence tended to show that defendant had threatened deceased, that deceased and defendant argued on the morning of the shooting, that defendant fired two shots at deceased, that deceased and defendant scuffled for the gun, and that the gun was discharged during the scuffle, killing deceased instantly.

APPEAL by defendant from *Seay, Judge,* 3 January 1972 Session of Superior Court held in GUILFORD County.

In this criminal action, the defendant was tried upon a bill of indictment charging him with the offense of first-degree murder. Upon the same bill of indictment, defendant was found guilty of second-degree murder in a previous trial, but on appeal, the Supreme Court of North Carolina reversed and the defendant was granted a new trial. [See *State v. Wrenn,* 279 N.C. 676, 185 S.E. 2d 129 (1971)]. On this the second trial, the solicitor "stated to the court that he elected to arraign the defendant on the charge of Murder in the Second Degree or Manslaughter, or such lesser plea as the evidence may warrant, or as the jury may find." The defendant pleaded not guilty.

For a complete recounting of the facts, see *State v. Wrenn, supra.* Briefly restated, the evidence for the State tended to show that neighbors of the defendant heard gunshots and observed defendant struggling with something outside his home; that defendant called the sheriff's department and reported he had killed his wife, Mary Etta Wrenn; that the night before the shooting defendant had told his wife, "Woman, you better not be here when I get back or you're going to be a dead woman"; that defendant had been drinking and had written a note saying that defendant was going "to end it all. . . . So bury us together"; that on the morning of the shooting, 25 July 1970, the deceased returned to the house and had angry words with the defendant; that defendant, in an apparent rage of anger, fired two shots at deceased with a shotgun; that deceased ran and defendant followed her out in the yard

to where she was hiding behind a car trailer; that deceased while on the ground was trying to grab the gun from the defendant who was standing over her when the gun fired and killed the deceased instantly; and that the defendant then turned and walked to the porch of his home.

Defendant's evidence tended to show that his wife was "going to leave with this Bob Dalton and take" his two children with her; that his wife was "running around with other men"; that on the morning of 25 July 1970, defendant had been drinking liquor; that the shots defendant fired at his wife were not aimed at her, nor were they meant to hit her; that defendant only intended to "scare" his wife; that his wife "cursed" at him; that defendant pointed the shotgun at his wife before shooting the second shot but never intended to actually kill her; that he went to where she was hiding and pushed her to the ground; and that while struggling on the ground, deceased kicked defendant about the body and also kicked the shotgun, causing it to accidently discharge and kill her.

The court submitted to the jury the following possible verdicts: (1) guilty of murder in the second degree; (2) guilty of voluntary manslaughter; (3) guilty of involuntary manslaughter; or (4) not guilty of any offense. From a verdict of guilty of voluntary manslaughter, punishable under G.S. 14-18, and sentence imposed thereon, the defendant appealed, assigning error.

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

Wallace C. Harrelson, Public Defender, Eighteenth Judicial District, for defendant appellant.

MALLARD, Chief Judge.

The defendant in his brief contends that the court committed error in submitting to the jury the question of the defendant's guilt of voluntary manslaughter. This contention is without merit. We think the trial judge properly submitted the issue of voluntary manslaughter.

The defendant also contends that the trial judge committed error in ruling on the admission of some of the evidence. We have examined these assignments of error, properly presented,

and are of the opinion that the trial judge did not commit prejudicial error in ruling on the admission or exclusion of evidence.

Defendant contends that the trial judge committed error in failing to set aside the verdict of guilty of voluntary manslaughter and in refusing to grant defendant's motion in arrest of judgment and in entering and signing the judgment. We do not agree and these assignments of error are overruled.

The defendant was, at his first trial, convicted of murder in the second-degree, and at this trial he was convicted of voluntary manslaughter.

We are of the opinion and so hold that the defendant has had a fair trial, free from prejudicial error.

No error.

Judges CAMPBELL and BRITT concur.

IN THE MATTER OF: THE CUSTODY OF VANNESSA BRANCH AND JESSIE MONTINE BRANCH, MINORS

No. 7216DC725

(Filed 25 October 1972)

1. **Infants § 9; Parent and Child § 6— custody of children awarded to father — no request for custody by father**

The trial court was fully authorized to award custody of two children to their father, although he had filed no pleading asking for their custody, where the father was named a respondent in the case, appeared at the hearing in person and through counsel, and was subject to the orders of the court. G.S. 50-13.2(a).

2. **Infants § 9— findings of fact — changed conditions — findings supported by evidence**

In an action to determine the custody of two children there was plenary evidence to support the findings of fact and conclusions of law that there had been considerable change of conditions from the time the custody of the children was awarded to the maternal grandparents until this action was brought by the paternal grandparents to obtain custody.

In re Branch

APPEAL by respondents Frank Nix and Montine Nix from order of *Gardner, District Judge,* entered on 28 April 1972 in ROBESON District Court.

This is a civil action to determine custody of two minor children. On 6 January 1972 Jessie Branch Smith (Mrs. Smith), paternal grandmother of Vannessa Branch, age 12, and Jessie Montine Branch, age 5, filed petition for writ of habeas corpus asking that she be awarded custody of said children. The father of the children, Claude Earl Branch, and their maternal grandparents, Frank Nix and Montine Nix (Mr. and Mrs. Nix), were made respondents. The mother of the children died in April 1968.

Mr. and Mrs. Nix filed answer to the petition and a counterclaim asking that custody of the children be awarded to them.

Following hearings on 18 February 1972 and 24 March 1972 at which time petitioner and respondents appeared in person and with counsel, the court entered an order summarized in pertinent part as follows: The children were born in Georgia and immediately following the death of their mother, Mr. and Mrs. Nix took them into their home in Atlanta where the children lived until 3 January 1972 when their father brought them from Atlanta to his and his mother's home in Robeson County, North Carolina. On 29 May 1968 an order was entered in the Superior Court of Fulton County, Georgia, denying custody of the children to their father and awarding permanent custody to Mr. and Mrs. Nix. Since 3 January 1972 the children have resided with their father in the home of Mrs. Smith and her husband in Robeson County. The children are the only children living in their father's home; while living with Mr. and Mrs. Nix they shared a small home with three children of Mr. and Mrs. Nix, two of the Nix children being boys, ages 16 and 14. Mrs. Nix works five days per week and the Nix home was crowded with the two Branch children sharing a room on occasion with an older Nix girl and the younger Nix boy. Mrs. Smith does not work away from her home and is able to give full time supervision to the Branch children while they are living in her home. Vannessa Branch became very unhappy in the Nix home and called her father and Mrs. Smith on the telephone on numerous occasions asking them to let her and her sister live with them. There is a close relationship between the

Branch children and it is in their best interest that they not be separated from each other. The children are happy living with their father in the home of Mrs. Smith.

The court concluded that it had jurisdiction of the children, that there had been considerable change of conditions between the time the custody order was entered in Georgia and the hearings in this action in Robeson County; that it would be for the best interest of the Branch children to place their custody with their father while he resides in the home of his mother.

From an order awarding custody of the children to the father so long as he resides in the home of Mrs. Smith, subject to modification on changed circumstances, respondents Nix appealed.

John C. B. Regan III for appellants.

McLean, Stacy, Henry & McLean by William S. McLean for respondent Claude Earl Branch, appellee.

BRITT, Judge.

[1] Appellants contend that the court erred in awarding custody of the children to their father when he had filed no motion or petition and had not indicated that he was seeking custody. This contention is without merit.

Petitioner, the paternal grandmother of the Branch children, had standing to institute this action. "Any parent, relative, or other person, agency, organization or institution claiming the right to custody of a minor child may institute an action or proceeding for the custody of such child . . . . " G.S. 50-13.1. Following the institution of an action or proceeding pursuant to G.S. 50-13.1, the court is authorized to award the custody of the 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." G.S. 50-13.2(a).

In awarding custody to a person who is not a party to the action or proceeding, it would be proper and advisable for that person to be made a party to the action or proceeding to the end that such party would be subject to orders of the court. We have held, however, that this may be done even after judgment and by the appellate court when the case is appealed.

See *Brandon v. Brandon,* 10 N.C. App. 457, 179 S.E. 2d 177 (1971). In the case at bar the father was a respondent, appeared at the hearing in person and through counsel, and is subject to orders of the court. We hold that the court was fully authorized to award him custody of the children although he had filed no pleading asking for their custody. G.S. 50-13.2(a).

[2] Appellants contend that there was not sufficient evidence presented to support the findings of fact and conclusions of law that there had been considerable change of conditions justifying the awarding of custody to the father. We disagree with this contention. We hold that the evidence was plenary to support the findings of fact and conclusions of law.

We have carefully considered the other contentions argued in appellants' brief but find them to be without merit.

The order appealed from is

Affirmed.

Chief Judge MALLARD and Judge BROCK concur.

STATE OF NORTH CAROLINA v. ROGER SNIPES

No. 7215SC622

(Filed 25 October 1972)

1. **Criminal Law § 23— plea of guilty**

Defendant's appeal from sentence imposed upon entry of his guilty plea presented for review only the question whether the facts charged constituted an offense punishable under the laws and constitution.

2. **Assault and Battery § 5— assault with a deadly weapon — punishable offense**

Where defendant was charged with discharging a firearm into a vehicle and the evidence tended to show that he did fire at a vehicle, but none of the shotgun pellets penetrated into the interior of the vehicle, the facts shown were sufficient to constitute the punishable offense of assault with a deadly weapon.

APPEAL by defendant from *Godwin, Judge,* 4 April 1972 Criminal Session of ALAMANCE Superior Court.

An indictment was returned charging defendant Roger Snipes with the offense of discharging a firearm into a vehicle, a felony prohibited by G.S. 14-34.1. A jury was empaneled and trial begun. The State's evidence tended to show that none of the shotgun pellets penetrated into the interior of the vehicle, and, there being some question as to the meaning of the word "into" used in G.S. 14-34.1, the solicitor accepted a plea of guilty of assault with a deadly weapon, a misdemeanor prohibited by G.S. 14-33(c)(2). Indictment on the misdemeanor charge was waived by defendant and his attorney.

Before accepting the guilty plea the trial court examined the defendant, finding that he was represented by appointed counsel, and that the plea of guilty was freely, understandingly and voluntarily made, without undue influence, compulsion or duress, and without promise of leniency. Defendant was sentenced to imprisonment for two years.

The evidence tended to show that on 31 January 1972 defendant and a group of his friends had had an argument with two Thompson brothers and a group of their friends concerning the sister of a member of the Thompson group. Sometime thereafter on that day, a gunshot was fired from a blue automobile at the automobile in which defendant and his friends were riding. Defendant believed that one of the Thompson brothers or a member of that group fired the shot.

Later that evening Sylvia Jeanette Thompson Williams (sister of the Thompson boys) was driving an automobile belonging to her brother, Jerry Thompson, in which there were two passengers. She was following a blue automobile in which her two brothers and two of their friends were riding.

As Mrs. Williams and the Thompson group were traveling along Rauhut Street in Burlington, the defendant fired a 12 gauge shotgun and hit the car Mrs. Williams was driving. Buckshot hit below the left front window of the automobile, scratching the paint and breaking the chrome trim on the car door.

The defendant testified that he aimed the shotgun at, and intended to hit, the blue car in front of Mrs. Williams; that he did not intend to kill anyone, just scare them.

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

W. R. Dalton, Jr., for defendant appellant.

CAMPBELL, Judge.

The superior court has jurisdiction to try a misdemeanor to which a plea of guilty or nolo contendere is tendered in lieu of a felony charge. G.S. 7A-271 (a) (4).

G.S. 15-140 provides that "[i]n any criminal action in the superior court where the offense charged is a misdemeanor, the defendant may waive the finding and return into court of a bill of indictment. If the defendant pleads not guilty, the prosecution shall be on a written information, signed by the solicitor, which information shall contain as full and complete a statement of the accusation as would be required in an indictment. No waiver of a bill of indictment shall be allowed by the court unless by the consent of the defendant's counsel . . . . "

When the offense charged is a misdemeanor and defendant's plea is not guilty, the requirements for a waiver of indictment and trial upon an information signed by the solicitor are the same as in "noncapital" felony cases under G.S. 15-140.1. Although the statute (G.S. 15-140) does not require trial on an information signed by the solicitor when the defendant pleads guilty to a misdemeanor, "[n]otwithstanding, whether the plea be guilty or not guilty, in all cases the better practice is the preparation of an information." *State v. Bethea,* 272 N.C. 521, 158 S.E. 2d 591 (1968).

[1] The defendant having entered a plea of guilty to a valid information upon waiver of indictment, this appeal brings up for review only the question whether the facts charged constitute an offense punishable under the laws and constitution. *State v. Hodge* and *State v. White,* 267 N.C. 238, 147 S.E. 2d 881 (1966). Appeal upon conviction following a guilty plea presents for review only the question whether error appears on the face of the record proper. *State v. McClure,* 13 N.C. App. 634, 186 S.E. 2d 609 (1972).

[2] The facts charged in the instant case constitute a punishable offense. *State v. Tripp,* 9 N.C. App. 518, 176 S.E. 2d 892 (1970). Defendant's waiver of indictment was properly

made; he was charged under a valid information, and his plea of guilty was knowingly and voluntarily made. The punishment is within the limit authorized by statute.

No error.

Judges MORRIS and PARKER concur.

STATE OF NORTH CAROLINA v. KENNETH ALLEN STEWART

No. 7210SC612

(Filed 25 October 1972)

1. **Criminal Law § 97— recall of witnesses**

The trial court did not abuse its discretion in allowing the State to recall witnesses.

2. **Criminal Law § 60— breaking and entering — fingerprint evidence — sufficiency of evidence to withstand nonsuit**

State's evidence was sufficient to withstand nonsuit in a prosecution for breaking and entering and larceny though the only evidence linking defendant with the crime was fingerprint evidence, since evidence given by a qualified fingerprint expert of fingerprints corresponding to those of an accused found at a place where the crime was committed under such circumstances that they could have been impressed only at the time the offense was committed is sufficient to withstand nonsuit.

3. **Criminal Law § 113— jury instructions supported by evidence**

The trial judge's charge to the jury was proper where it was supported by the evidence.

Judge BROCK concurring in result.

APPEAL by defendant from *Godwin, Judge,* 31 January 1972 Session of Superior Court held in WAKE County.

Defendant was tried upon a bill of indictment, proper in form, charging him with the felonies of breaking and entering, larceny, and receiving.

The evidence for the State, briefly summarized, is that on the night of 16 September 1971 or the early morning hours of 17 September 1971, the place of business owned and operated by Raleigh Loan Office, Inc., a corporation, located at 223

South Wilmington Street in Raleigh was broken and entered through a window on the second floor, and over twelve hundred dollars worth of merchandise was removed therefrom. Police Officer Dunbar arrived at the scene at 3:11 a.m. He found a "satchel laying on the sidewalk and also a satchel in the second store window at 223 South Wilmington Street." In these satchels there were several pistols, several cameras, and other items which had been stolen and removed from the place of business of Raleigh Loan Office, Inc. The defendant's fingerprints were found on one of the pistols, on the outside plastic cover of a flash unit, and on an empty ring box recovered from the two satchels. The State's witness Golden testified that he was the president of the Raleigh Loan Office, Inc., and that "[t]here is (sic) three clerks there, besides myself, allowed to handle the ring tray. The customer is not allowed to handle them, they don't touch the trays at all."

The defendant offered no evidence.

The defendant pleaded not guilty. The jury returned a verdict against the defendant of guilty as charged of the felony of breaking and entering and also guilty as charged of the felony of larceny. From judgment imposing a prison sentence, the defendant appealed.

Attorney General Morgan and Associate Attorney Silverstein for the State.

James E. Cline for defendant appellant.

MALLARD, Chief Judge.

[1] The defendant's first assignment of error is that the trial court erred "in allowing the State to continually recall witnesses over objection by defendant." The record reveals that one State's witness testified four different times, another witness testified three different times, and another witness testified on two different occasions. The rule is that the recalling of witnesses ordinarily rests in the sound discretion of the trial judge. See *State v. Bentley,* 1 N.C. App. 365, 161 S.E. 2d 650 (1968) and 98 C.J.S., Witnesses, § 365. In *Moore v. Bezalla,* 241 N.C. 190, 84 S.E. 2d 817 (1954), it is said: "Whether a witness may be recalled is in the sound discretion of the trial judge." When this rule is applied to this case, we hold that the trial judge did not commit error in permitting the State to recall the witnesses.

[2] Defendant assigns as error the failure of the trial judge to allow his motion for judgment of nonsuit. Defendant contends that the only evidence linking him with the crime is fingerprint evidence.

The rule is that evidence, given by a qualified fingerprint expert, of fingerprints corresponding to those of an accused found at a place where the crime was committed under such circumstances that they could have been impressed only at the time the offense was committed is sufficient to withstand a motion for nonsuit. See *State v. Tew,* 234 N.C. 612, 68 S.E. 2d 291 (1951); *State v. Rogers,* 233 N.C. 390, 64 S.E. 2d 572, 28 A.L.R. 2d 1104 (1951); *State v. Blackmon,* 6 N.C. App. 66, 169 S.E. 2d 472 (1969); 29 Am. Jur. 2d, Evidence, § 374. When the evidence in this case is viewed in the light of this rule, we are of the opinion and so hold that the trial judge properly overruled the defendant's motion for judgment of nonsuit.

[3] Defendant assigns as error a portion of the judge's charge wherein he summarized a portion of the evidence to the jury. Defendant contends that the evidence does not support this portion of the charge. We do not agree. The general rule is that objections to the recapitulation of the evidence in the charge must be called to the trial court's attention in apt time to afford opportunity for correction in order that an exception thereto will be considered on appeal. See *State v. Weaver,* 3 N.C. App. 439, 165 S.E. 2d 15 (1969), *cert. denied,* 275 N.C. 263. The defendant did not state his contention that there was a misstatement of the evidence to the trial judge. However, the general rule does not apply to a statement of a material fact not shown in evidence. See *State v. Blackshear,* 10 N.C. App. 237, 178 S.E. 2d 105 (1970), and the cases therein cited. We hold that in the instant case the portion of the charge excepted to was supported by the evidence, and therefore the question of the materiality of the statement complained of does not arise.

In the trial we find no error.

No error.

Judge BRITT concurs.

Judge BROCK concurs in result.

Judge BROCK concurring in the result.

I concur in the result reached that the trial of defendant was free from prejudicial error. However, I do not agree with the rule pronounced by the majority concerning fingerprint evidence.

The rule stated by the majority places on the State a heavier burden of proof in the use of fingerprint evidence than is justified. As I read the rule stated by the majority, in order *to withstand a motion for nonsuit* it is incumbent on the State to conclusively establish that the fingerprints could have been impressed only at the time the offense was committed.

In my opinion, the State need only offer *evidence from which the jury could find,* after consideration of all the circumstances of the case, that the fingerprints could have been impressed only at the time the offense was committed. The question of whether, under the circumstances of the case as the jury found them to be, fingerprints found at the scene of the crime could have been impressed only at the time when the crime was committed, is a question for determination by the jury, not the court. This, I think, is the intent of *State v. Tew, State v. Rogers, State v. Blackmon,* and the secondary source material cited by the majority. Also, I think it is the intent of *State v. Minton,* 228 N.C. 518, 46 S.E. 2d 296; *State v. Smith,* 274 N.C. 159, 161 S.E. 2d 449; *State v. Pittman,* 10 N.C. App. 508, 179 S.E. 2d 198; and Annot., 28 A.L.R. 2d 1115, at 1150.

STATE OF NORTH CAROLINA v. MATTHEW WILLIAMS

No. 7214SC574

(Filed 25 October 1972)

Criminal Law § 30; Solicitors— entry of nolle prosequi — testimony by solicitor — no prejudice to defendant

In a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury, defendant was not prejudiced where a *nolle prosequi* had been entered against the prosecuting witness in another action charging him with a violation of G.S. 14-32(a) arising from the same incident which gave rise to the charge against defendant; nor was defendant prejudiced where the solicitor was not the prosecuting attorney but was called as a character witness for the prosecuting witness.

State v. Williams

APPEAL by defendant from *Robert M. Martin, Judge,* 20 March 1972 Session, Superior Court, DURHAM County.

Defendant was tried under a bill of indictment charging him with assault with a deadly weapon with intent to kill resulting in serious bodily injury. He was found guilty of assault with a deadly weapon inflicting serious injury and appeals from the judgment entered on the verdict.

Attorney General Morgan by Associate Attorney Reed for the State.

Kenneth B. Spaulding for defendant appellant.

MORRIS, Judge.

Defendant's sole assignment of error is directed to the court's denial of his motion to quash the indictment. This he contends "violated the defendant's constitutional right of due process and a fair and impartial trial."

It appears that as a result of the same incident bills of indictment were returned against defendant, Nathaniel Jones, and Napoleon Lawrence charging violations of G.S. 14-32(a). At the hearing on defendant's motion to quash, the solicitor testified that at the preliminary hearing in District Court, he had expressed to counsel for Lawrence his willingness to appear on behalf of Napoleon Lawrence as a character witness at a subsequent trial. He also testified that in Superior Court leave of court was requested to take a *nol pros* with leave as to Napoleon Lawrence and the court agreed that "that was the thing to do." The original warrant against defendant was issued on the affidavit of Napoleon Lawrence and the original warrant against Lawrence was issued on the affidavit of defendant Williams. At defendant's trial, Lawrence testified as the prosecuting witness and the solicitor testified as a character witness for Lawrence. The solicitor did not prosecute the case for the State. This was done by privately retained prosecutor.

These facts, defendant contends, show abuse of discretion and robbed defendant of a fair and impartial trial. We do not agree.

> "A solicitor, as a public officer and as an officer of the court, is vested with important discretionary powers. True, it is his responsibility, upon a fair and impartial trial, to

bring forward all available evidence and to prosecute persons charged with crime. Even so, prior to prosecution, if he finds the available evidence insufficient to support a conviction, he may enter a *nolle prosequi* or *nolle prosequi* with leave. (Citations omitted.) In *S. v. Moody,* 69 N.C. 529, *Reade, J.,* said: 'It was discussed at the bar whether it is within the power of a Solicitor to discharge a defendant or to enter a *nol. pros.*, etc., or whether that is the province of the court. The rule is that it is within the *control* of the court, but it is usually and properly left to the discretion of the Solicitor.' " (Citations omitted.) *State v. Furmage,* 250 N.C. 616, 622-623, 109 S.E. 2d 563 (1959).

In the trial of this case, the solicitor was not the prosecuting attorney and was called as a witness for the prosecuting witness. We know of nothing to prohibit his testifying as a character witness. The *nol pros* of Lawrence's charge had nothing to do with the trial of this defendant. It was a separate completed transaction not within the knowledge of the jury so far as the record discloses. Defendant does not contend that the solicitor took a *nol pros* as to Lawrence in spite of evidence sufficient to convict. We fail to find abuse of discretion or any conduct on the part of the solicitor which prevented defendant from having a fair and impartial trial. The evidence for the State was certainly sufficient to support the jury's verdict. Defendant's assignment of error is without merit and is overruled.

No error.

Judges CAMPBELL and PARKER concur.

STATE OF NORTH CAROLINA v. JOHNNY LEE SCOTT AND FREDDIE REVELS

No. 7212SC707

(Filed 25 October 1972)

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

Defendant's appeal from conviction on a breaking and entering and larceny charge is dismissed for failure to docket the record on appeal within the time allowed. Court of Appeals Rule 5.

State v. Scott

APPEAL from *Robert M. Martin, Judge,* 27 March 1972 Session, Superior Court, HOKE County.

Defendants were charged with feloniously breaking or entering the Arabia Golf Club building with the intent to steal and with the larceny therefrom of merchandise valued at $8,933.40. Defendants, through privately retained counsel, entered a plea of not guilty. The jury found them guilty, and, from judgments entered on the verdict, defendants appealed.

Attorney General Morgan, by Assistant Attorneys General Ray and Melvin, for the State.

Seawell, Pollock, Fullenwider, VanCamp and Robbins, by H. F. Seawell, Jr., for defendant appellees.

MORRIS, Judge.

Judgments were entered on 30 March 1972. Defendants were allowed 60 days within which to prepare and serve case on appeal. On 4 May 1972, defendants filed petition requesting 20 days additional time within which to make up and serve case on appeal. On 15 May 1972 an order was signed by Judge Martin allowing the petition. The record on appeal was not docketed in this Court until 11 August 1972. Time for docketing the record on appeal expired 28 June 1972. The record contains no request for, nor order granting extension of time within which to docket the appeal. An order extending time within which to serve case on appeal does not automatically extend the time within which an appeal must be docketed in this Court. *State v. Hunt,* 14 N.C. App. 626, 188 S.E. 2d 546 (1972). Rule 5, Rules of Practice in the Court of Appeals, requires that a record on appeal be docketed within 90 days after the date of the judgment from which appeal is taken, absent an order extending the time. In accordance with the practice of this Court, defendants' appeal is dismissed for failure to docket within the time allowed. *State v. Hunt, supra,* and cases there cited.

Nevertheless, we have reviewed the record and the assignments of error urged by defendants. We find no error sufficiently prejudicial to require a new trial.

No error.

Judges CAMPBELL and PARKER concur.

STATE OF NORTH CAROLINA v. ANTHONY DRAUGHN

No. 7212SC727

(Filed 25 October 1972)

Criminal Law § 146— appeal from guilty plea — no error on face of record

In an appeal from a sentence imposed upon defendant's plea of guilty to a charge of conspiracy to commit armed robbery, no error appeared on the face of the record where it showed that the bill of indictment was in all respects regular; the court was properly organized; the trial judge found that defendant's plea of guilty was freely, understandingly and voluntarily made; there was plenary evidence to support these findings; and the sentence imposed was within statutory limits.

APPEAL by defendant from *Clark, Judge,* 15 May 1972 Regular Criminal Session of Superior Court held in CUMBERLAND County.

Defendant and two others were indicted for conspiracy to commit armed robbery. Represented by court-appointed counsel, defendant tendered a plea of guilty. Before accepting the plea, the court examined defendant, and defendant signed and swore to a written transcript of the plea. Based thereon, the court found and adjudged that the plea of guilty had been freely, understandingly and voluntarily made, without undue influence, compulsion or duress, and without promise of leniency, and ordered that the plea of guilty, the transcript of the plea, and the court's adjudication thereon be filed and recorded. Judgment was imposed sentencing defendant to prison for a term of not less than seven nor more than ten years, with direction that the sentence be credited with the time defendant had spent in confinement awaiting trial. From this judgment, defendant appealed.

Attorney General Robert Morgan by Associate Attorney Ralf F. Haskell for the State.

Downing, David & Vallery by Ray C. Vallery for defendant appellant.

PARKER, Judge.

Since defendant pleaded guilty, this appeal presents for review only the question whether error appears on the face of the record proper. *State v. Roberts,* 279 N.C. 500, 183 S.E. 2d

647. We have carefully examined the record, and no error appears. The bill of indictment was in all respects regular; the court was properly organized; the trial judge properly examined defendant before accepting his plea and found that the plea of guilty was freely, understanding and voluntarily made; there was plenary evidence to support these findings; and the sentence imposed was within statutory limits.

After careful review of the record, we find

No error.

Judges CAMPBELL and MORRIS concur.

CAROLINA ELECTRIC SERVICE OF HENDERSON, INC.
v. THEODORE A. GRANGER

No. 729DC740

(Filed 25 October 1972)

Judgments § 50— action on a default judgment — summary judgment

Summary judgment was properly entered in favor of plaintiff in an action to renew a default judgment obtained in 1962 where defendant made no effort to have the judgment set aside after he learned of it in 1963, and there is nothing in the record to show that defendant was entitled to have the judgment set aside.

APPEAL by defendant from *Peoples, District Judge,* at the 26 June 1972 Session of VANCE District Court.

The purported record on appeal filed by defendant, and the "countercase" filed by plaintiff, disclose:

On 8 February 1972 plaintiff filed complaint in this action alleging in pertinent part as follows: On 17 April 1962, L. W. Mitchell, trading as Carolina Electric Service, obtained judgment against defendant for $2,057.91 plus interest and costs. Thereafter L. W. Mitchell caused his business to be incorporated and said judgment was transferred to the corporation, plaintiff herein. No payment having been made on the judgment, plaintiff prays that it recover the principal amount of the judgment plus interest and costs.

The answer to said complaint in pertinent part alleges: Defendant is not indebted to plaintiff herein or the plaintiff in the original action. At the time the original action was instituted defendant had "suffered" an accident and was "beset by difficulties as a result thereof." Defendant advised his counsel of errors in the complaint in the original action, was given certain assurances by his counsel, and did not learn "until more than one year after April 17, 1962," that judgment had been entered against defendant.

On 7 March 1972 plaintiff moved for summary judgment pursuant to G.S. 1A-1, Rule 56, on the ground that "there is no genuine issue as to any material fact and that the plaintiff is entitled to a judgment as a matter of law." The motion was duly served on defendant. On 28 June 1972 summary judgment was entered in favor of plaintiff for $2,057.91 plus interest and costs. Defendant gave notice of appeal.

Zollicoffer & Zollicoffer by John H. Zollicoffer, Jr., for plaintiff appellee.

Theodore A. Granger In Propria Persona (by Brief).

BRITT, Judge.

Plaintiff appellee has moved in the Court of Appeals that all documents filed by defendant appellant in this court, and particularly those designated "Case on Appeal and Record" and "Brief" be dismissed for that they do not comply with the rules of the court. Plaintiff attaches to its motion a record of the case duly certified by the Clerk of the District Court of Vance County. Although plaintiff's motion has merit and should be allowed, we elect to consider the case on its merits.

We hold that summary judgment in favor of plaintiff was proper. Nothing in the record indicates that after defendant learned (evidently in 1963) that judgment had been rendered against him in the original action that he made any effort to have the judgment set aside. Furthermore, there is nothing in the record to show that defendant was entitled to have the judgment set aside. See *Johnson v. Sidbury,* 225 N.C. 208, 34

S.E. 2d 67 (1945); *Rawleigh, Moses & Co. v. Furniture, Inc.*, 9 N.C. App. 640, 177 S.E. 2d 332 (1970).

The judgment of the district court is

Affirmed.

Chief Judge MALLARD and Judge BROCK concur.

ALFRED B. FAEBER v. E. C. T. CORPORATION

No. 7212SC675

(Filed 25 October 1972)

1. **Trial § 38— request for instructions**

When a party aptly tenders a written request for a specific instruction which is correct in itself and supported by the evidence, the failure of the court to give the instruction, at least in substance, is error.

2. **Master and Servant § 9— breach of employment contract — sufficiency of instructions**

In an action to recover for breach of an employment contract, the trial court's instructions sufficiently covered the meaning of the terms "legal justification," "sufficient cause," and "wrongful discharge," although the court did not specifically define those terms as had been requested by defendant.

APPEAL by defendant from *Clark, Judge*, at the April 1972 Civil Session of CUMBERLAND Superior Court.

Plaintiff instituted this action to recover $11,000 allegedly due him for breach of a contract of employment with defendant. The jury found (1) that defendant wrongfully terminated the contract of employment with plaintiff and (2) that plaintiff was entitled to recover $8,415. From judgment entered on the verdict, defendant appealed.

McCoy, Weaver, Wiggins, Cleveland & Raper by William E. Clark for plaintiff appellee.

Nance, Collier, Singleton, Kirkman & Herndon by Charles H. Kirkman for defendant appellant.

BRITT, Judge.

Defendant submits that the questions raised in its three assignments of error are included in its contention that "the court erred in its failure and refusal to instruct the jury as requested by the defendant in apt time to give instructions to the jury as specially prayed for as to the meaning of the terms 'legal justification,' 'sufficient cause' and 'wrongful discharge.' "

[1] It is the duty of the trial court to charge the law applicable to the substantive features of the case arising on the evidence, without special requests, and to apply the law to the various factual situations presented by the conflicting evidence. 7 Strong, N. C. Index 2d, Trial, § 33, pp. 324, 325. When a party aptly tenders a written request for a specific instruction which is correct in itself and supported by evidence, the failure of the court to give the instruction, at least in substance, is error. *Bass v. Hocutt,* 221 N.C. 218, 19 S.E. 2d 871 (1942). However, the court is not required to charge the jury in the precise language of the instructions requested so long as the substance of the request is included in the charge. *King v. Higgins,* 272 N.C. 267, 158 S.E. 2d 67 (1967).

[2] After a careful review of the charge in the instant case, we conclude that the court properly instructed the jury with respect to the law applicable to the substantive features of the case, and properly applied the law to the evidence. Defendant's prayer for special instructions was in two parts. First, defendant "spelled out" an instruction that it wanted given; the court gave that instruction almost verbatim. (R. p. 77.) Defendant then requested that the court instruct the jury on the terms "legal justification," "sufficient cause," and "wrongful discharge" and cited *Hagan v. Jenkins,* 234 N.C. 427, 429. We conclude that while the court did not specifically define the terms requested by defendant, its instructions sufficiently covered the meaning of the terms. We perceive no prejudice to defendant; therefore, the assignments of error are overruled.

No error.

Chief Judge MALLARD and Judge BROCK concur.

STATE OF NORTH CAROLINA v. JAMES CALVIN WARF

No. 7211SC585

(Filed 25 October 1972)

Automobiles § 126— breathalyzer test results — requirements for admissibility

Defendant is entitled to a new trial in a prosecution for operating a motor vehicle on the highway while under the influence of intoxicating liquor where the trial court allowed into evidence the results of a breathalyzer test without a showing by the State that the test was administered according to methods approved by the State Board of Health and that the test was administered by a person possessing a valid permit issued by the State Board of Health. G.S. 20-139.1(b).

APPEAL by defendant from *Bailey, Judge,* 28 March 1972 Session of LEE Superior Court.

Defendant was tried in the district court upon a warrant charging him with operating a motor vehicle on the highways while under the influence of intoxicating liquor in violation of G.S. 20-138 and was found guilty. He appealed to superior court for a trial de novo and pleaded not guilty. From a jury verdict of guilty as charged and judgment imposed thereon, he appealed to the Court of Appeals.

Attorney General Robert Morgan by Associate Attorney E. Thomas Maddox, Jr., for the State.

Pittman, Staton & Betts by William W. Staton and Ronald Penny for defendant appellant.

BRITT, Judge.

Defendant's assignments of error all question the admissibility into evidence, over defendant's objection, of the results of a breathalyzer test given to defendant when there was no evidence presented by the State that (1) the test was administered according to methods approved by the State Board of Health and that (2) the test was administered by a person possessing a valid permit issued by the State Board of Health for that purpose, as required by G.S. 20-139.1(b). The assignments of error are well taken.

The decisions of this court in *State v. Caviness,* 7 N.C. App. 541, 173 S.E. 2d 12 (1970), *State v. Powell,* 10 N.C. App. 726,

179 S.E. 2d 785, affirmed 279 N.C. 608, 184 S.E. 2d 243 (1971), and *State v. Chavis,* 15 N.C. App. 566, 190 S.E. 2d 374 (1972) are controlling here. In *Caviness* a new trial was ordered for failure of the State to meet either requirement of G.S. 20-139.1(b). In *Powell* we held that both requirements must be complied with and further that the State may prove compliance in any proper and acceptable manner. In *Chavis* we pointed out that although the manner of proof is left up to the State, the failure to offer any proof is not sanctioned by the courts and the defendant was granted a new trial because "such failure resulted in clear and manifest error prejudicial to defendant."

Since the record in the instant case fails to reveal any proof to satisfy the statutory requirements, for the reasons set forth in the above cited cases, defendant is awarded a

New trial.

Chief Judge MALLARD and Judge BROCK concur.

BILLIE JOHNSON WHITAKER v. JOHN WILLIAM WHITAKER

No. 7215DC578

(Filed 25 October 1972)

1. **Divorce and Alimony § 2; Rules of Civil Procedure § 8— failure to file answer — admission of averments**

   In an action for alimony without divorce based on abandonment, the failure of defendant to file an answer constituted an admission of the abandonment.

2. **Rules of Civil Procedure §§ 8, 55— failure to answer as admission — entry of default unnecessary**

   Since defendant's failure to deny plaintiff's averment of abandonment constituted an admission thereof, the trial court did not err in signing a judgment awarding alimony and counsel fees without prior entry of default by the Clerk or notice as required by G.S. 1A-1, Rule 55.

APPEAL by defendant from *McLelland, District Judge,* 20 April 1972 Session of District Court held in ALAMANCE County.

In a verified complaint filed 8 November 1971, plaintiff, among other things, alleged abandonment by her husband, the defendant, and sought counsel fees, alimony and alimony *pendente lite*. The summons and complaint were personally served. After hearing, an order allowing alimony *pendente lite* was entered. Thereafter, the case was placed on the trial calendar. When the case was called for trial on 20 April 1972, defendant had not filed answer. Both parties appeared and were represented by counsel. The judge restricted the evidence to that tending to show the proper amount of alimony. From judgment awarding alimony and counsel fees, defendant appealed.

Dalton & Long by W. R. Dalton, Jr., for plaintiff appellee.

Ross, Wood & Dodge by Harold T. Dodge; Welker O. Shue for defendant appellant.

VAUGHN, Judge.

[1] The question presented is as follows: In an action for alimony without divorce based on abandonment, does the failure of defendant to file answer constitute an admission of the abandonment? G.S. 50-16.8(a), effective 1 October 1967, provides that "the procedure in actions for alimony and actions for alimony pendente lite shall be as in other civil actions."

There is no question but that an answer is required in "other civil actions." "There *shall* be a complaint and an answer." G.S. 1A-1, Rule 7(a). (Emphasis added.) The effect of failure to respond with a required pleading (as here, an answer) is to admit the averments in the complaint. G.S. 1A-1, Rule 8(d). We hold, therefore, that defendant's failure to deny the allegation of abandonment constituted an admission of this fact. Our conclusion is in accord with the decision in *Williams v. Williams*, 13 N.C. App. 468, 186 S.E. 2d 210, where we held as follows:

> "We are of the opinion, and so hold, that in enacting G.S. 50-16.8, the General Assembly changed the procedure to be followed in actions for alimony without divorce from the divorce procedure set forth in G.S. 50-10 to the procedure applicable to *other civil actions*. In *other civil actions*, issues of fact may be determined by the judge if a jury trial is waived by failing to make timely demand pursuant to G.S. 1A-1, Rule 38(b). *Sykes v. Belk*, 278 N.C. 106, 179 S.E. 2d 439. Defendant did not demand a jury

trial in accordance with Rule 38(b) and therefore he waived his right to trial by jury." (Emphasis in original.)

[2] Defendant further contends that it was error to sign the judgment as set out in the record without prior entry of default by the Clerk as required by G.S. 1A-1, Rule 55(a) or notice as required by G.S. 1A-1, Rule 55(b)(2). The answer is that, as to the facts of this case, Rule 55 has no application. It is true that plaintiff could have proceeded under that rule at any time after defendant failed to file answer within the required time. Plaintiff did not do so but allowed the case to be regularly scheduled for trial. When the case came on for trial, defendant neither moved for a continuance nor asked the court to permit him to file answer. On the question of abandonment, the court was faced with precisely the same situation it would have faced if defendant had filed answer admitting the abandonment, for defendant's failure to deny the averment of abandonment constituted an admission thereof, Rule 8(d), *supra,* and no proof was required. Although the judgment does contain a recital to the effect that the court was making its finding on the issue of abandonment by way of default, the court was doing nothing more than eliminating an issue admitted by defendant by his failure to deny the same and limiting the trial to matters put in dispute by the pleadings.

Affirmed.

Judges HEDRICK and GRAHAM concur.

STATE OF NORTH CAROLINA v. FLOYD Z. HIGGENS
(ALIAS FLOYD ROBINSON)

No. 7217SC737

(Filed 25 October 1972)

1. Criminal Law §§ 73, 77— declaration of prosecuting witness — admissibility as res gestae

In a prosecution for kidnapping and armed robbery, the trial court properly admitted as part of the *res gestae* testimony of a third person as to the prosecuting witness's statement that defendant was going to kill her.

2. **Criminal Law § 50— emotional state of victim — opinion testimony admissible**

Testimony of a third person as to the prosecuting witness's emotional state immediately following the commission of the offense was properly admitted in the trial court as a lay witness may give his opinion as to the emotions displayed by a given person on a given occasion.

CERTIORARI to review trial before *Martin, Judge,* 9 August 1971 Session of Superior Court held in SURRY County.

Defendant was convicted on indictments charging kidnapping and armed robbery. We allowed certiorari to perfect a late appeal.

The State's evidence tended to show that defendant, armed with a pistol, forced a young married female to enter her own car, give the defendant six dollars from her purse and drive him approximately twenty miles into the country. Defendant then told his victim that he would have to kill her because she could identify him. In an effort to escape, the victim deliberately collided with an oncoming car, jumped out of her own vehicle and ran to the other vehicle screaming, "He is going to kill me." The driver of the other car testified that the prosecuting witness was "begging and pleading" for help and "she was just wild."

Defendant admitted riding with the prosecuting witness but asserted that it was with her consent and that they had made a "date" to meet and go out together.

Judgment was entered imposing a prison sentence in each case.

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

Hiatt & Hiatt by V. Talmage Hiatt for defendant appellant.

VAUGHN, Judge.

We note at the outset that defendant's name is spelled variously throughout the original record as "Higgens," "Higgins" and "Heggins" while his alias is given as both "Robertson" and "Robinson." However, no contention has been raised to the effect that defendant and the person referred to in the warrants,

indictments, affidavit of indigency and commitment orders, *et al.*, are not one and the same person.

[1] Defendant challenges the admissibility of the testimony of the driver of the car with which the victim's auto collided to the effect that the prosecuting witness ran up to her screaming, "He is going to kill me." The test of evidence submitted under the *res gestae* doctrine is set out in *Coley v. Phillips*, 224 N.C. 618, 31 S.E. 2d 757. We find, and so hold, that this testimony meets the three qualifications required of testimony to be admissible under the *res gestae* exception to the hearsay evidence rule and it was properly admitted.

[2] Defendant contends that it was error to accept the driver's conclusions as to the prosecuting witness' emotional state and behavior at the time of the collision. The long-standing rule in North Carolina is that a lay witness may give his opinion as to, among other things, the emotions displayed by a given person on a given occasion. Stansbury, N. C. Evidence 2d, § 129. The testimony of the driver accepted by the court was not in conflict with this rule. All of defendant's assignments of error directed to the admission of the other driver's testimony are overruled.

Defendant brings forward numerous other assignments of error, all involving well-established principles of law and none of them disclose prejudicial error.

No error.

Judges HEDRICK and GRAHAM concur.

STATE OF NORTH CAROLINA v. GEORGE GADDY

No. 7220SC641

(Filed 25 October 1972)

Larceny § 8— larceny of property from land — erroneous instructions

In a prosecution for larceny of property from land in violation of G.S. 14-80, the trial court erred in giving the jury instructions which would have permitted it to return a verdict of guilty upon a finding of the elements of common law larceny.

APPEAL by defendant from *Wood, Judge,* 10 April 1972 Session of ANSON Superior Court.

State v. Gaddy

Defendant was convicted on a bill of indictment which, by its terms, charged a violation of G.S. 14-80. Judgment was entered imposing a sentence of three to five years, suspended on certain terms and conditions.

Attorney General Robert Morgan by Christine A. Witcover, Associate Attorney, for the State.

Thomas and Harrington by L. E. Harrington for defendant appellant.

VAUGHN, Judge.

Defendant's assignments of error to the charge are well taken. Defendant was indicted under G.S. 14-80 which is as follows:

> "Larceny of wood and other property from land.—If any person, not being the present owner or bona fide claimant thereof, shall willfully and unlawfully enter upon the lands of another, carrying off or being engaged in carrying off any wood or other kind of property whatsoever, growing or being thereon, the same being the property of the owner of the premises, or under his control, keeping or care, such person shall, if the act be done with felonious intent, be guilty of larceny, and punished as for that offense; and if not done with such intent, he shall be guilty of a misdemeanor."

This statute was intended to prevent the wilful and unlawful entry upon the lands of another and the taking and carrying of such articles as were not, at common law or by prior statute, the subject of larceny. *State v. Vosburg,* 111 N.C. 718, 16 S.E. 392. A trespass upon land is an essential element of the offense. *State v. Jackson,* 218 N.C. 373, 11 S.E. 2d 149.

The evidence would have permitted the jury to find defendant guilty as charged in the bill. On at least three occasions, however, the jury was given instructions which would have permitted it to return a verdict of guilty upon a finding of the elements of common law larceny. In fact, the instructions appear to follow closely the North Carolina Pattern Jury Instructions for Criminal Cases (tentative), Section 216.10, "FELONIOUS LARCENY—GOODS WORTH MORE THAN $200.00 STOLEN. G.S. 14-72(a)." To so instruct on a bill charging a violation of G.S.

14-80 constituted prejudicial error and a new trial is required. Since they may not occur at the next trial, we do not review the assignments of error directed to the transgressions of private prosecution in his argument to the jury.

New trial.

Judges PARKER and GRAHAM concur.

STATE OF NORTH CAROLINA v. STEVEN H. DAHL

No. 7212SC575

(Filed 25 October 1972)

Criminal Law § 145.1— revocation of probation — evidence

There was sufficient evidence to support the court's finding that defendant had wilfully violated the terms and conditions of his probation.

APPEAL by defendant from *Clark, Judge,* 27 March 1972 Session of Superior Court held in CUMBERLAND County for the trial of criminal cases.

The defendant was charged with the violation of the terms and conditions of a probation judgment. From the order of revocation which required that the sentence previously suspended be placed into effect and that commitment issue, the defendant appealed.

Attorney General Morgan and Associate Attorney Haskell for the State.

Kenneth A. Glusman, Assistant Public Defender, Twelfth Judicial District, for defendant appellant.

MALLARD, Chief Judge.

There was ample evidence upon which a proper finding was made by Judge Clark that the defendant had wilfully violated the terms and conditions of the probation judgment. Judge Clark properly ordered that the defendant be required to serve the sentence imposed.

No error.

Judges BROCK and BRITT concur.

STATE OF NORTH CAROLINA v. EASTERN WILLINGHAM

No. 7212SC698

(Filed 25 October 1972)

APPEAL by defendant from *Clark, Judge,* 15 May 1972 Criminal Session, CUMBERLAND County Superior Court.

The defendant was charged in two separate bills of indictment. The first bill of indictment charged the defendant with second-degree burglary of a mobile home located in a trailer park in Fayetteville, North Carolina, which was used as a dwelling house but at the time was actually unoccupied. In the second bill of indictment, the defendant was charged with the crime of an assault with intent to commit rape. To both charges the defendant entered a plea of not guilty. After a jury trial the defendant was found guilty of both charges, and from judgments imposing prison sentences, the defendant appealed.

Attorney General Robert Morgan by Assistant Attorney General James L. Blackburn for the State.

Assistant Public Defender Kenneth Glusman for defendant appellant.

CAMPBELL, Judge.

We have reviewed the record in this case and find it to be free of any prejudicial error. The defendant was afforded a trial which was fair and free of error. The bills of indictment, pleas, judgment and sentences were in all respects regular and proper.

No error.

Judges MORRIS and PARKER concur.

STATE OF NORTH CAROLINA v. WILLIAM FLOYD JOHNSON, JR.

No. 7210SC732

(Filed 25 October 1972)

APPEAL by defendant from *Braswell, Judge,* 1 May 1972 Session, WAKE County Superior Court.

The defendant was charged in a valid bill of indictment containing three counts; in the first count with the felonious breaking and entering of the home of Raymond White on Lutz Street in Raleigh; in the second count with felonious larceny of personal property from the said home; and in a third count with receiving stolen property knowing same to have been stolen. To the charges contained in the bill of indictment, the defendant entered a plea of not guilty. From a jury verdict finding the defendant guilty of felonious breaking and entering and felonious larceny and the imposition of a prison sentence thereon, the defendant appealed.

Attorney General Robert Morgan by Associate Attorney C. Diederich Heidgerd for the State.

Robert P. Gruber for defendant appellant.

CAMPBELL, Judge.

We have reviewed the record, and we find it to be free of any prejudicial error. The defendant was afforded a trial which was fair and free of error. The bill of indictment, plea, judgment and sentence were in all respects regular and proper.

No error.

Judges MORRIS and PARKER concur.

STATE OF NORTH CAROLINA v. OSCAR TIMOTHY ROBINSON

No. 7210SC743

(Filed 25 October 1972)

ON *certiorari* to review a trial before *Bickett, Judge,* 13 December 1963 Session of WAKE Superior Court.

Defendant, represented by counsel, pleaded guilty to felonious breaking and entering and felonious larceny. The cases were consolidated for judgment and a prison sentence of ten years was imposed. Although defendant's counsel gave notice of appeal, statement of case on appeal was not served and, on motion of the Solicitor, the appeal was dismissed. We allowed certiorari to perfect a late appeal.

Attorney General Robert Morgan by William F. Briley, Assistant Attorney General for the State.

Sanford, Cannon, Adams & McCullough by John H. Parker for defendant appellant.

VAUGHN, Judge.

We have carefully examined the record and briefs of counsel. We find no error.

No error.

Judges HEDRICK and GRAHAM concur.

STATE OF NORTH CAROLINA v. KIM JEFFREY PRUITT

No. 7214SC745

(Filed 25 October 1972)

APPEAL by defendant from *Cooper, Judge,* 1 May 1972 Session of Superior Court held in DURHAM County.

Defendant was convicted of felonious breaking or entering. Judgment imposing an active sentence was entered.

Attorney General Robert Morgan by Parks H. Icenhour, Assistant Attorney General, for the State.

Loflin, Anderson and Loflin by Thomas F. Loflin III for defendant appellant.

VAUGHN, Judge.

Defendant has filed a motion to withdraw his appeal. We have denied the motion and considered the case on its merits. We find no error.

No error.

Judges HEDRICK and GRAHAM concur.

STATE OF NORTH CAROLINA v. PAUL PETER ROY, JR.

No. 7216SC638

(Filed 25 October 1972)

APPEAL by defendant from *Hobgood, Judge,* 21 February 1972 Session of Superior Court held in ROBESON County.

The defendant Paul Peter Roy, Jr., was charged in separate bills of indictment, proper in form, with rape and burglary.

The defendant was found guilty of assault with intent to commit rape and with felonious breaking and entering.

From judgments imposing consecutive prison sentences of ten years, defendant appealed.

Attorney General Robert Morgan and Assistant Attorney General James E. Magner for the State.

Britt & Britt by Evander M. Britt and McLean, Stacy, Henry & McLean by William S. McLean for defendant appellant.

HEDRICK, Judge.

Counsel for defendant state in their brief that they have reviewed the record and find no error in defendant's trial in the Superior Court. We have carefully examined the record and find that defendant had a fair trial free from prejudicial error.

No error.

Judges VAUGHN and GRAHAM concur.

STATE OF NORTH CAROLINA v. HOMER MACK GUFFEY

No. 7215SC681

(Filed 25 October 1972)

APPEAL by defendant from *Bailey, Judge,* 28 February 1972 Session of Superior Court held in ORANGE County.

Defendant was convicted in the District Court of Orange County under a warrant charging him with operating a vehicle while his driver's license was permanently revoked, and also, with a fourth offense of operating a vehicle on a public highway while under the influence of intoxicating liquor. He appealed to the Superior Court and entered a plea of not guilty to both charges. The jury found him guilty as charged of the offense of operating a motor vehicle while his driver's license was permanently revoked, and guilty (as for a first offense) of operating a vehicle while under the influence of intoxicating liquor. Appeal is from judgments imposing active prison sentences in each case.

Attorney General Morgan by Assistant Attorney General Melvin and Assistant Attorney General Ray for the State.

Charles Lawrence James for defendant appellant.

GRAHAM, Judge.

We have carefully reviewed all of defendant's contentions which are properly before us and find them without merit.

No error.

Judges VAUGHN and HEDRICK concur.

STATE OF NORTH CAROLINA, EX REL. UTILITIES COMMISSION AND CAROLINA POWER & LIGHT COMPANY v. ROBERT MORGAN, ATTORNEY GENERAL

No. 7210UC650

(Filed 22 November 1972)

1. **Utilities Commission § 6— interim rate increase — authority of Utilities Commission**

The Utilities Commission had authority to enter an interim order allowing a power company's initially requested rate increase to go into effect pending final determination of the case, subject to the refund with interest of any portion of the increase ultimately determined to be excessive. G.S. 62-134.

2. **Utilities Commission § 6— interim rate increase — preliminary hearing**

When a utility files a new or revised rate with the Utilities Commission, the Commission has the discretion to (1) act promptly and suspend the rate for up to the maximum period it is permitted to do so, (2) hold a preliminary hearing to receive additional evidence and information, and (3) in the clearer light furnished by the additional information so acquired, reconsider its original order and either modify it or cancel it altogether, as the situation may require.

3. **Utilities Commission § 6— general rate case — interim rate increase**

Contention that no rate increase may be allowed to become effective in a "general rate case" except after approval of such new rate upon final consideration and determination of all factors as required by G.S. 62-133 is untenable.

4. **Utilities Commission § 6— interim rate increase — preliminary hearing on affidavits**

It was appropriate for the Utilities Commission to hold a public hearing and make findings upon the basis of affidavits in determining whether to permit an interim rate increase.

5. **Utilities Commission § 6— interim rate increase — ability to render service**

A power company is not required to present evidence that its ability to render electrical service is "in immediate jeopardy" before the Utilities Commission may allow it an interim rate increase.

APPEAL by Attorney General from order of the North Carolina Utilities Commission in Docket No. E-2, Sub 201.

On 3 May 1971 Carolina Power & Light Company (CP&L) filed application with the North Carolina Utilities Commission (Commission) for authority to increase by 5.63% its rates and charges for retail electrical service. Included in this application

was a request that the new rates become effective on 17 May 1971 upon condition that CP&L undertake to refund to its customers affected thereby the amount, if any, collected under the requested new rates in excess of the amount which would have been collected under rates finally determined to be fair and reasonable, with interest upon any such excess. In the alternative, CP&L requested that the Commission withhold decision on suspension of the new rates pending hearing by the Commission on a date set by it to be held on or before 17 May 1971, at which hearing CP&L would be afforded opportunity to present evidence in support of its request that the new rates not be suspended upon conditions of refund pending final hearing and determination. CP&L further requested that following such preliminary hearing, if such preliminary hearing should be required by the Commission, the new rates become effective 3 June 1971, subject to refund and such other conditions as the Commission deemed just and proper. An Undertaking for Refund was attached to and filed with CP&L's application.

By order of 7 May 1971 the Commission declared this proceeding to be a general rate case, ordered that the proposed rates should be suspended pursuant to G.S. 62-134 for a period of 270 days from the time said rates would have gone into effect on 3 June 1971, "unless otherwise determined by Order of the Commission," and set CP&L's request to place the new rates into effect immediately, including removal of said suspension, for hearing on oral argument and affidavits to be heard on 16 June 1971. The order also set the application for final hearing and determination on the ultimate merits as a general rate case for 2 November 1971, and directed that the test period for data and evidence in this proceeding under G.S. 62-133 should be the twelve months' period ending on 30 June 1971. As directed by the Commission, CP&L published notice of the 16 June 1971 hearing and mailed notice to its customers. Petitions to intervene were filed by, and orders allowing intervention were entered for, ElectriCities of North Carolina, the U. S. Department of Defense, and the Attorney General of North Carolina for the using and consuming public.

On 16 June 1971 the public hearing was held as scheduled on CP&L's request that the new rates be put into immediate effect, subject to refund, pending final determination. At this hearing affidavits setting forth the factual basis for its appli-

cation were presented by CP&L, affidavits in opposition were filed by the Attorney General, and the Commission's own staff presented detailed reports and memoranda verified by affidavit of the Commission's Director of the Department of Engineering reviewing CP&L's already incurred and expected fuel expenses. Oral argument was presented by counsel.

On 30 June 1971 the Commission entered an order, joined in by a majority of its members, withdrawing and canceling the suspension of the proposed new rates and permitting the new rates to become effective on all sales and services made and rendered by CP&L on and after 1 July 1971. The authorization to place the new rates into immediate effect was specifically conditioned upon repayment by CP&L to its customers, with interest, of such amount, if any, to be collected under the new rates in excess of the amount which would have been collected under rates and charges finally determined to be fair and reasonable upon a final determination of this matter. In its order of 30 June 1971 the Commission made extensive "Interim Findings of Fact" on the basis of the affidavits which had been presented to it, and on these findings concluded that CP&L had shown good cause to have the proposed new rates be made effective immediately and that the granting of the interim emergency relief applied for was in the public interest. The order also directed CP&L to file with the Commission monthly profit and loss statements and balance sheets and monthly reports detailing its cost of fuel, both purchased and consumed.

On 30 July 1971 the Attorney General petitioned this Court for a writ of certiorari to review the Commission's order of 30 June 1971, asserting, among other things, that the order was in excess of the Commission's lawful authority. The petition was denied by this Court on 11 August 1971.

On 30 August 1971 CP&L filed an amendment to its original application in which it sought authority to make an across-the-board increase of 19.63% in its retail rates and charges. Public hearings were held by the Commission on the amended application from 2 November 1971 through 12 November 1971. At these hearings CP&L and the Commission staff offered extensive testimony and exhibits and opinions of expert witnesses concerning CP&L's plant and operations, its rate of return, its fuel costs and purchasing practices, its construction program, and its interest charges incurred as expenses during

the twelve-month-test period ending on 30 June 1971. Public witnesses also testified, both in support and in opposition to CP&L's application.

Following these public hearings and after receiving briefs of the parties, the Commission entered its final order on 17 February 1972. In this order the Commission made extensive findings of fact on the basis of which it concluded, among other things, that in order for CP&L to attract the capital funds required for its construction program its earnings must be maintained on a level substantially higher than it experienced during the test year which ended on 30 June 1971, during which period its earnings had dropped sharply; that this decline in earnings was occasioned principally by higher interest expense and higher fuel cost; that such higher fuel cost was the most critical factor affecting CP&L's earnings; that most of the increased cost of fuel was due to market conditions beyond CP&L's control; and that "CP&L obviously must improve its earnings over that of the test year." Based on these findings, the Commission found and concluded that a flat across-the-board increase of 14.38% on all of CP&L's metered rates was necessary, just and reasonable. This 14.38% increase included the 5.63% interim rate increase which had previously been allowed in the Commission's order of 30 June 1971, and the final order expressly provided that upon placing the 14.38% rate increase in effect on service rendered on and after 1 March 1972, the interim rate increase approved on 30 June 1971 should be terminated "as being included in the final rate found to be just and reasonable herein."

Following entry of the final order of the Commission on 17 February 1972, the Attorney General appealed.

Attorney General Robert Morgan by Deputy Attorney General Jean A. Benoy, for the Using and Consuming Public, appellant.

Joyner & Howison by Robert C. Howison, Jr.; and Sherwood H. Smith, Jr. and Thomas E. Capps, for Carolina Power & Light Company, appellee.

Commission Attorney Edward B. Hipp and Assistant Commission Attorneys Maurice W. Horne and William E. Anderson for North Carolina Utilities Commission.

PARKER, Judge.

[1] By this appeal appellant in no way challenges validity of the final order entered 17 February 1972 in which the Commission found a rate increase of 14.38% to be just and reasonable. His sole challenge is to the interim order entered 30 June 1971 allowing the initially requested rate increase of 5.63% to go into effect pending final determination of the case, on condition that any amounts ultimately determined excessive must be refunded. Appellant contends that in entering this order the Commission exceeded its statutory authority. We do not agree.

G.S. 62-134 is as follows:

"Change of rates; notice; suspension and investigation.—

"(a) Unless the Commission otherwise orders, no public utility shall make any changes in any rate which has been duly established under this chapter, except after thirty (30) days' notice to the Commission, which notice shall plainly state the changes proposed to be made in the rates then in force, and the time when the changed rates will go into effect. The public utility shall also give such notice, which may include notice by publication, of the proposed changes to other interested persons as the Commission in its discretion may direct. All proposed changes shall be shown by filing new schedules, or shall be plainly indicated upon schedules filed and in force at the time and kept open to public inspection. The Commission, for good cause shown in writing, may allow changes in rates without requiring the thirty (30) days' notice, under such conditions as it may prescribe. All such changes shall be immediately indicated upon its schedules by such public utility.

"(b) Whenever there is filed with the Commission by any public utility any schedule stating a new or revised rate or rates, the Commission may, either upon complaint or upon its own initiative, upon reasonable notice, enter upon a hearing concerning the lawfulness of such rate or rates. Pending such hearing and the decision thereon, the Commission, upon filing with such schedule and delivering to the public utility affected thereby a statement in writing of its reasons therefor, may, at any time before they

become effective, suspend the operation of such rate or rates, but not for a longer period than 270 days beyond the time when such rate or rates would otherwise go into effect. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate shall go into effect at the end of such period. After hearing, whether completed before or after the rate goes into effect, the Commission may make such order with respect thereto as would be proper in a proceeding instituted after it had become effective.

"(c) At any hearing involving a rate changed or sought to be changed by the public utility, the burden of proof shall be upon the public utility to show that the changed rate is just and reasonable."

The procedures provided in G.S. 62-134 were correctly followed in the present case. When, on 3 May 1971, applicant filed for an increase of 5.63% in its rates to become effective on 3 June 1971, it was proceeding in accordance with G.S. 62-134(a) which requires, "[u]nless the Commission otherwise orders," 30 days' notice to the Commission of "any changes in any rates" stating the time when the changed rates would go into effect. At the time of its initial filing on 3 May 1971, applicant requested further, in accordance with the express language of G.S. 62-134(a), "for good cause shown in writing" in its verified application and exhibits, that the new rates be allowed to become effective in less than 30 days, to wit, on 17 May 1971. The Commission did not grant this further request to allow the change in rate to go into effect without requiring the 30 days' notice, as "for good cause shown in writing" it had discretionary authority but was not required to do by G.S. 62-134(a), nor did the Commission allow the new rates to become effective at the end of the 30 days' notice period on 3 June 1971. Instead, within the 30 days' notice period and on 7 May 1971, the Commission, acting under the authority granted it by G.S. 62-134(b), proceeded to suspend the new rates for 270 days and set applicant's request to put the rates into effect on an interim basis for hearing on 16 June 1971. In this order of 7 May 1971 the Commission expressly provided that the 270-day suspension should remain effective "unless otherwise determined by Order of the Commission." Following the hearing held on affidavit and oral argument on 16 June 1971, the Commission entered the order of 30 June 1971 here challenged, in

which it withdrew its previous suspension of the new rates and allowed them to become effective subject to refund pending final hearing and determination. In so doing, in our opinion, the Commission acted in all respects within its statutory authority.

G.S. 62-134(b) provides that pending hearing and determination concerning the lawfulness of new or revised rates, the Commission "*may*, at any time before they become effective, suspend the operation of such rate or rates, but not for a longer period than two hundred seventy (270) days beyond the time when such rate or rates would otherwise go into effect." (Emphasis added.) While this language gives the Commission authority to suspend changes in rates subject to the time limitation imposed, clearly it does not *require* that it do so. The language is permissive, not mandatory. Further, nothing in the statute indicates a legislative intent that once the Commission exercises its discretionary power and suspends rates, it thereby necessarily exhausts its authority in that regard so as thereafter to be precluded from withdrawing or modifying the suspension. The authority to suspend rates for not more than 270 days clearly includes the power to suspend them for some lesser period. Implicit within the authority granting discretion of whether and for how long to suspend, is the discretion to cancel or modify a suspension once it has been made, and nothing in the language of the statute suggests that the Legislature intended that the Commission could exercise the discretionary authority granted it only if it did so on an all-or-nothing, once-and-for-all basis. Indeed, a more reasonable interpretation is that the Legislature intended that the Commission might, though it was not required to do so, follow exactly the procedure which it followed here.

[2] The Commission is granted authority in G.S. 62-134(b) to suspend rates, but only if it acts "at any time before they become effective." Normally this will be at the end of the 30 days' notice period provided for in G.S. 62-134(a), a brief time within which to act. If it does nothing, the new rates become effective at the end of the 30 days' notice period. If it acts to suspend the rates, it must deliver to the public utility affected "a statement in writing of its reasons therefor." There seems little purpose in requiring such a statement unless it be useful in connection with further proceedings. It is, therefore, entirely consistent with the statutory procedure contemplated by G.S.

62-134 that upon the filing with it by a utility of a new or revised rate, the Commission, if it does exercise its discretion to suspend such rate, shall (1st) act promptly and suspend the rate for up to the maximum period it is permitted to do so; (2nd) hold a preliminary hearing, if the Commission should deem this desirable, to receive additional evidence and information; and (3rd) in the clearer light furnished by the additional information so acquired, reconsider its original order and either modify it or cancel it altogether, as the situation may require. This, essentially, was what was done in the present case, and in this we find no error.

Had the Commission failed to withdraw its suspension in the present case, a gross unfairness would have resulted to the utility. After extensive evidentiary hearings based on a test period ending on 30 June 1971, the Commission found and determined that a 14.38% rate increase, far more than the 5.63% increase allowed as result of the interim order, was just, fair and reasonable. No exception has been taken to that determination and it is conclusive on this appeal. Regulatory lag deprived the utility of the benefit of the full increase found fair and reasonable for the entire time during which, but for such lag, it would have been entitled to receive the same. Its customers have no just cause to complain simply because during a portion of that time they were required to pay only a part of the increase to which the utility was ultimately found justly entitled. Had it finally been determined that the interim increase allowed was too high and the customers were required to pay too much, their rights were protected by the requirement that the excess be refunded with interest. No similar adjustment in favor of the utility was imposed in the event, as occurred, that the interim increase was too low.

[3] Appellant's contention that no rate increase in a case such as this, which was declared by the Commission as directed by G.S. 62-137 to be a "general rate case," may be allowed to become effective except after approval of such new rate upon final consideration and determination of all factors as required by G.S. 62-133, is without merit. Adoption of such a contention makes meaningless the language relating to suspension of new or revised rates contained in G.S. 62-134 and is patently at variance with the regulatory system contemplated by G.S., Chap. 62.

[4, 5] Appellant's further contention that in entering its order of 30 June 1971 the Commission acted arbitrarily and capriciously is simply not supported by the record. On the contrary, the record discloses that the Commission acted carefully and deliberately in exercising the discretion granted it by statute to suspend or not to suspend the new rates pending its final determination of this general rate case. While not required to do so, it held a public hearing after due notice before making its decision. Because of the necessity of making a prompt decision, it was appropriate to hold such a hearing and to make findings upon the basis of affidavits. The facts found by the Commission were fully supported by affidavits and other evidence presented to it. These findings in turn support the Commission's order, which was in any event discretionary with it, to withdraw the suspension and to permit the new rates to become effective pending final determination. Appellant's contention that before such an order can be justified the utility was required to present evidence that its ability to render electrical service was "in immediate jeopardy" is without merit. Nothing in our applicable statutes would support reading into them such a drastic limitation upon the discretionary authority which the Legislature has expressly vested in the Commission.

The actions and orders of the Utilities Commission appealed from in this case are

Affirmed.

Judges CAMPBELL and MORRIS concur.

STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION; DUKE POWER COMPANY; CITY OF DURHAM; AND HOUSTON V. BLAIR v. ROBERT MORGAN, ATTORNEY GENERAL

No. 7210UC620

(Filed 22 November 1972)

APPEAL by Attorney General from order of the North Carolina Utilities Commission dated 30 June 1971, affirmed in Commission order dated 31 January 1972.

On 28 April 1971, Duke Power Company (Duke) filed application with the North Carolina Utilities Commission (Commission) for authority to increase by 7.10% its electric rates. The application included a request that the rates be placed into effect immediately, without suspension, subject to Duke's undertaking to refund, with interest, any amounts by which such rates exceeded the amount finally determined to be just and reasonable. On 7 May 1971, the Commission issued its order finding the proposed increase to be a general rate increase, setting the matter for hearings beginning 12 October 1971, suspending the proposed rates for a period of 270 days pursuant to G.S. 62-134 "unless otherwise determined by order of the Commission," and set for hearing on 15 June 1971 Duke's request that the rates be made effective immediately subject to refund. After due notice, the public hearing was held on 15 June 1971 as scheduled on Duke's petition for immediate relief. On 30 June 1971, the Commission issued its order finding that Duke had shown "good and sufficient cause in writing and through hearing and exhibits, reduced to writing, to allow the interim emergency change in rates as requested without making the usual 30 days' notice," and finding further that the granting of the interim emergency relief "is in the public interest." Accordingly, the Commission withdrew and canceled its original denial of Duke's request that the proposed rate increase become immediately effective and allowed the new rates to become effective on all sales and services made and rendered by Duke on and after 1 July 1971, conditioned on Duke's undertaking to refund, with interest, any amount not ultimately allowed after the full evidentiary hearings.

On 30 July 1971, the Attorney General filed a petition for writ of certiorari requesting this Court to review the Commission's order of 30 June 1971. The petition was denied by this Court on 11 August 1971.

On 11 August 1971, Duke amended its original application to increase the proposed rate increase to 11.75% in lieu of the 7.10% increase originally requested. Public hearings were held on the amended application from 12 October through 21 October 1971. On 31 January 1972, the Commission entered its final order allowing a modified increase in rates of 8.93% which the Commission found to be just and reasonable, such increase including the 7.10% increase allowed by the order of 30 June 1971.

Following entry of the final order of the Commission on 31 January 1972, the Attorney General appealed.

Attorney General Robert Morgan by Deputy Attorney General Jean A. Benoy, for the Using and Consuming Public, appellant.

William H. Grigg, Steve C. Griffith, Jr., and Clarence W. Walker for Duke Power Company, appellee.

Commission Attorney Edward B. Hipp and Assistant Commission Attorneys Maurice W. Horne and William E. Anderson for North Carolina Utilities Commission.

MORRIS, Judge.

By this appeal appellant does not challenge validity of the final order entered 31 January 1972 and challenges only validity of the order entered 30 June 1971 allowing the initially requested rate increase of 7.10% to go into effect pending final determination of the case, on condition that any amounts ultimately determined excessive must be refunded. This appeal thus presents the identical question as was presented in the case decided by this Court concurrently herewith entitled *"State of North Carolina ex rel. Utilities Commission and Carolina Power & Light Company v. Robert Morgan, Attorney General,"* with which case this case was consolidated for purposes of oral argument in the Court of Appeals.

For the reasons stated in the opinion filed in the companion case, the actions and orders of the Utilities Commission appealed from in this case are

Affirmed.

Judges CAMPBELL and PARKER concur.

STATE OF NORTH CAROLINA v. JOE BRYANT
— AND —
STATE OF NORTH CAROLINA v. RAYMOND MITCHELL FLOYD

No. 7226SC592

(Filed 22 November 1972)

1. **Indictment and Warrant § 9; Obscenity — dissemination of obscenity — description of films — sufficiency of indictment**

The trial court properly denied defendants' motions to quash warrants charging them with disseminating obscenity in a public place in violation of G.S. 14-190.1 where the warrants specifically described the motion pictures shown in defendants' place of business and alleged to be obscene.

2. **Obscenity — dissemination of obscenity — guilty knowledge required**

G.S. 14-190.1 requires a finding of intent and guilty knowledge before a defendant may be convicted thereunder for dissemination of obscenity in a public place.

3. **Constitutional Law § 18— obscenity statute — constitutionality**

The statute proscribing dissemination of obscenity in a public place specifically defines the elements of obscenity and hence is not unconstitutional on grounds of vagueness or overbreadth.

4. **Criminal Law § 51— opinion testimony — no finding of expertise — testimony admissible**

Where defendants did not request a finding as to whether four State's witnesses who gave opinions on the issue of obscenity were experts, the trial court properly overruled defendants' objections to testimony by the witnesses, particularly since there was ample evidence in the record upon which to base a finding that each of the witnesses was an expert.

5. **Obscenity — uncontrovertibly obscene films — dissemniation of obscenity — sufficiency of evidence**

Films shown in defendants' place of business which had no plot, no real motive and no objectives other than to appeal to the prurient interest in sex were uncontrovertibly obscene and exhibition of such films was not protected by the First and Fourteenth Amendments; therefore, the trial court did not err in submitting the case to the jury in an action under G.S. 14-190.1.

6. **Criminal Law § 170— improper jury argument — objection properly sustained**

The trial court did not err in sustaining the solicitor's objection to defense counsel's argument to the jury that "(t)hese men have done everything they can to avoid offending people" where there was no evidence in the record to support such argument.

7. Criminal Law § 161— assignment of error not in record on appeal

An assignment of error not a part of the record on appeal but argued by both the defendants and the State in the briefs will not be considered by the court on appeal.

APPEAL by defendants from *Friday, Judge,* 6 March 1972 Session of Superior Court for the trial of criminal cases held in MECKLENBURG County.

The "Complaint for Arrest" or affidavit portion of the warrant against Joe Bryant (Bryant) reads as follows:

> "The undersigned, G. C. Hager, being duly sworn, complains and says that at and in the County named above and on or about the 10th day of September, 1971, the defendant named above did unlawfully, willfully, and did intentionally disseminate obscenity in a public place, to wit: The Adult Book Center, 407 North Tryon Street, Charlotte, N. C., in that he did provide obscene 8mm motion picture, did exhibit and make available 8mm motion pictures, and did rent and sell and provide obscene motion picture 8mm film which with the representation, embodiment, performance and publication of the obscene, and that the said 8mm motion picture film did show actual acts of sexual intercourse, fellatio and cunnilingus performed by and between human males and human females.
>
> The offense charged here was committed against the peace and dignity of the State and in violation of law G.S. 14-190.1."

The "Complaint for Arrest" or affidavit portion of the warrant against Raymond Mitchell Floyd (Floyd) is identical to that against Bryant with the exception that instead of the word "provide" appearing as the fifth word after the words "Charlotte, N. C." there appears the word "allow" as the fifth word after the words "Charlotte, N. C."

The defendants were tried in the district court on these warrants, found guilty, and sentenced. From the sentence imposed, they both appealed to the superior court where the cases were consolidated without objection, and the defendants were tried *de novo.*

The evidence for the State tended to show that on 10 September 1971 Floyd was the owner of the business operated at

407 North Tryon Street in Charlotte which was open for business under the name of The Adult Book Center, and Bryant was his employee. The Adult Book Center was open to the public but had a sign on the window reading, "No one under the age of 18 years allowed." Inside the door there was a large plastic-faced sign on the floor reading, "Adult Book Store." "Nude Movies in Color." On that date in the two small rooms in The Adult Book Center, there were seven machines which were designed and used for showing eight millimeter moving pictures. On the front of these machines there were color photographs of nude human males and females. The film in these machines could be viewed by the insertion of a twenty-five cent piece which thereupon permitted the viewer to see approximately one-eighth of the film. To see the entire film, eight twenty-five cent pieces were required. On 10 September 1971 two police officers of the City of Charlotte went to The Adult Book Center and entered through the open door. One of the police officers obtained ten dollars worth of twenty-five cent pieces from Bryant who was behind the counter and thereupon the two officers went into the viewing rooms and viewed films in four of the machines. After viewing the films in these machines, the officers identified themselves to Bryant and then to Floyd who arrived a short time thereafter. These four films were introduced in evidence as State's Exhibits 2, 3, 4 and 5 and were shown to the jury and to the State's and defendant's witnesses in the courtroom. The parties stipulated that "the films exhibited in the courtroom, State's Exhibits 2, 3, 4 and 5, were 8 millimeter color motion pictures, films, without sound, with no captions or titles except in one film there was a sign, 'Hundred Dollar Call Girl,' near the front of the movie, and in two of the exhibits there was a 'The End.' And it is further stipulated that these films showed acts of sexual intercourse and oral sexual acts by and between human males and human females in a state of undress."

The State's evidence further tended to show that the dominant theme of the four films appealed to a prurient interest in sex; that they were offensive because they affronted contemporary national community standards relating to the description or representation of sexual matters; that they were utterly without redeeming social value; and that they were not protected or privileged under the Constitution of the United States or the Constitution of North Carolina.

The defendants offered evidence which tended to show that the dominant theme of the four films did not appeal to a prurient interest in sex; that they did not affront contemporary national community standards relating to the description or representation of sexual matters; that they did have a social value in that they were entertaining and educational; and that they were protected and privileged under the Constitution of the United States and the Constitution of North Carolina.

There was a verdict of guilty, and from the sentence imposed, the defendants appealed to the Court of Appeals, assigning error.

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

Smith, Patterson, Follin & Curtis by Norman B. Smith, Michael K. Curtis and J. David James for defendant appellants.

MALLARD, Chief Judge.

[1] Defendants' first assignment of error is to the failure of the court to allow their motions to quash the warrant as to each defendant on the grounds that the warrant was defective in that it failed to state a crime and failed to adequately describe the films involved so as to distinguish them from other items in their class.

The pertinent parts of G.S. 14-190.1, the statute under which the defendants were charged, read as follows:

> "(a) It shall be unlawful for any person, firm or corporation to intentionally disseminate obscenity in any public place. A person, firm or corporation disseminates obscenity within the meaning of this Article if he or it:
>
> * * *
>
> (3) Publishes, exhibits or otherwise makes available anything obscene; or
>
> (4) Exhibits, broadcasts, televises, presents, rents, sells, delivers, or provides; or offers or agrees to exhibit, broadcast, televise, present, rent or to provide; any obscene still or motion picture, film, filmstrip, or projection slide, or sound recording, sound tape, or sound track, or any matter or material of whatever form which is a representation, embodiment, performance, or publication of the obscene.

(b) For purposes of this Article any material is obscene if:

(1) The dominant theme of the material taken as a whole appeals to the prurient interest in sex; and,

(2) The material is patently offensive because it affronts contemporary national community standards relating to the description or representation of sexual matters; and,

(3) The material is utterly without redeeming social value; and,

(4) The material as used is not protected or privileged under the Constitution of the United States or the Constitution of North Carolina."

This statute was enacted by the General Assembly of North Carolina at the 1971 Session, to be effective 1 July 1971.

In support of their contentions that the warrants were defective, the defendants cite *State v. Barnes,* 253 N.C. 711, 117 S.E. 2d 849 (1961), in which a warrant attempting to charge the dissemination of obscenity under a statute, now repealed, was held to be void because of an insufficient description of the obscene material. The warrants in this case are distinguishable from those in the Barnes case in that here, the warrants describe the specific sexual acts contained in the 8 millimeter motion pictures alleged to be obscene in violation of G.S. 14-190.1. We hold that the obscene materials were sufficiently described in the warrants in these two cases and that the court properly denied the motion to quash.

[2, 3] Defendants' second assignment of error is that the statute, G.S. 14-190.1, is unconstitutional and that the warrants should have been quashed for that reason. In *A Book v. Attorney General,* 383 U.S. 413, 16 L.Ed. 2d 1, 86 S.Ct. 975 (1966), which is sometimes referred to as the "Fanny Hill" case, Mr. Justice Brennan announced the judgment of the Court and said:

"We defined obscenity in Roth in the following terms: '[W]hether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.' 354 US, at 489, 1 L ed 2d at 1509. Under this definition, as elaborated

> in subsequent cases, three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value."

Our statute, G.S. 14-190.1, contains all of the elements set forth as essential in the "Fanny Hill" case and, in addition, requires that literature and exhibitions proscribed therein must affront not just "contemporary community standards" but that it must be offensive because it affronts contemporary *national* community standards. Defendants argue that the statute is impermissibility vague and overbroad and omits any requirement of knowledge. We hold that any citizen who desires to obey the law will have no difficulty in understanding the conduct proscribed by this statute. The dissemination of obscenity is not protected by the Constitutions; thus, this statute by its terms does not infringe upon the rights to disseminate protected material. In the statute it is required that one must "intentionally disseminate obscenity." We hold that therefore this statute does require a finding of intent and guilty knowledge before a defendant may be convicted thereunder. We reject defendants' contention that the statute is vague, overbroad, or does not require an intent and guilty knowledge. We hold that the statute is not unconstitutional and that the trial judge correctly denied the motion of the defendants to quash the warrants.

[4] Defendants' third assignment of error is that the trial judge committed prejudicial error in overruling defendants' objections to questions directed at eliciting opinions from witnesses who were not qualified as experts.

One of the State's witnesses who gave his opinion was a writer for the Charlotte News. He was offered by the State and found by the court, without objection, to be an expert in the field of movie criticism. However, four other State's witnesses also gave their opinions on the issue of obscenity. G.S. 14-190.1(c) specifically authorizes expert testimony relating to factors entering into the determination of the issue of obscenity but does not limit the testimony to experts.

In G.S. 14-190.1(c), it is also provided that evidence shall be admissible to show:

"(4) What the predominant appeal of the material would be for ordinary adults or a special audience, and what effect, if any, it would probably have on the behavior of such people;

(5) Artistic, literary, scientific, educational or other social value, if any, of the material;

(6) The degree of public acceptance of the material throughout the United States;

(7) Appeal to prurient interest, or absence thereof, in advertising or in the promotion of the material."

In *State v. Perry,* 275 N.C. 565, 169 S.E. 2d 839 (1969), the Supreme Court said:

"In the absence of a request by the appellant for a finding by the trial court as to the qualification of a witness as an expert, it is not essential that the record show an express finding on this matter, the finding, one way or the other, being deemed implicit in the ruling admitting or rejecting the opinion testimony of the witness. * * *"

In the present case the appellants did not request a finding as to whether the other four State's witnesses (in addition to the one held to be an expert) who gave their opinions were experts. Moreover, there was ample evidence in the record upon which to base a finding that each of the State's witnesses who were permitted to give their opinion was an expert (by education, or travel, or experience, or all combined) in the area of life relating to factors entering into the determination of the issue of obscenity. See *United States v. Wild,* 422 F. 2d 34 (2d Cir. 1969), *cert. denied,* 402 U.S. 986, *reh. denied,* 403 U.S. 940. It was not essential that the record show an express finding that they were expert witnesses. *State v. Perry, supra;* and *State v. Tessenar,* 15 N.C. App. 424, 190 S.E. 2d 313 (1972). The defendants' third assignment of error is without merit. See also 3 Strong, N. C. Index 2d, Evidence, § 48; and Stansbury, N. C. Evidence 2d, § 133.

[5] The defendants' fourth assignment of error is that the trial judge committed prejudicial and reversible error in failing to allow their motion for judgment of nonsuit on the grounds that the material involved, in view of the circumstances of its distribution, was protected under the First and Fourteenth

Amendments to the United States Constitution, and that the State failed to prove knowledge on the part of the defendants.

In *United States v. Wild, supra,* color slides presenting a nude male, seated or lying facing the camera, holding or touching his erect penis, and slides depicting two nude males in the act of fellatio were held to be hard core pornography. In so holding, the Court said:

> "We do not believe, as appellants in effect urge, that the Constitution requires the Government to produce expert testimony about appeal to the prurient interest and contemporary community standards in every obscenity case. * * *
>
> We hold that in cases such as this the trier of fact needs no expert advice. * * * Simply stated, hard core pornography such as this can and does speak for itself.
>
> * * *
>
> '* * * These are stark, unretouched photographs —no text, no possible avoidance of *scienter,* no suggested proper purpose, no conceivable community standard which would permit the indiscriminate dissemination of the material, no alleviating artistic overtones. These exhibits reflect a morbid interest in the nude, beyond any customary limit of candor. They are "utterly without redeeming social importance." * * *
>
> We think that photographs can be so obscene—it is conceivably possible that they be so obscene—that the fact is uncontrovertible. These photographs are such. * * *' "

In the case before us it was stipulated that the films "showed acts of sexual intercourse and oral sexual acts by and between human males and human females in a state of undress." The films identified as State's Exhibits 2, 3, 4 and 5 introduced into evidence in this case depicted sexual activity in what is customarily thought of as the normal manner by the insertion of the human penis into the vagina of the human female. In addition, they depicted sexual activity by oral stimulation of the penis with the mouth of a nude female, and also sexual activity by the stimulation of the vulva and clitoris with the lips and tongue of a nude male. There were depictions of

simultaneous acts of fellatio and cunnilingus between a nude male and a nude female. There were also depictions where the act of cunnilingus was performed by one nude male with a nude female while another nude female was engaged simultaneously with the same nude male in the act of fellatio. These depictions were not all simulated and little, if anything, was left to the imagination. The sole emphasis of these films is the revealing of the sexual activity of the moment. They have no plot, no real motive, and no objectives other than to appeal to the prurient interest in sex. We hold that these films are uncontrovertibly obscene.

We reject the defendants' contention that such exhibitions in the place of business described here are protected by the First and Fourteenth Amendments. See *A Book v. Attorney General, supra.* We reject the contentions of the defendants that these films have entertainment as well as educational value. The fact that perhaps adults were the only ones who viewed these films did not rob them of their salacious character. We hold that there was ample evidence, circumstantial in part and direct in part, to show knowledge on the part of both defendants of the contents of these films.

We also reject defendants' contention that this court should hold that these films have educational as well as entertainment value because some other publications, exhibitions, or material (some of which may be of ancient origin) have vivid descriptions of various obscene acts in them. The obscenity revealed in the films in this case does not lose its lewd, lascivious and salacious character simply because it is not the only source thereof.

The trial judge did not commit error in submitting the case to the jury and the defendants' fourth assignment of error is overruled.

[6] Defendants' assignment of error numbered 6 is that the trial judge committed error in sustaining the objection of the solicitor to a portion of the argument to the jury of counsel for the appellants.

In the record the following appears:

"During the defendants' argument, defendants' counsel argued: 'These men have done everything they can to

avoid offending people. The front of the store is painted over. . . ' At this point in the argument the solicitor objected on the ground that the defendants had not taken the stand, and the objection was sustained by the court."

The precise wording of the solicitor's objection is not given. The record does not reveal precisely what the solicitor *stated* as his grounds in the presence and hearing of the jury. It was improper for the defendants' counsel to argue, when there was no evidence to support it, that "(t)hese men have done everything they can to avoid offending people." It would be improper for the solicitor to argue to the jury that the defendants had not testified. The record, however, does not reveal that the solicitor argued to the jury the fact that the defendants had not testified. It was not error for the solicitor to object to the improper argument of counsel. See *Knowles v. United States,* 224 F. 2d 168 (10th Cir. 1955). If the solicitor did state in the presence and hearing of the jury that his grounds for objecting to the improper argument of defendants' attorney was that they had not taken the witness stand, and if it be conceded, which we do not, that it was error, it was invited by the improper argument of the attorney for the defendants and they cannot complain. See *State v. Payne,* 280 N.C. 170, 185 S.E. 2d 101 (1971). Moreover, the trial judge instructed the jury that they were not to allow the fact that the defendants did not testify to influence their decision in any way. There was no objection to this instruction given by the trial judge, and if the solicitor's objection constituted error, it was cured by the instructions of the judge. See *State v. Bumpers,* 270 N.C. 521, 155 S.E. 2d 173 (1967), *rev'd. on other grounds,* 391 U.S. 543, 20 L.Ed. 2d 797, 88 S.Ct. 1788; *State v. Stephens,* 262 N.C. 45, 136 S.E. 2d 209 (1965). The defendants' assignment of error numbered 6 is overruled.

The jury of twelve, from all walks of life, after viewing the films and hearing the evidence, under proper instructions from the court, found that the dominant theme of the material in the films introduced into evidence in this case appeals to the prurient interest in sex, that they are patently offensive because they are an affront to contemporary national community standards relating to the description or representation of sexual matters, that they are utterly without redeeming social value, and that the material as used is not protected or privi-

leged under the Federal or State Constitutions. After viewing the films [see *Jacobellis v. Ohio*, 378 U.S. 184, 12 L.Ed. 2d 793, 84 S.Ct. 1676 (1964)] and considering the evidence offered by the parties, we concur in each of the findings by the jury.

[7] The record on appeal in this case was filed in this court on 19 June 1972. On 9 August 1972 defendants' counsel, the solicitor and the Attorney General stipulated that assignment of error numbered 4 appearing in the record on appeal should be corrected as set forth in the stipulation. On 10 August 1972 this correction was allowed. Thereafter on 6 October 1972, in an *ex parte* motion the defendants moved to insert material into the record on appeal and to be permitted to add an assignment of error numbered 10 based on the material thus inserted. That motion was denied by this court on 10 October 1972. Both the defendants and the State ignored the denial of that proposed addendum by this court and argued that so-called assignment of error in the briefs. Inasmuch as that assignment of error is not a part of the record on appeal, it is not considered.

We have considered all of the defendants' assignments of error properly presented and find no prejudicial error.

In the trial we find no prejudicial error.

No error.

Judges BROCK and BRITT concur.

GARLAND M. NEFF v. QUEEN CITY COACH COMPANY, A CORPORATION

No. 7226DC789

(Filed 22 November 1972)

1. **Rules of Civil Procedure §§ 11, 50— involuntary dismissal — directed verdict — improper motion**

Though defendant's motions for directed verdict were improperly made before the trial judge sitting without a jury, the court on appeal treats the motions as motions for involuntary dismissal and considers the merits of the case.

2. **Bailment § 5; Rules of Civil Procedure § 20— plaintiff bailee — right of action against third person**

Plaintiff husband was entitled to prosecute a claim against defendant carrier for the value of the contents of lost baggage,

though the most valuable portion of the contents belonged to his wife, since plaintiff was owner of part and at least bailee of the remainder of the contents; however, defendant's contention that plaintiff was not the real party in interest by reason of the wife's ownership of part of the lost goods was completely disposed of when the wife was made an additional party plaintiff.

3. Appeal and Error § 57— findings of fact — review

The trial court's findings that plaintiff was a paid passenger on defendant's bus, that plaintiff checked a duffel bag with defendant and that defendant took plaintiff's baggage into its exclusive custody, control and possession as a common carrier were supported by the evidence and are binding on appeal, though there was evidence that subsidiaries of Continental Trailways, Inc. other than defendant were transporting plaintiff and his baggage when the loss complained of occurred.

4. Carriers § 16— limitation of liability — authorization by ICC

Defendant carrier's asserted $50.00 limitation on its liability for negligence in the loss of plaintiff's baggage was ineffective where the evidence failed to show that the Interstate Commerce Commission had expressly authorized the limitation based on a rate differential.

5. Evidence § 28— proof of official records — baggage tariff — exclusion proper

A document offered by defendant as the applicable baggage tariff on file with the Interstate Commerce Commission was properly excluded where the document conformed with neither 49 U.S.C. § 16(13) nor G.S. 1A-1, Rule 44, providing for the method of proof of official records.

6. Bailment § 3; Carriers § 16— loss of baggage — prima facie case of negligence

A *prima facie* case of actionable negligence was established when plaintiff offered evidence tending to show (1) that his property was delivered to defendant, (2) that defendant accepted it and therefore had possession and control over it, and (3) that defendant failed to return the property; moreover, plaintiff's evidence tended directly to establish negligence on the part of defendant's bus driver in failing to supervise the removal of baggage from the bus, when he stopped it at night, not at the bus station, at Orangeburg, S. C.

APPEAL by defendant from *Stukes, District Judge,* 12 June 1972 Session of District Court held in MECKLENBURG County.

Civil action in which plaintiff-passenger seeks recovery of damages from defendant-bus company for the value of baggage allegedly lost by negligence of defendant, heard by the court without a jury.

Plaintiff's evidence in substance showed the following: On 8 January 1970 plaintiff purchased three tickets at the bus station at the Charleston Air Force Base in South Carolina so that he, his wife, and child could travel to Charlotte, N. C. Plaintiff paid full fare for himself and his wife and paid half-fare for his child. These tickets, plaintiff's Exhibits 1, 2 and 3, bore on the back the legend: "Issued by:" followed by the names of some twenty-eight bus companies, including the name of the defendant in this case, followed by the words: "all doing business as Continental Trailways, Dallas, Tex." Plaintiff checked four pieces of luggage at the station. One piece, a World War II duffel bag with plaintiff's name and identification on it, was never recovered. At the Charleston station the bus company did not have any employees to load baggage onto the bus, and the passengers put their own bags on board. Plaintiff's duffel bag was too heavy for him to carry, and in his presence it was loaded on board the bus by another passenger. (While plaintiff's evidence is not altogether clear on the question, defendant's brief concedes that apparently the baggage was loaded into the baggage compartment of the bus.) Plaintiff's Exhibit 4 is the baggage claim check for the duffel bag. On one side of this claim check there is printed, among other matters, the following: "Baggage liability limited to $50.00 (see over)." The other side contains the following:

"BAGGAGE CONTRACT

(1) The party accepting this check hereby agrees that no claim in excess of $50.00 for all baggage checked on one full fare ticket and in excess of $25.00 on one-half fare ticket shall be made against the issuing Company for loss of/or damage to property covered by this and/or other baggage checks issued to the same passenger, unless a greater amount is declared in writing at time of checking, in which case charges for excess value will be collected and an excess valuation receipt will be issued. EXCEPTION: On *intrastate* tickets in certain states, as specified in published tariffs, the maximum liability is $25.00 on each full fare ticket and $12.50 on each half fare ticket.

(2) This check is accepted subject to all conditions of published tariffs.

Passengers are Instructed to claim baggage at destination promptly to avoid payment of storage charges.

This Check Must Be Surrendered In Order To
Obtain Baggage
CONTINENTAL TRAILWAYS
Dallas, Texas"

Plaintiff testified he did not notice this provision when he purchased his tickets and checked his baggage.

The lost duffel bag contained plaintiff's suit and two pairs of shoes, valued at $145.45, and dresses, skirts, and a pants suit for his wife, having a fair market value between $600.00 and $700.00.

At Orangeburg, the bus driver stopped the bus at night, not at a bus station, but beside another bus, and told Army personnel on board that they could get their gear and take the other bus directly to Fort Bragg. The Army personnel got off the bus and unloaded their luggage from the side of the bus in the dark. The bus driver did not get off the bus to supervise the unloading and plaintiff did not see any bus employees assisting with this transfer of baggage.

At Columbia, where plaintiff and his wife and child changed buses to continue their trip to Charlotte, the bus employees unloaded the bus, but plaintiff's duffel bag was missing. At the destination point, Charlotte, employees of defendant Queen City Coach Company, offered plaintiff $50.00 as compensation for the lost bag, which offer plaintiff rejected. The bag was never recovered. Other evidence will be referred to in the opinion.

The court entered judgment making findings of fact and adjudging that plaintiff recover $600.00 from defendant. Defendant appealed.

Hicks & Harris by Richard F. Harris III for plaintiff appellee.

John F. Ray; and Myers & Collie by Charles T. Myers for defendant appellant.

PARKER, Judge.

At the close of plaintiff's evidence and again at the close of all of the evidence defendant moved for a directed verdict

in its favor. Denial of these motions is the subject of the exceptions included in appellant's first assignment of error.

[1] A motion for directed verdict under Rule 50(a) of the Rules of Civil Procedure is appropriate when trial is held before a jury. This case was tried by the judge without a jury. The appropriate motion in such case is for involuntary dismissal under Rule 41(b). The distinction is more than one of mere nomenclature, as a different test is to be applied to determine the sufficiency of the evidence to withstand the motion when the case is tried before court and jury than when the court alone is finder of the facts. *Bryant v. Kelly,* 10 N.C. App. 208, 178 S.E. 2d 113, *rev'd on other grounds,* 279 N.C. 123, 181 S.E. 2d 438. In the present case defendant not only made the wrong motions, but in doing so failed to comply with Rule 6 of the General Rules of Practice for the Superior and District Courts Supplemental to the Rules of Civil Procedure, as adopted by our Supreme Court pursuant to G.S. 7A-34 effective 1 July 1970. This rule requires that "[a]ll motions written or oral, shall state the rule number or numbers under which the movant is proceeding." *Mull v. Mull,* 13 N.C. App. 154, 185 S.E. 2d 14; *Terrell v. Chevrolet Co.,* 11 N.C. App. 310, 181 S.E. 2d 124; *Lee v. Rowland,* 11 N.C. App. 27, 180 S.E. 2d 445. Adherence to this requirement would have contributed to precision in making the appropriate motions in this case. Though defendant's motions were not properly made, nevertheless we shall treat defendant's motions for directed verdict as motions for an involuntary dismissal under Rule 41(b) and shall pass on the merits of the questions which defendant seeks to raise by this appeal. *Mills v. Koskot Interplanetary,* 13 N.C. App. 681, 187 S.E. 2d 372.

[2] Defendant first contends its motions should have been allowed because plaintiff's evidence showed that his wife, and not he, was the owner of the most valuable portion of the contents of the lost baggage, from which defendant argues that plaintiff is not the real party in interest and therefore is not entitled to prosecute this claim. There is no merit in this contention. Plaintiff's evidence showed that he was the owner of a portion of the contents of the lost bag and as to the remainder, the clothing of his wife, he was in lawful possession and was at least a bailee. "It has been uniformly held that the bailee has a right of action against a third party, who by his negligence causes the loss of or an injury to the bailed articles, and

this right has been held to be the same, even though the bailee is not responsible to the bailor for the loss." *Hopkins v. Colonial Stores, Inc.*, 224 N.C. 137, 29 S.E. 2d 455; 8 Am. Jur. 2d, Bailments, § 247. Furthermore, motion has been made in this Court through counsel that plaintiff's wife be made a party-plaintiff. A similar motion was made and allowed in *Merchant v. Lassiter*, 224 N.C. 343, 30 S.E. 2d 217. The motion to make plaintiff's wife an additional party-plaintiff is also allowed in the case now before us. This completely disposes of any contention that this action must be dismissed because it is not prosecuted in the name of the real party in interest. A bailor and bailee may jointly maintain an action for the conversion of or injury to the bailed property. *Peed v. Burleson's, Inc.*, 242 N.C. 628, 89 S.E. 2d 256; G.S. 1A-1, Rule 20(a).

[3] Defendant next contends that its motions to dismiss should have been allowed because certain of plaintiff's evidence indicates that other subsidiaries of Continental Trailways, Inc., and not the defendant, operated the bus on which plaintiff and his wife and child traveled and on which his baggage was transported. In this connection, plaintiff called as a witness one of the attorneys for defendant, who testified that Coastal Stages Corporation was the corporation which operated the bus on which plaintiff traveled for the portion of his trip between Charleston and Orangeburg, and that Carolina Scenic Stages, Inc., operated the bus for the portion of the trip from Orangeburg to Charlotte. The evidence indicates that Coastal Stages Corporation, Carolina Scenic Stages, Inc., and defendant, Queen City Coach Company, are all subsidiaries of Continental Trailways, Inc., and the names of all three companies appear on the tickets sold to plaintiff after the words "Issued by:" and before the words "all doing business as Continental Trailways." However that may be, and despite the testimony of defendant's attorney, the trial court in the present case made, among others, the following findings of fact:

> "7. On January 8, 1970, the plaintiff was a paid passenger on defendant's bus traveling from Charleston Air Force Base, South Carolina, to Charlotte, North Carolina.
>
> "8. On said date, the plaintiff checked a World War II brown B-4 military bag bearing the inscription 'Lt. G. M. Neff 01331856' with the defendant for transportation from Charleston Air Force Base, South Carolina, to Charlotte,

North Carolina, and the plaintiff was given a baggage claim check bearing the number F870-713 by the defendant."

* * * * *

"14. The plaintiff's baggage was duly accepted by and taken into the exclusive custody, control, and possession of the defendant as a carrier for transportation by its motor vehicle, a bus, in interstate commerce from Charleston Air Force Base, South Carolina, to Charlotte, North Carolina."

Support for these findings may be found not only in plaintiff's testimony but in defendant's own verified pleadings. In its answer defendant admitted the allegations in paragraph 3 of the complaint that "[o]n or about January 8, 1970, the defendant was engaged in the business of transporting passengers as a common carrier for hire in interstate commerce from Charleston Air Force Base and other cities in South Carolina to Charlotte and other cities in North Carolina," and in a further answer and defense defendant made reference to the baggage tariff which it had on file with the Interstate Commerce Commission and alleged that such "tariff governs the transportation of baggage between the defendant and its passengers, *including the plaintiff;* that the said tariff constitutes a contract *under which the defendant transported the baggage of the plaintiff* and by which contract the defendant limited its liability for failure to deliver the baggage of the plaintiff to Fifty Dollars." (Emphasis added.) The trial court's findings, being supported by admissions and allegations in defendant's own verified pleadings, are binding on this appeal. The trial court was not required to accept as conclusive the contrary testimony given by defendant's attorney, even when he was presented as a witness for the plaintiff.

[4] Finally, defendant contends its motions should have been allowed because of the $50.00 limitation on its liability and its offer to allow judgment to be taken against it in that amount as contained in its further answer and defense. We do not agree. "[I]n absence of statutory authorization, a common carrier or other public utility may not contract for its freedom from liability for injury caused by its negligence in the regular course of its business." *Jordan v. Storage Co.*, 266 N.C. 156, 146 S.E. 2d 43. However, a common carrier may, by contract,

limit its liability if it is expressly authorized to do so by applicable statute or by a regulatory body having power to grant that privilege. *Neece v. Greyhound Lines,* 246 N.C. 547, 99 S.E. 2d 756. In the present case, plaintiff's loss occurred while his property was being moved in interstate commerce. Therefore, appropriate federal statutes are here applicable. *Clott v. Greyhound Lines,* 278 N.C. 378, 180 S.E. 2d 102.

The particular federal statute here relevant is 49 U.S.C. § 20(11), which was made applicable to motor carriers by 49 U.S.C. § 319. In general, 49 U.S.C. § 20(11) makes a common carrier to which that statute is applicable liable for loss or damage to property transported by it "for the full actual loss, damage, or injury to such property caused by it . . . , notwithstanding any limitation of liability or limitation of the recovery . . . in any contract . . . ; and any such limitation, without respect to the manner or form in which it is sought to be made is declared to be unlawful and void." Certain exceptions to the rule declaring limitations on the carrier's liability void are contained in provisos in the statute. Our Supreme Court held in *Neece v. Greyhound Lines, supra,* that "[t]he authority of motor carriers to limit their liability is found in the second portion of the provision" in 49 U.S.C. § 20(11). This portion provides that the rule making limitations on liability void shall not apply, "second, to property . . . received for transportation concerning which the carriers shall have been or shall be expressly authorized or required by order of the Interstate Commerce Commission to establish and maintain rates dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value of the property, in which case such declaration or agreement shall have no other effect than to limit liability and recovery to an amount not exceeding the value so declared or released . . . ; and any tariff schedule which may be filed with the commission pursuant to such order shall contain specific reference thereto and may establish rates varying with the value so declared and agreed upon. . . ."

In *Neece v. Greyhound Lines, supra,* our Supreme Court said:

> "Before a motor carrier can limit its liability for negligent loss or damage to property entrusted to it, it must show: (1) it received the property as a common carrier; (2) it issued a written receipt which contained the asserted

limitation; (3) *the Interstate Commerce Commission has expressly authorized the limitation which is based on a rate differential.*

"If each of these conditions is not shown to exist, the asserted limitation has no effect." (Emphasis added.)

[5] In the case before us the evidence was sufficient to show the first two of the foregoing conditions, but there was no competent evidence to show the existence of the third. In an apparent attempt to show compliance with the third condition, defendant sought to introduce in evidence a copy of what defendant's counsel contends is the applicable baggage tariff on file with the Interstate Commerce Commission. This document, defendant's Exhibit 1, consists of thirty-three printed pages and has printed on the cover page, among other matters, the following: "Issued by National Bus Traffic Association, Inc., Agent." The trial judge sustained plaintiff's objection to introduction in evidence of this document, but did allow it "to illustrate the testimony" of a witness presented by the defendant. In the judgment appealed from the trial court found that "[t]here was no competent evidence presented to this Court that the Interstate Commerce Commission or any other regulatory body, or statute had expressly authorized the limitation of defendant's liability in this case to $50.00." In this finding and ruling we find no error. 49 U.S.C. § 16(13) provides that copies of certain records filed with the Interstate Commerce Commission, when certified by the secretary of the commission, under the commission's seal, shall be received in evidence with like effect as the originals. G.S. 1A-1, Rule 44 of the North Carolina Rules of Civil Procedure provides for the method of proof of official records. Defendant's proffered Exhibit 1 conformed neither with 49 U.S.C. § 16(13) nor with G.S. 1A-1, Rule 44, and was properly excluded from evidence.

[6] We note that plaintiff's action in this case, as set forth in his complaint, was not predicated on the theory that defendant became liable as an insurer. See Annot., *Motor Carrier —Loss of Baggage,* 68 A.L.R. 2d 1350, § 2(b), p. 1353. Instead, plaintiff based his action on the theory that the loss of his baggage was proximately caused by defendant's failure to exercise due care. In this connection there was ample evidence to support the trial court's finding No. 13 that "[t]he defendant failed to exercise reasonable care in the transporting and

protection of the plaintiff's baggage and the contents thereof." A *prima facie* case of actionable negligence was established when plaintiff offered evidence tending to show (1) that his property was delivered to defendant, (2) that defendant accepted it and therefore had possession and control of it, and (3) that defendant failed to return the property. *Clott v. Greyhound Lines, supra.* In addition, plaintiff's evidence tended directly to establish negligence on the part of defendant's bus driver in failing to supervise the removal of baggage from the bus, when he stopped it at night, not at the bus station, at Orangeburg, S. C. Defendant's contention that it could be held liable in this case only if found guilty of gross negligence and that the trial court failed to so find is without merit. Plaintiff's payment for his ticket as a passenger constituted sufficient consideration to make defendant a bailee for hire, and we find no merit in defendant's contention that the contents of the lost bag included such an extensive wardrobe for plaintiff's wife that the lost articles could not properly be considered "baggage" within the meaning of that term as used to designate property which must be carried by a carrier without additional compensation beyond the passenger's fare.

We have carefully examined all of defendant's assignments of error, and find no prejudicial error. The motion that plaintiff's wife be added as a party-plaintiff to the action having been allowed, with the addition of plaintiff's wife as a party-plaintiff the judgment appealed from is

Affirmed.

Judges CAMPBELL and MORRIS concur.

STATE OF NORTH CAROLINA, EX REL. UTILITIES COMMISSION AND KENOSHA AUTO TRANSPORT CORPORATION (APPLICANT) v. J. D. McCOTTER, INC. (PROTESTANT)

No. 7210UC542

(Filed 22 November 1972)

1. Carriers § 2— application for contract carrier permit — proof required

To be entitled to a permit to operate as a contract carrier, an applicant is not required to show a public demand and need for the proposed service as is required of an applicant for a certificate of

authority to operate as a common carrier, but must show that one or more shippers have a need for a specific type of service not otherwise available by existing means of transportation. Utilities Commission Rule R2-15(b).

2. **Carriers § 2— contract carrier permit — needs of boat manufacturer**

The Utilities Commission did not err in determining that a boat manufacturer has a need for a specific type of service not otherwise available by existing means of transportation and in granting applicant the authority to operate as a contract carrier for the boat manufacturer from its plant in High Point to New Bern and Morehead City.

3. **Carriers § 2— contract carrier permit— effect on common carrier — public interest**

The fact that protestant might reasonably expect to receive a portion of a boat manufacturer's transportation business if applicant is denied authority to operate as a contract carrier for the boat manufacturer does not compel a determination that the grant of such authority will unreasonably impair the efficient service of protestant as a common carrier or that it is inconsistent with the public interest.

4. **Carriers § 2; Utilities Commission § 3— application for common carrier authority — grant of contract authority**

The Utilities Commission had authority to grant contract authority to the applicant although common carrier authority had been requested in the application. Utilities Commission Rule R2-10(a).

5. **Carriers § 2; Utilities Commission § 3— hearing on application for carrier authority — departure from pleadings**

Where the parties to be affected are before the Utilities Commission, participate in the hearing and make defense, they cannot complain of a departure from the pleadings.

6. **Carriers § 2— fitness to perform as contract carrier — previous transportation without required intrastate authority**

Applicant's previous unlawful transportation of boats from the manufacturer's plant in High Point to New Bern and Morehead City under the mistaken belief that the transportation was in interstate commerce and that no intrastate authority was needed did not require the Utilities Commission to find that the applicant is unfit to perform as a contract carrier in this State.

Judge VAUGHN dissents.

APPEAL by protestant from an order of North Carolina Utilities Commission in Docket No. T-1581, entered 21 March 1972.

Kenosha Auto Transport Corporation (applicant) filed application with the Utilities Commission on 6 October 1971 seeking a certificate to operate as an intrastate common carrier

for the purpose of transporting boats and boat accessories, attachments and parts when moving with mixed loads with boats. Exhibits incorporated in the application indicate applicant owns 288 boat trailers, operates 408 tractors, and proposes to establish 1 tractor and 8 trailers at High Point, or more if required; also, that applicant has a net worth of approximately $7,000,000.00.

J. D. McCotter, Inc., filed timely protest and was permitted to intervene. At hearings held pursuant to notice, applicant offered evidence tending to show the following:

Applicant has been in business as a specialized carrier since 1932. It is principally engaged in the transportation of cars, trucks, boats and related products under authority issued by the Interstate Commerce Commission for interstate hauling throughout the continental United States. Since 1960, applicant has serviced the Hatteras Yacht Company (now a division of North American Rockwell Corporation) by transporting boats from the Hatteras plant in High Point to New Bern and Morehead City. Since the ultimate destination of these boats was understood to be points outside this State, applicant considered the transportation to be interstate commerce. When this interpretation of the law was questioned by the Utilities Commission, applicant immediately followed the Commission's advice and applied for intrastate authority. The Hatteras boat plant in High Point produces about 300 units a year, including some which extend more than 50 feet in length. Applicant makes available to the High Point plant 6 specialized trailers which are suitable for transporting the various boat models produced there. It takes several trailers to accommodate the volume of shipments that move between High Point and New Bern and Morehead City. While one boat is in transit, others are "being moved." Hatteras supports the application. One of its officers testified that ". . . [w]e could not operate unless we had at least the number of trailers and other equipment that we presently have at our disposal from Kenosha. Our agreement with them is that we will use their equipment if they will provide all the equipment that we need." He also stated that Kenosha's service has been satisfactory and that to his knowledge no one has solicited the hauling now being done by Kenosha; further, that while his company has not attempted to determine what companies might have intrastate authority, "[a] supplier normally comes to us."

The sole intervenor, J. D. McCotter, Inc., offered the testimony of its owner, J. D. McCotter. McCotter operates out of Washington, N. C. He testified in substance as follows: His company has had intrastate authority for the transportation of boats since 17 June 1969. It owns 4 trailers and several tractors. The trucks have printed on the side "J. D. McCotter, Building Supplies and Concrete Products." McCotter has been a dealer for Chris-Craft boats for over 25 years. At first other carriers were used, but ". . . we bought our own equipment because we couldn't get service in the remote area we are in. It took ten days or 2 weeks so our customers could get better service we bought our own equipment." In addition to being in the boat business, McCotter owns a ready-mixed concrete company, a farm, a marina, and he hauls lumber and other commodities. Upon cross-examination he stated: "I do not think it should be the information of Hatteras to know the number of boats that I sell in a year's time. We have our boats [sic] that we can haul it on, we have equipment to do it with, we can delay our business, but we cannot delay the customers." McCotter contended that he had solicited intrastate hauling business from Hatteras on several occasions. He also stated: "I have 2 trailers that could handle most of the boats of Hatteras. That is 40 feet and up. I have 3 that could haul from 40 feet down. I do not have a trailer at this time that could haul a boat in the 50 foot class." He went on to say that his company has equipment sitting idle and that any additional equipment which the company might need to service Hatteras could be acquired.

The hearing examiner recommended an order denying the requested authority. Applicant filed exceptions to the order and the matter was set for oral argument before the Full Commission. The Commission issued its order denying the requested authority, but granting applicant authority to operate as a contract carrier for Hatteras from its plant in High Point, North Carolina to New Bern and Morehead City. The protestant appealed.

Edward B. Hipp, Commission Attorney, and William E. Anderson, Assistant Commission Attorney, for the North Carolina Utilities Commission.

York, Boyd and Flynn by A. W. Flynn, Jr., for applicant appellee.

Vaughan S. Winborne for protestant appellant.

GRAHAM, Judge.

[1] A common carrier by motor vehicle may be defined as a person who is not exempted from regulation under the provisions of G.S. 62-260, and who holds himself out to the general public to engage in transportation of persons or property for compensation. G.S. 62-3(7). A contract carrier is a person who is not exempted from regulation under the provision of G.S. 62-260, and who, under agreement with another person, and with such additional persons as may be approved by the Utilities Commission, engages in the transportation, other than transportation as a common carrier, of persons or property in intrastate commerce for compensation. G.S. 62-3(8). To be entitled to a certificate of authority to operate as a common carrier, the applicant has the burden of showing, among other things, that public convenience and necessity require the proposed service in addition to existing authorized transportation service. G.S. 62-262(e)(1). To be entitled to a permit to operate as a contract carrier, an applicant does not have to show a public demand and need for his service. He must show, however, "that one or more shippers or passengers have a need for a specific type of service not otherwise available by existing means of transportation. . . ." Rule R2-15(b) of the North Carolina Utilities Commission, adopted pursuant to G.S. 62-31; *Utilities Comm. v. Transport Co.*, 10 N.C. App. 626, 179 S.E. 2d 799; *Utilities Comm. v. American Courier Corp.*, 8 N.C. App. 358, 174 S.E. 2d 814, *cert. denied*, 277 N.C. 117; *Utilities Comm. v. Petroleum Transportation, Inc.*, 2 N.C. App. 566, 163 S.E. 2d 526.

[2] The principal question presented on this appeal is whether the Commission erred in determining, as required by its Rule R2-15(b), that Hatteras has a need for a specific type of service not otherwise available by existing means of transportation. We hold that it did not. A special type of equipment is required for the transportation of the boats and accessory parts manufactured by Hatteras. At least 6 trailers capable of this special type of hauling must be dedicated exclusively to Hatteras's disposal; otherwise, as a Hatteras officer testified, "We could not operate." A contract carrier serves only the other party to the contract; whereas, a common carrier must serve the public generally. It is apparent from the evidence that contract carrier service, and not common carrier service, is the answer to Hatteras's special needs. See especially: *Utilities Commission v. Transport*, 260 N.C. 762, 133 S.E. 2d 692; and

Utilities Comm. v. Transport Co., supra. The constant availability of adequate equipment, properly designed for Hatteras's particular needs, is essential to the welfare of its business. Insofar as its North Carolina operation is concerned, applicant has no duty to the public that will compete with its contractual duty to make this needed equipment constantly available to Hatteras and to otherwise service Hatteras's special shipping needs.

Protestant argues that *Utilities Comm. v. Petroleum Transportation, Inc., supra,* is directly on point. That case is easily distinguishable from the case at hand. The applicant there not only failed to show that the shipper had a need for a specific type of service not otherwise available by existing means of transportation, but offered evidence that adequate transportation was available and that the only purpose in applying for a permit was to increase the profits of applicant.

Protestant challenges the Commission's findings "that the contract carrier authority and operations favorably considered herein will be consistent with the public interest . . . " and "will not unreasonably impair the efficient service of carriers operating under certificates or rail carriers." Protestant's basic argument is that these findings are inconsistent with evidence which tends to show that it has idle equipment which is suitable for use in handling Hatteras's shipping needs. However, protestant's evidence also tends to show that even if all the equipment which it now owns were dedicated exclusively to the use of Hatteras, the equipment would not be adequate to service all of Hatteras's needs. It is further noted that at least a portion of protestant's equipment is used in the transportation of its own boats, an enterprise found by the Commission to be competitive with Hatteras, and a portion of its equipment is also used for transportation of lumber and other materials. Moreover, protestant, as a common carrier, has a duty to serve the public generally. To dedicate all or most of its equipment exclusively to the use of a single shipper would be inconsistent with this duty.

[3] It is true that protestant might reasonably expect to receive a portion of Hatteras's business should contract authority be denied to applicant. This fact alone, however, does not compel a determination that the efficient service of protestant as a common carrier will be unreasonably impaired. "There is no public policy condemning competition as such in

the field of public utilities; the public policy only condemns unfair or destructive competition." *Utilities Comm. v. Coach Co.*, 261 N.C. 384, 389, 134 S.E. 2d 689, 694. Neither protestant, nor any other intrastate carrier, has handled any of the shipping which applicant will handle under the contract authority granted herein. Consequently, a continuation of applicant's operations under proper authority could hardly constitute unfair or destructive competition with respect to protestant or other carriers.

Protestant's argument that the Commission's action is inconsistent with the public interest seems to be based primarily upon the contention that the granting of contract authority to applicant is unfair to protestant. As previously noted, if the authority were withheld, Hatteras might turn to protestant for intrastate carrier service. Presumably, this would be in protestant's economic interest. However, the interest of a single carrier and the interest of the public are not necessarily one and the same. Certainly it is in the public's interest for this State's manufacturers to have available the service of carriers which are equipped to efficiently handle their particular shipping requirements. Here the Commission determined that the issuance of contract authority to applicant was the only effective means of assuring that Hatteras would have adequate transportation service available to meet its specific needs. This determination is supported by the evidence and supports the Commission's finding that the contract authority granted is consistent with the public interest.

[4] Protestant questions the authority of the Commission to grant contract authority when common carrier authority was requested in the application. Rule R2-10(a) of the Commission provides:

> "Unless the applicant elects to accept only the type of authority set out in the application, the Commission will grant such authority as the evidence shows the applicant is entitled to receive; that is to say, if the applicant has misconceived the nature of his proposed operation, or has misconstrued the meaning of terms used in his application, and has applied for a certificate to operate as a common carrier when the application should have been for a permit to operate as a contract carrier, or vice versa, the Commission will disregard the form of the application and grant

such authority within the scope of the application as the applicant is entitled to receive upon the facts."

[5] It is well established that the procedure before the Commission is more or less informal and that substance and not form is controlling. *Utilities Comm. v. Coach Co.* and *Utilities Comm. v. Greyhound Corp.*, 260 N.C. 43, 132 S.E. 2d 249; *Utilities Commission v. Telephone Co.*, 260 N.C. 369, 132 S.E. 2d 873; *Utilities Commission v. Area Development, Inc.*, 257 N.C. 560, 126 S.E. 2d 325. Thus, where the parties to be affected are before the Commission, participate in the hearing and make defense, they cannot complain of a departure from the pleadings. *Utilities Comm. v. Coach Co., supra.* All of the evidence presented was directed toward the needs of a single shipper and the abilities of applicant and protestant to service these individual and specialized needs. Regardless of the name given the proceeding, the operation proposed in the hearing was in the nature of a contract operation rather than that of a common carrier operation. In our opinion, no prejudice could have resulted to protestant as a consequence of the mislabeling of the application.

[6] Protestant says the Commission erred in failing to find that applicant knowingly engaged in unauthorized and unlawful transportation of boats in North Carolina for several years before filing its application.

Applicant admits that since 1960 it has transported from High Point to New Bern and Morehead City boats destined for further movement to points outside the state. It argues that when this operation began, it was subject to regulation as interstate commerce. See: Hafner and Hanson Common Carrier Application, 69 M.C.C. 581; Eldon Miller, Inc., Extension—Illinois, 63 M.C.C. 313; Dora Motor Carrier Operations Within Arizona, 48 M.C.C. 171; Bisceglia Contract Carrier Application, 34 M.C.C. 233; and Roethlisberger Transfer Co. Ext.—Frankenmuth, Mich., 32 M.C.C. 709. Several years later, the Interstate Commerce Commission reversed its previous rulings to this effect, Motor Transportation of Property Within A Single State, 94 M.C.C. 541, and its decision was ultimately affirmed by the Supreme Court of the United States. *Pennsylvania Railroad Co. v. United States,* 242 F. Supp. 890 (E.D. Pa. 1965), *aff'd mem.* 382 U.S. 372 (1966). Applicant further argues that it was not aware of this change in the law until its operation was questioned by the North Carolina Utilities Commission. At that time,

applicant immediately furnished the Commission with the details of its operation, and when the Commission questioned the legality of the operation, applicant immediately filed application for intrastate authority. No attempt was ever made by applicant to conceal its activities in this State. All of its vehicles used in the intrastate operation were licensed in this State and special permits were obtained from the North Carolina Department of Motor Vehicles to move the boats over this State's highways.

The Commission obviously considered evidence of applicant's previous illegal operations in the light of the explanations offered. A finding was made that applicant is *fit,* willing and able to perform a contract service. In our opinion, applicant's concessions regarding its past intrastate operations did not require the Commission to find that it is *unfit* to perform as a contract carrier in this State. There is plenary evidence to support the Commission's finding of fitness and the finding will not be disturbed.

Protestant has presented other contentions which are not discussed. These contentions have nevertheless been reviewed and found to be without merit.

Affirmed.

Judge HEDRICK concurs.

Judge VAUGHN dissents.

WACHOVIA BANK AND TRUST COMPANY, N.A., TRUSTEE OF THE LOGAN T. ROBERTSON FUND, A TRUST CREATED UNDER THE WILL OF HOPE T. ROBERTSON, DECEASED, PETITIONER v. LOGAN T. ROBERTSON; AMERETTE ROBERTSON, A MINOR; LAURA LEE SAFFORD; RUFUS LASHER SAFFORD; RUFUS BRADFORD SAFFORD, A MINOR; GEORGE SCOTT SAFFORD, A MINOR; LILLIAN ROBERTSON SHINNICK; JOSEPH N. SHINNICK; ROBERTSON WILLIAM SHINNICK, A MINOR; LAURA ELIZABETH SHINNICK, A MINOR; LOGAN T. ROBERTSON, JR.; MARY NORBURN ROBERTSON; SCOTT A. ROBERTSON, A MINOR; ASHLEY NICHOLETTE ROBERTSON, A MINOR; HOPE T. NORBURN; RICHARD A. FARMER; LAURA LEE FARMER, A MINOR; CYNTHIA ANN FARMER, A MINOR; RICHARD R. FARMER, A MINOR; CHARLES R. NORBURN; RUSSELL L. NORBURN, JR.; HELEN H. NORBURN; ROBERT E. NORBURN, A MINOR; CHRISTOPHER S. NORBURN, A MINOR; REUBEN B. ROBERTSON, III; DANIEL H. ROBERTSON; PETER T. ROBERTSON; MARGARET ROBERTSON WHITE, A MINOR; LAURENS T. WHITE, A MINOR; LOUISE H. ROBERTSON, A MINOR; GEORGE W. ROBERTSON, A MINOR, RESPONDENTS

No. 7228SC633

(Filed 22 November 1972)

Wills § 43.5— class gift — determination of class members

Provision of a testamentary trust directing the trustee to divide the trust assets "into separate shares of equal value so that there shall be one such share for each child of (testatrix' son) then living and one such share for the living issue collectively of each child of (testatrix' son) then deceased" and directing the trustee in the administration of the shares of the trust *is held* a class gift to the children of the testatrix' son, which class was determined and closed at the death of testatrix; consequently, a child born to testatrix' son after the death of the testatrix was not entitled to share in the trust.

APPEAL by respondents Scott A. Robertson and Ashley Nicholette Robertson, minors, by and through their guardian ad litem, Philip G. Carson; and Rufus Bradford Safford, George Scott Safford, Robertson William Shinnick, and Laura Elizabeth Shinnick, minors, by and through their guardian ad litem, William Samuel Woodard, from *Harry C. Martin, Judge,* 1 March 1971 Session of Superior Court, BUNCOMBE County.

This is a declaratory judgment action brought to have the court determine whether and to what extent a child born to testatrix's son after the death of testatrix is entitled to share in the Logan T. Robertson trust created by the will. The matter was heard upon the petition and answer, stipulations of the parties, interrogatories and answers to interrogatories. The

court made findings of fact and concluded that a child born to Logan T. Robertson after the death of testatrix was entitled to share in the trust. From the judgment entered the guardians ad litem for minor great grandchildren of testatrix appealed. Each of the minors has an interest in the trust in the event of the death of his or her parent prior to the termination of the trust. Facts necessary for decision are set out in the opinion.

Herbert L. Hyde for petitioner appellee.

William Samuel Woodard, attorney and guardian ad litem for Rufus Bradford Safford, George Scott Safford, Robertson William Shinnick, and Laura Elizabeth Shinnick, minors; and Grier, Parker, Poe, Thompson, Bernstein, Gage and Preston, by James Y. Preston, for respondent appellants.

Hendon and Carson, by Philip G. Carson, for respondent appellants, Scott A. Robertson and Ashley Nicholette Robertson, minors, by their guardian ad litem, Philip G. Carson.

Shuford, Frue and Sluder, by Gary A. Sluder, for appellee respondent, Amerette Robertson and any and all other children that may be born to Logan T. Robertson, by their guardian ad litem, Gary A. Sluder.

MORRIS, Judge.

Hope T. Robertson died on 19 September 1958, leaving a last will and testament which was duly admitted to probate by the Clerk of the Superior Court of Buncombe County. The estate was fully administered and closed by order of the Clerk of Superior Court on 30 August 1962. By her will, testatrix created two trusts. One was denominated "The Hope T. Norburn Fund" and the other, "The Logan T. Robertson Fund." Petitioner was appointed trustee of "The Logan T. Robertson Fund" and qualified as trustee on 31 July 1962. Since that date, petitioner has continued to act as trustee of this fund. The trustee is presently holding cash and other property, the combined value of which is in excess of $1,300,000.

In Item IV of her will, testatrix stated that she and others had, at various times, made gifts of the common stock of Champion Paper and Fibre Company to her grandchildren (children of Hope T. Norburn, children of Logan T. Robertson, and children of Reuben B. Robertson, Jr.). The number of shares of such stock owned by each grandchild was listed for the stated

purpose of taking this stock ownership into account in achieving equality among the children, collectively, of her three children, and her executor was instructed to rely on that list of holdings in making distribution to the funds set up for her children. The distribution for Reuben T. Robinson, Jr., was to be given to the Fifth Third Union Trust Company, Cincinnati, Ohio, as trustee under a trust she had already established.

By section 1 of Item IV, testatrix established The Hope T. Norburn Fund and provided that one-half the income therefrom should be paid to Hope T. Norburn. The balance of the net income is to be paid to the same persons as that half of the net income of the Logan Robertson Fund not paid to Hope T. Norburn. The trustee was also directed to invade the corpus if the income provided for her under this Fund, The Logan Robertson Fund, and her income from other sources should be insufficient to provide liberally for her comfort, maintenance, travel and the education of her children, or enable her to meet any emergency which might arise affecting her or any member of her family. Additionally, with the written approval of Hope Norburn, the trustee may make available to any of her children amounts of principal for the purpose of purchasing a home, investing in a business, etc., as an advancement against the child's eventual share. The testatrix then specifically provided that the fund should be divided into separate shares for the benefit of the children of Hope T. Norburn at the death of Hope T. Norburn: "Upon the death of my daughter, Hope T. Norburn, if she survives me, or upon my death if she does not, in accordance with my desires with respect to the equalization of the shares my grandchildren will eventually receive as hereinabove expressed, I direct that my Trustee divide the Hope T. Norburn Fund into separate shares of equal value so that there shall be one such share for each such child of Hope T. Norburn then living and one such share for the living issue collectively of each child of Hope T. Norburn then deceased, and that thereupon the Trustee shall charge each such child's or collective issue's share with the amount of any gift or gifts of the common stock of The Champion Paper and Fibre Company made to such child or to the parent of such collective issue, so that each such child and the living issue collectively of any such deceased child, when the appraised value of his, her, or their separate shares of the trust estate, if any, is added to the appraised value of his or her gift or the gift of such collective issue's parent, if any, shall share approximately equally."

With respect to The Logan T. Robertson Fund (established by section 2 of Item IV), however, testatrix made entirely different provisions. As to that fund, she provided:

> "In accordance with my desires with respect to the equalizing of the shares my grandchildren will eventually receive, as hereinabove expressed, I direct that my Trustee divide the Logan T. Robertson Fund into separate shares of equal value so that there shall be one such share for each child of Logan T. Robertson then living and one such share for the living issue collectively of each child of Logan T. Robertson then deceased, and that thereupon the Trustee shall charge each such child's or collective issue's share with the amount of any gift or gifts of the common stock of The Champion Paper and Fibre Company made to such child or to the parent of such collective issue, so that each such child and the living issue collectively of any such deceased child, when the appraised value of his, her or their separate shares in the trust estate, if any, is added to the appraised value of his or her gift, or the gift of such collective issue's parent, if any, shall share approximately equally."

Testatrix further provided that if her son Logan T. Robertson were living at her death, the various funds established by this item of her will should be administered in accordance with the following directions: Since her son Logan T. Robertson has income from other sources sufficient to meet his commitments and maintain his standard of living, the income of the funds should be used by the trustee to provide adequately for the maintenance, education, travel, and emergency requirements of each beneficiary, the trustee to consult testatrix's daughter-in-law, Elizabeth R. Robertson (then wife of Logan T.), and give due weight to her suggestions. However, should Logan's income drop to a point which would not enable him to maintain his then standard of living, the provisions in favor of his children should be considered subordinate and postponed to his requirements, the trustee being authorized to invade corpus for this purpose. At the death of Logan, the funds are to be administered by the trustee for the benefit of each fund's beneficiary or beneficiaries to final termination. Testatrix further provided that, "anything to the contrary contained in this Section 2 of this Item IV notwithstanding, if my daughter Hope T. Norburn survives me, the Trustee shall pay to her in convenient periodical installments

throughout each year, one-half of the net income of all the funds comprising the Logan T. Robertson fund, as originally set apart so long as she may live."

Hope T. Norburn, Reuben Robertson, Jr., and Logan T. Robertson all survived testatrix. At the time of the death of testatrix, Logan T. Robertson had three children; Laura Lee Safford, born 14 February 1940; Lillian Robertson Shinnick, born 4 January 1944; and Logan T. Robertson, Jr., born 6 June 1946. Subsequent to the death of testatrix, Logan T. Robertson and his wife, Elizabeth R. Robertson, were divorced. On 13 September 1966, Logan T. Robertson was married to Mary Mesnard Robertson, and to this marriage Amerette Robertson was born on 16 August 1967.

The court found facts and concluded that the bequest to the children of Hope T. Norburn was a bequest to them as a class, the class to close at the death of Hope T. Norburn. We agree with this conclusion, and no question is raised on this appeal with respect thereto.

The court also concluded that the bequest to the children of Logan T. Robertson was a bequest to them as a class. We agree with this conclusion.

The court's conclusion No. 8 is as follows:

> "That the bequest of the trust estate, known of as the Logan T. Robertson Fund to the children of Logan T. Robertson vested in the said children of Logan T. Robertson living at the death of the said Hope T. Robertson, subject to the life estate of Hope T. Norburn and Logan T. Robertson in the income and principal of said Fund, and further subject to open to make room for any and all other members of said class, to wit any and all other children born to the said Logan T. Robertson prior to the falling in of the intervening estate, that is upon the death of the said Logan T. Robertson."

With this conclusion we do not agree.

Respondents argue that the gift to the children of Logan T. Robertson was a gift to individuals and not to a class, but if a class gift, the class closed at death of testatrix. We cannot agree that the gift was one to individuals. Testatrix certainly did not name the individuals to take. It is true she named them

at the beginning of Item IV, but this was solely for the purpose of listing their holdings in Champion Paper and Fibre for the use of the executors and trustees in equalizing shares they would eventually take. Nor do we find any expression of testatrix which would indicate her intention that the gift be a gift to individuals.

> "A gift to a class is a gift of 'an aggregate sum to a body of persons uncertain in number at the time of the gift, to be ascertained at a future time, and who are all to take in equal or in some other definite proportions, the share of each being dependent for its amount upon the ultimate number.' A gift to a group of persons who are not named and who have one or more characteristics in common by which they are indicated or who answer to a general description is, prima facie, a gift to a class." 4 Bowe-Parker: Page on Wills, § 35.1, p. 487-488.

Thus, if the testatrix makes no attempt to name the individual members of the class or to identify them individually by description, but merely designates the class, such as "children," whether testatrix's children, or the children of another, the courts generally treat such a gift as prima facie a gift to a class. Id., § 35.2. We find nothing in the will before us indicating a contrary intent.

Having determined that testatrix's gift to her grandchildren by the creation of The Logan T. Robertson Fund was a class gift, the question then becomes when does the class close or when are the children of Logan T. Robertson to be determined?

> "In *Smith v. Mears,* 218 N.C. 193 (197) citing a wealth of authorities, it is said: *'In limine,* it may be well to recall that the guiding star in the interpretation of wills, to which all rules must bend, unless contrary to some principle of law or public policy, is the intent of the testator, and this is to be ascertained from the language used by him, "taking it by its four-corners," and considering for the purpose the will and any codicil or codicils as constituting one instrument.' " *Walsh v. Friedman,* 219 N.C. 151, 160, 13 S.E. 2d 250 (1941).

We think the intention of testatrix is clear and expressed by unambiguous words. Most importantly, testatrix used com-

pletely different language in Logan Robertson trust than she did in the Hope Norburn trust. The Hope Norburn trust was established first. In that trust she provided specifically that "(u)pon the death of my daughter, Hope T. Norburn" the trustee should divide the fund into separate shares of equal value so that there "shall be one such share for each such child *then living* and one such share for the living issue collectively of each child of Hope T. Norburn *then deceased* . . . " , this to be done in accordance with her desires with respect to the equalization of shares her "grandchildren" would eventually receive as she had previously expressed. However, when she set up the Logan Robertson trust, testatrix used the exact phraseology with respect to equalization of shares, of her grandchildren and charging each share with the gifts of stock with the exception that she did not use the words "upon the death of" Logan T. Robertson, "if (he) survives me, or upon my death if (he) does not." She simply directed the trustee to "divide the Logan T. Robertson Fund into separate shares of equal value so that there shall be one such share for each child of Logan T. Robertson then living and one such share for the living issue collectively of each child of Logan T. Robertson then deceased . . . " In making provisions for income distribution, she said: "If my son, Logan T. Robertson, is living at the date of my death, the various funds as *above constituted* shall" (emphasis added) be administered as directed. Throughout the trust she referred to the funds for her grandchildren as having been established, although she provided for use of income and principal for Logan T. Robertson during his lifetime if the trustee deemed it necessary. Payment of principal to children of Logan Robertson during his lifetime was to be made from "such beneficiary's share."

It seems to us clear that testatrix knew how to create interests vesting only at Logan Robertson's death. She had certainly done so in The Hope T. Norburn Fund. Having omitted those words in The Logan Robertson Fund, we think she clearly intended that the children of Logan Robertson were to be determined at her death and the division of shares for them made then. We, therefore, hold that the class was fixed at the death of Hope T. Robertson. "Persons who are born after the class is fixed, cannot take, although they would otherwise answer to the description in the will." Bowe-Parker: Page on Wills, *supra*, § 35.14, p. 538. It follows that Amerette Robertson, having

been born after the death of testatrix, cannot take under the will of Hope T. Robertson.

The judgment of the trial court must be

Reversed.

Judges CAMPBELL and PARKER concur.

INTERNATIONAL HARVESTER CREDIT CORPORATION, PLAINTIFF v. R. S. RICKS, ORIGINAL DEFENDANT, AND INTERNATIONAL HARVESTER COMPANY AND WAKEFIELD EQUIPMENT COMPANY, THIRD PARTY DEFENDANTS

No. 7226SC721

(Filed 22 November 1972)

1. **Courts § 21— contract executed in Virginia — what law governs**

Where the contract in question was executed in Virginia, interpretation of the contract is governed by the law of that state; however, the laws of North Carolina govern questions of procedure.

2. **Rules of Civil Procedure § 41; Sales § 14— cross claim — denial by court sitting without jury**

The trial court, sitting without a jury, did not err in denying third party defendant's motion to dismiss the cross claim of original defendant based on third party defendant's alleged breach of an express written warranty. Rule of Civil Procedure 41.

3. **Sales § 15— breach of warranty — defective parts as determined by seller — judicial review**

A proviso in a warranty made by third party defendant Harvester Company that repairs would be made where parts or workmanship proved to be defective "in the Company's judgment" did not grant the seller uncontrolled discretion in recognizing the warranty but did subject Harvester Company's judgment as to defective material or workmanship to judicial review.

4. **Sales § 17— breach of warranty — sufficiency of evidence**

Evidence was sufficient to support the findings of fact that third party defendant Harvester Company breached its warranty with respect to a farm tractor.

5. **Sales §§ 17, 19— breach of warranty — sufficiency of evidence**

Evidence was sufficient to support judgment for $5000 for original defendant on his cross claim for breach of warranty where such evidence tended to show that defendant purchased a farm tractor

under warranty, that the tractor performed "all right" until 1968 when problems with the hydraulic system rendered the equipment totally useless, that defendant made numerous attempts to have the tractor repaired through the dealer, and that the fair market value of the tractor had it been in operating condition was $5000, but in its defective condition it was worth nothing.

6. **Contracts § 29— breach of contract — "accrued interest" — liability of purchaser for interest after breach**

Where plaintiff brought an action to recover the balance due on a conditional sales contract and such amount as determined by plaintiff included "accrued interest," the trial court did not err in failing to award interest on the recovery since the record did not show when plaintiff added the "accrued interest."

7. **Costs § 1— attorney's fees — liability of purchaser in action on conditional sales contract**

By provision of the contract whereby purchaser agreed to pay reasonable attorney's fees incurred in the collection of an amount payable under the contract, plaintiff seller was entitled to an award of attorney's fees in a suit brought to recover balance due on a conditional sales contract.

APPEAL by plaintiff and third party defendant International Harvester Company from *McLean, Judge,* 15 May 1972 Schedule C Session of MECKLENBURG Superior Court.

Plaintiff instituted this action against the original defendant (Ricks) to recover $5,150.29 balance on a conditional sale contract and for possession of a farm tractor and certain equipment covered by the contract to the end that the same be sold and proceeds from the sale applied to the indebtedness. Ricks filed answer admitting execution of the contract but denied that plaintiff owned the contract, denied that Ricks had defaulted in payments, and denied that he was indebted to plaintiff.

Ricks also pleaded a cross claim based on breach of warranty against the third party defendants, International Harvester Company (Harvester Company) who manufactured the tractor, and Wakefield Equipment Company (Equipment Company) who sold him the tractor.

Jury trial was waived and following the introduction of evidence by all parties except Equipment Company, the court entered judgment in which it found facts as alleged and contended by plaintiff and Ricks, concluded that plaintiff was entitled to judgment for deficiency against Ricks and that Ricks was entitled to judgment against Harvester Company and

Equipment Company for damages for breach of warranty. From judgment in favor of plaintiff against Ricks for $1,606.47 and in favor of Ricks against Harvester Company and Equipment Company for $5,000.00, plaintiff and Harvester Company appealed.

Ervin, Horack & McCartha by C. Eugene McCartha for International Harvester Credit Corporation and third party defendant, International Harvester Company.

Cherry, Cherry and Flythe by Joseph J. Flythe and Ernest L. Evans for R. S. Ricks, original defendant and third party plaintiff.

BRITT, Judge.

[1] While there was no finding or admission on the point, it appears that the conditional sale contract involved in this action was executed in Wakefield, Virginia, where Equipment Company's place of business was located. Our courts have held that the interpretation of a contract is governed by the law of the place where the contract was made. *Fast v. Gulley,* 271 N.C. 208, 155 S.E. 2d 507 (1967); *Ford Motor Credit Co. v. Jordan,* 5 N.C. App. 249, 168 S.E. 2d 229 (1969). However, the laws of North Carolina govern questions of procedure including the rules as to the sufficiency of evidence to withstand motion for nonsuit or dismissal. 2 Strong, N.C. Index 2d, Courts, § 21, p. 467.

HARVESTER COMPANY APPEAL

[2] Harvester Company's first contention is that the evidence offered by Ricks was not sufficient to withstand Harvester Company's motion to dismiss the cross claim.

Harvester Company's main argument on this contention is that while Ricks based his cross claim on breach of an express written warranty, he did not introduce the written warranty into evidence. The record reveals that Harvester Company moved to dismiss the cross claim at the close of Ricks's evidence and on failure of the court to grant its motion proceeded to introduce evidence including the written warranty; the motion to dismiss was not renewed at the close of all the evidence.

Since 1 January 1970 the former motion for involuntary nonsuit in nonjury trials has been replaced by the motion for

dismissal authorized by G.S. 1A-1, Rule 41(b) and (c). *Cutts v. Casey,* 278 N.C. 390, 180 S.E. 2d 297 (1971). Under the former practice it was clear that where plaintiff offered evidence for the purpose of defeating defendant's cross claim, plaintiff waived his motion to nonsuit the cross claim made at the close of defendant's evidence, and if the motion to nonsuit was not renewed at the close of all the evidence, the sufficiency of the evidence was not presented on appeal. 7 Strong, N.C. Index 2d, Trial, § 20, p. 292.

G.S. 1A-1, Rule 41(b) provides in pertinent part: "After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence." Rule 41(c) provides that the "provisions of this rule apply to the dismissal of any counterclaim, cross claim, or third-party claim." We hold that the court did not err in denying defendant's motion to dismiss the cross claim.

Harvester Company's second contention is that there was not sufficient evidence to support the court's findings of fact that Harvester Company breached its warranty.

[3] The written warranty involved here provides in pertinent part as follows: "International Harvester Company warrants to the original purchaser each item of new farm * * * equipment * * * to be free from defects in material and workmanship under normal use and service. The obligation of the Company under this warranty is limited to repairing or replacing as the Company may elect, free of charge and without charge for installation, at the place of business of a dealer of the Company * * * any parts that prove, in the Company's judgment, to be defective in material or workmanship within twelve months or 1500 hours of use, whichever occurs first, after delivery to the original purchaser."

First, we consider the effect of the proviso in the warranty "in the Company's judgment." In 46 Am. Jur., Sales, § 732, p. 857 we find: "A provision that liability under the warranty of an automobile against defects shall be limited to making good

any parts 'which our examination shall disclose to our satisfaction to have been thus defective' will not subject the matter to the uncontrolled judgment of the seller, or deprive the courts of the right to pronounce upon the question of fact involved." *Mills v. Maxwell Motor Sales Corp.*, 105 Neb. 465, 181 N.W. 152, 22 A.L.R. 130 (1920) is cited as authority for the quoted statement. We think the same rule would apply here and that Harvester Company's judgment as to defective material or workmanship is subject to judicial review.

[4] Since pertinent evidence is reviewed in connection with plaintiff's third contention, we deem it unnecessary to review the evidence here; suffice to say, we hold that it was sufficient to support the findings of fact that Harvester Company breached its warranty.

[5] Harvester Company's third contention is that there was not sufficient evidence to support the court's findings of fact, conclusions of law, and judgment that Ricks was entitled to recover $5,000.00 from Harvester Company. We reject his contention.

A part of the evidence viewed in the light most favorable to Ricks tended to show:

On 28 February 1968 Ricks (a resident of Conway, N. C.) purchased the tractor in question together with four items of farm equipment from Equipment Company for $10,549.50, the price of the tractor being $7,300.00. Ricks "traded in" a 1965 Ford tractor and two items of farm equipment for which he was allowed $3,000.00; he paid $1,399.50 in cash. On 23 December 1968 he paid $2,029.07 and on 23 December 1969 he paid $1,258.14. Ricks proceeded to use the tractor during 1968 and the tractor performed "all right" except for the hydraulic system and that did not give much trouble until he began picking peanuts in 1968. In picking peanuts he used a combine with the tractor and the hydraulic system gave considerable trouble. Failing to get relief from Equipment Company, very soon after Christmas of 1968 Ricks contacted Harvester Company's Charlotte office by telephone and was instructed to take the tractor to Harvester Company's dealer in Scotland Neck, N. C. Being unsuccessful in his efforts to get assistance from the Scotland Neck dealer, Ricks called the Charlotte office again and was told to contact their dealer in Franklin, Virginia. The Franklin dealer took the tractor "back and forth" three times but did

not succeed in repairing it. When the 1969 planting season arrived, the tractor was in the Franklin dealer's garage. Ricks hired someone to plant his 1969 crops because he could not steer the tractor due to the defective hydraulic system which affected the power steering. Beginning in 1968, Ricks called Harvester Company's Charlotte office at least 10 or 15 times and requested that the defective hydraulic system be remedied. Failing to get relief from the Charlotte office, he contacted Harvester Company's Chicago office but that office provided no effective relief. In 1969 and 1970 Ricks farmed by hiring someone else's tractor but due to delays in getting the work done, he lost some of his crops.

When the tractor was repossessed in 1971, it registered only 434 work hours. Ricks testified without objection that in his opinion the reasonable fair market value of the tractor had it been in operating order was $5,000.00; that in the fall of 1968, in its defective condition, the tractor was not worth anything.

The measure of damages ordinarily recoverable for breach of warranty is the difference between the reasonable market value of the property as warranty and as delivered, with such special damages as were within the contemplation of the parties. *Nationwide Mutual Insurance Company v. Don Allen Chevrolet Company,* 253 N.C. 243, 116 S.E. 2d 780 (1960); *Hendrix v. B. & L. Motors, Inc.,* 241 N.C. 644, 86 S.E. 2d 448 (1955).

We hold that the evidence was sufficient to support the findings of fact, conclusions of law, and judgment that Ricks was entitled to recover $5,000.00 from Harvester Company.

PLAINTIFF'S APPEAL

Plaintiff contends that the court erred in not allowing plaintiff to recover interest and attorney fees from Ricks.

[6] We consider first the question of interest. Plaintiff commenced this action on 16 March 1971 and thereafter took possession of the tractor and equipment embraced in the conditional sale contract. Plaintiff's evidence discloses that pursuant to notice a sale of the property was held on 2 June 1971 but there were no bids. Thereafter, plaintiff's witness Denham testified: "We ultimately sold the tractor to Mitchiner Truck & Tractor Company in Scotland Neck, North Carolina, and the remainder of the equipment was sold to Bunn International, both of which were International Harvester Company dealers at that time.

The total sales price for the equipment was $3,600. We had a total of $297.56 expenses in connection with the sale. After adding the *accrued interest* and deducting the expenses of the sale and deducting the proceeds of the sale, there was a balance due International Harvester Credit Corporation by Mr. Ricks of $1,606.47." (Emphasis added.)

The record does not disclose when plaintiff added "accrued interest" and concluded that Ricks owed a balance of $1,606.47, therefore, the court did not err in failing to award interest on the recovery. As to interest on the judgment which was entered on 22 May 1972, it would appear that G.S. 24-5 would apply.

[7] We now consider the question of attorney fees. The contract provides: "Purchaser agrees to pay all expenses including reasonable attorney's fees, court costs and out-of-pocket expenses incurred in the collection, by suit or otherwise, of any amount payable under this contract."

We hold that plaintiff was entitled to recover attorney fees; however, the amount of fees could depend on whether Virginia law applies or whether North Carolina law applies. If Virginia law is applicable, then the trial court would award a "reasonable" fee. *United States v. Bank,* 206 F. 2d 62 (1953); *Merchants and Planters Bank v. Forney,* 183 Va. 83, 31 S.E. 2d 340 (1944). If North Carolina law is applicable, then the provisions of G.S. 6-21.2 would control.

For the reasons stated, this cause must be remanded to the superior court for (1) a determination as to whether the contract was executed in Virginia or North Carolina and (2) awarding of attorney fees consistent with this opinion.

As to Harvester Company's appeal, the judgment is affirmed.

As to plaintiff's appeal, the cause is remanded.

Chief Judge MALLARD and Judge BROCK concur.

TENNESSEE CAROLINA TRANSPORTATION, INC. v. STRICK CORPORATION

No. 7226SC672

(Filed 22 November 1972)

1. **Courts § 21— interpretation and validity of contract — what law applies**

Matters bearing upon the execution, interpretation and validity of a contract are determined by the law of the place where it was made.

2. **Courts § 21; Damages § 2— damages — what law applies**

The law of the place where rights were acquired or liabilities incurred governs the award of damages, they being substantive in nature.

3. **Courts § 21— contract entered in another state — what law applies**

Pennsylvania law governs the interpretation of a contract entered in that state and the measure of damages for breach of the contract, and North Carolina law governs matters of procedure, including the rules as to the sufficency of the evidence to withstand the motion for directed verdict.

4. **Sales § 17— breach of implied warranty of fitness — sufficiency of evidence**

Plaintiff's evidence was sufficient to be submitted to the jury in an action to recover damages for breach of an implied warranty of fitness of trailers purchased from defendant.

5. **Sales § 5— attempted disclaimer of warranty — voidness under Pennsylvania law**

Attempted disclaimer of warranty in a sales contract entered in Pennsylvania was void under Pennsylvania law where it was printed in the same color as the other printing in the contract and was in the smallest print used therein.

6. **Courts § 21; Interest § 1— interest as damages for breach of contract — what law applies**

Where a contract provided that it should be governed and interpreted according to the laws of Pennsylvania, the laws of Pennsylvania determined whether plaintiff could recover interest as damages for breach of the contract.

7. **Interest § 1— interest on damages for breach of warranty**

The trial judge, in applying Pennsylvania law, did not abuse his discretion in allowing interest on the amount of damages awarded for breach of warranty from the date the breach occurred.

Judge BRITT dissents.

APPEAL by defendant from *McLean, Judge,* 14 February 1972 Session of Superior Court held in MECKLENBURG County.

The plaintiff is a Tennessee corporation with its home offices in Nashville, Tennessee, where it is engaged in the trucking industry as a common cargo carrier. The plaintiff operates in several states, including the State of North Carolina, under its Interstate Commerce Commission franchise.

The defendant is a trailer manufacturer incorporated in the State of Pennsylvania, where its home offices are located. The defendant has a place of business in Charlotte where it operates a sales, service and trailer repair shop.

On 10 July 1967 in the State of Pennsylvania, the plaintiff entered into a contract to purchase 150 trailers from the defendant for Five Thousand Six Hundred Ninety-Five Dollars ($5,695.00) each. At the time the contract was entered into, the trailers were not in existence and were to be built and delivered to the plaintiff in groups of 50 each on or about September 1, October 10, and October 25, 1967.

Plaintiff sought damages for breach of an implied warranty of fitness of use for the particular purpose for which the trailers were sold by defendant and purchased by plaintiff.

Defendant denied that there was an implied warranty or that there was any breach of warranty. Defendant also alleged that plaintiff had executed several security instuments in which there was a disclaimer or exclusion of warranties.

After hearing the evidence of both parties, the jury returned a verdict in favor of the plaintiff and awarded damages in the amount of $215,600. The trial judge signed judgment for that amount and allowed interest thereon from 31 October 1967. The defendant, having moved in apt time for a directed verdict, which was denied, filed a written motion for judgment notwithstanding the verdict, which was similarly denied. Defendant appealed, assigning error.

Wallace S. Osborne, and Waggoner, Hasty & Kratt by William J. Waggoner for plaintiff appellee.

Welling & Miller by George J. Miller and Charles M. Welling, and Womble, Carlyle, Sandridge & Rice by W. P. Sandridge, Sr., for defendant appellant.

MALLARD, Chief Judge.

Plaintiff executed six separate instruments during the period of 30 August 1967 to 31 October 1967. Each of these instruments is denominated "Time Sale Contract and Security Agreement" and each describes twenty-five of the "New Strick Model 7420U33NSAOW 42 ft. closed top tandem axle semi-trailers" purchased by plaintiff from defendant. In each of these instruments there appears the following language:

> " * * * This instrument contains the entire agreement between the parties, is made and accepted in Pennsylvania, and shall be governed and interpreted according to the laws of Pennsylvania. * * * "

[1, 2] It is settled law in North Carolina that matters bearing upon the execution, interpretation, and validity of a contract are determined by the law of the place where it was made. *Cannaday v. R. R.*, 143 N.C. 439, 55 S.E. 836 (1906); *Industries, Inc. v. Blair*, 10 N.C. App. 323, 178 S.E. 2d 781 (1971). And the law of the place where rights were acquired or liabilities incurred also governs the award of damages, they being substantive in nature. *Wise v. Hollowell*, 205 N.C. 286, 171 S.E. 82 (1933); *Hancock v. Telegraph Co.*, 137 N.C. 497, 49 S.E. 952 (1905).

[3] According to the rules as set forth above, Pennsylvania law governs the interpretation of the contract herein and the measure of damages for breach of the contract. However, the laws of North Carolina govern matters of procedure, including the rules as to the sufficiency of the evidence to withstand the motion for a directed verdict. 2 Strong, N.C. Index 2d, Courts, § 21.

[4] Defendant contends that the court committed error in failing to grant its motion for a directed verdict on the grounds that the evidence failed to establish a claim against the defendant and that the court committed prejudicial error in the admission of some of plaintiff's evidence. We do not agree. We hold that the evidence was sufficient to withstand defendant's motion for a directed verdict and that the court did not commit prejudicial error in the admission of evidence.

[5] The defendant also contends that the court committed error in failing to submit an issue on disclaimer. This contention presents the question of the validity of the alleged disclaimer.

In subsection (h) of each of the "Time Sale Contract and Security Agreements," there appears in the same color as the other printing therein and in the smallest print used therein, the following: "There are no promises, understandings, agreements, representations, or warranties (except the warranties set forth in the Sales Order if the goods covered hereby are new), express or implied, respecting the Equipment which are not specified herein." No express warranties are set forth in the Sales Order.

The laws of Pennsylvania are applicable to the interpretation of the contract.

12A Purdon's Penna. Stat. Ann., § 2-316(2) reads in part:

> " * * * (T)o exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. * * * "

12A Purdon's Penna. Stat. Ann., § 1-201(10) reads in part:

> "A term or clause is conspicuous when it is so written that a reasonable person against whom it is to operate ought to have noticed it. * * * Language in the body of a form is 'conspicuous' if it is in larger or other contrasting type or color. * * * "

In Pennsylvania, an attempted disclaimer which is in the body of an instrument and in type of the same size and color as its other provisions is ineffective as a matter of law. *Boeing Airplane Company v. O'Malley,* 329 F. 2d 585 (8th Cir. 1964); *Greenspun v. American Adhesives, Inc.,* 320 F. Supp. 442 (E.D. Penn. 1970); *S.F.C. Acceptance Corp. v. Ferree,* 39 Pa. Dist. & Co. R. 2d 225 (39 D. & C. 2d 225) [1966]; see also *Mack Trucks of Ark., Inc. v. Jet Asphalt & Rock Co.,* 246 Ark. 101, 437 S.W. 2d 459 (1969).

Whether the attempted disclaimer is effective or not is a question of law for the court and not one of fact for the jury. 1 Anderson, Uniform Commercial Code, § 2-316:18 (2d ed. 1970); 12A Purdon's Penna. Stat. Ann., § 1-201(10).

In 1 Anderson, Uniform Commercial Code, § 2-316:4 (2d ed. 1970), it is said:

> "The prime objective of UCC § 2-316 is to avoid the surprise or fine print waiver of rights by the buyer. This

is made clear by the requirement of conspicuousness for waiver clauses. . . ." Cited in *Greenspun v. American Adhesives, Inc., supra.*

In light of the rules set forth above, the attempted disclaimer herein was void as a matter of law and the trial judge did not commit error in failing to submit that issue to the jury.

Defendant further contends that the court committed error in instructing the jury as to the breach of the contract, the disclaimer, and on the issue of damages.

The defendant requested the court to instruct the jury on the second and third issues as follows:

"1. As to the Second Issue: If you find from the evidence and the greater weight thereof, that there was an implied warranty of fitness for use of said trailers in the General Motor freight as a carrier of general cargo and you further find from the evidence and the greater weight thereof that there was a breach of said implied warranty then you must also find from the evidence and the greater weight thereof that the plaintiff upon discovering said breach gave timely notice to the defendant in what respect said implied warranty was breached to allow the defendant the opportunity to correct said condition to prevent any damages or to minimize or lessen the damages. If you find from the evidence and the greater weight thereof that the plaintiff gave such notice, you will answer the second issue 'yes'; if you fail to so find you shall answer the second issue 'no' and that will end the lawsuit. If you answer the second issue 'yes,' you will then go to the third issue. (U.C.C. 2-607(3)(a)).

2. As to the Third Issue: That if you answer the first and second issues yes, I hereby instruct you that if you reach the third issue, the measure of damages is the difference between the value of the trailers actually received and the value they would have been if they were as warranted, this rule or measure of damages applies to any trailer you find from the evidence and by its greater weight to have been defective at the time of delivery (U.C.C. 2-607(4)) and *Wagner Tractor, Inc. v. Shields,* 381 Fed 2d 441."

The court gave these requested instructions almost verbatim and the defendant cannot complain as to that. When the charge is considered as a whole, no prejudicial error appears therein.

[6] The defendant also contends that the court erred in allowing interest on the judgment from 31 October 1967.

In 1 Restatement of Conflict of Laws 2d, § 207 (1971), it is stated that "(t)he measure of recovery for a breach of contract is determined by the local law of the state selected by application of the rules of §§ 187-188." Under said § 187, questions involving the measure of recovery for a breach of contract are determined by the law chosen by the parties, if they have made an effective choice. The parties in this case effectively chose that the agreement concerning the sale and purchase should be governed and interpreted by the laws of Pennsylvania. In Section "e" of the Comment under § 207, it is stated:

> "The local law of the state selected by application of the rule of this Section determines whether plaintiff can recover interest, and, if so, the rate, upon damages awarded him for the period between the breach of contract and the rendition of judgment. * * *"

Therefore, the law of Pennsylvania applies in determining whether plaintiff may recover interest.

Pennsylvania law is in accord with the rule stated in the Restatement of Contracts, § 337 (1932) which reads as follows:

> "§ 337. WHEN INTEREST IS RECOVERABLE AS DAMAGES.
>
> If the parties have not by contract determined otherwise, simple interest at the statutory legal rate is recoverable as damages for breach of contract as follows:
>
> (a) Where the defendant commits a breach of a contract to pay a definite sum of money, or to render a performance the value of which in money is stated in the contract or is ascertainable by mathematical calculation from a standard fixed in the contract or from established market prices of the subject matter, interest is allowed on the amount of the debt or money value from the time performance was due, after making all the deductions to which the defendant may be entitled."

[7] Under Pennsylvania law, whether interest from the date of breach is allowable under the circumstances of this case is discretionary with the trial court. See *Penneys v. Pa. Railroad Co.*, 408 Pa. 276, 183 A. 2d 544 (1962); *Mauch v. Pbgh. Pension Board*, 383 Pa. 448, 119 A. 2d 193 (1956); *Babayan v. Reed*, 257 Pa. 206, 101 A. 339 (1917). And, we find no abuse of discretion warranting a reversal of the allowance herein of interest on the damages awarded from the date of breach of the warranty sued upon.

The North Carolina cases appear to be in accord. See *Construction Co. v. Crain and Denbo, Inc.*, 256 N.C. 110, 123 S.E. 2d 590 (1961), distinguishing the early law as set forth in *Lewis v. Rountree*, 79 N.C. 122 (1878); *General Metals v. Manufacturing Co.*, 259 N.C. 709, 131 S.E. 2d 360 (1963); *Investment Properties of Asheville, Inc. v. Allen*, 281 N.C. 174, 188 S.E. 2d 441 (1972).

We have considered all of appellant's assignments of error that are properly brought forward and are of the opinion that no prejudicial error appears.

No error.

Judge BROCK concurs.

Judge BRITT dissents.

AUBREY AIKEN v. ROBERT L. COLLINS AND WIFE, EDNA DARE COLLINS, AND ALFRED W. FORD AND WIFE, EMILIE FORD

No. 7228DC659

(Filed 22 November 1972)

1. Rules of Civil Procedure §§ 41, 50 — involuntary dismissal — directed verdict — failure to make findings of fact — dismissal proper

The trial court committed no prejudicial error in granting one defendant's motion for directed verdict under Rule 50(a), though the proper motion should have been one for involuntary dismissal under Rule 41(b) and though no findings of fact were made with respect to the motion, since the findings that were made established that plaintiff had shown no right to relief as against either defendant.

2. Appeal and Error § 28— broadside exception — face of record reviewed

Plaintiff's objection to the signing of the judgment and exception "to each of the findings of fact and conclusions of law" therein presented the face of the record for review, but no error appeared thereon.

3. Brokers and Factors § 6— sale by homeowner — broker not entitled to commission

Plaintiff broker was entitled to no compensation for sale of defendant owner's home by defendant to purchaser procured by plaintiff where plaintiff was to receive compensation only for amounts for which he might sell the property in excess of $25,000, where the purchaser procured by plaintiff was willing to pay only $24,000 and where there was no evidence tending to show that plaintiff was in any way prevented from making a sale by any fault of defendant.

APPEAL by plaintiff from *Allen, Chief District Judge,* 7 February 1972 Non-jury Session of District Court held in BUNCOMBE County.

Civil action to recover $2,400.00 allegedly due plaintiff, a licensed real estate broker, by reason of the sale of land by defendant Collins and wife to defendant Ford and wife. The action was dismissed as to the purchasers, Ford and wife, for plaintiff's failure to state a claim upon which relief could be granted as to them, and no question concerning the dismissal of the action as to defendants Ford is presented by this appeal. Plaintiff's action against defendant Collins and wife was heard by the court without a jury. The court entered judgment which contains the following:

> "Upon the trial of this case, at the conclusion of plaintiff's evidence, the defendants moved for a directed verdict, dismissing this action, which said motion was allowed as to the defendant, EDNA DARE COLLINS, and was denied as to the defendant, ROBERT L. COLLINS.
>
> "After having heard and considered all of the evidence offered by the plaintiff and defendant, ROBERT L. COLLINS, The Court finds the following facts:"

The judgment then contains detailed findings of fact including, in substance, the following:

In May 1969 defendant Robert L. Collins entered into a contract with plaintiff by which he listed the lands described in the complaint with the plaintiff for sale. By the terms of the

contract Collins authorized plaintiff to sell said property for the sum of $25,000.00, of which $3,000.00 was to be payable in cash, and the balance to be paid by purchase money note payable in monthly installments secured by a deed of trust. As compensation for the making of such sale, the plaintiff was to receive all amounts for which he might sell said property in excess of the sum of $25,000.00. Plaintiff never procured a purchaser for the property who was willing to pay a sum in excess of $25,000.00 with a cash down payment of $3,000.00. In November 1969, plaintiff tendered to the defendants for their execution a contract of sale by the terms of which the property was to be sold to Ford and wife for $24,000.00, of which $3,000.00 was to be paid in cash and the balance in monthly installments of $100.00 each, which contract was accompanied by a letter advising defendant, Robert L. Collins, that plaintiff would charge a commission of 10% of the total sales price, to be deducted from the cash down payment of $3,000.00; defendant Collins did not sign or accept this contract. In August 1970, defendants sold the lands to Ford and wife for the sum of $24,000.00, of which $3,000.00 was paid in cash and the balance was represented by a purchase money note payable in monthly installments of $125.00. Plaintiff failed to consummate the contract entered into with the defendant, Robert L. Collins, during the month of May 1969.

Thereupon, the court adjudged that plaintiff was entitled to recover nothing of the defendant, Robert L. Collins, and taxed the costs against the plaintiff. To the signing of this judgment, plaintiff excepted and appealed.

Cecil C. Jackson, Jr., for plaintiff appellant.

Paul J. Story and Charles M. Brown, Jr., for defendant appellees.

PARKER, Judge.

[1] Appellant first assigns as error the judgment "allowing the directed verdict in favor of the defendant Edna Dare Collins at the close of the evidence." A motion for directed verdict under G.S. 1A-1, Rule 50(a) of the Rules of Civil Procedure is appropriate when trial is held before a jury. When trial is by the court without a jury, the appropriate motion by which a defendant may test the sufficiency of plaintiff's evidence to show a right to relief is a motion for involuntary dismissal

as provided for in G.S. 1A-1, Rule 41(b). This rule contains the following:

> "After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. *If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a).*" (Emphasis added.)

Since the present case was tried by the court without a jury, defendant's motion should properly have been made under Rule 41(b), and before granting the motion as to either defendant, the trial court should have followed the directive in Rule 41(b) and made findings of fact as provided in Rule 52(a). However, in this case the dismissal of plaintiff's action as to the defendant, Edna Dare Collins, prior to making any findings of fact, resulted in no prejudice to plaintiff. In any event the court did proceed to make findings of fact, which are fully supported by the evidence, and under these findings plaintiff has shown no right to relief as against either defendant.

[2] The evidence indicates, though the trial court made no findings with respect thereto, that title to the land in question was vested solely in the defendant, Robert L. Collins, and that the defendant, Edna Dare Collins, neither held title to the land nor entered into any contract with the plaintiff respecting a sale thereof. If it was for this reason that the trial judge granted the motion to dismiss as to the defendant, Edna Dare Collins, then the court should properly have followed the directive of Rule 41(b) and made findings with respect to such matters. However that may be, plaintiff has suffered no prejudice, since, as above noted and as hereinafter discussed, the findings as actually made by the court establish that plaintiff has shown no right to relief as against either defendant. Accordingly, we proceed to consideration of appellant's second and only remaining assignment of error, which is directed to the judgment awarding plaintiff nothing from the defendant, Rob-

ert L. Collins. The exceptions upon which this assignment of error is based are those contained in the appeal entries in which plaintiff objected to the signing of the judgment and excepted "to each of the findings of fact and conclusions of law" therein.

> "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.

Such an exception is, however, "sufficient to present the record proper for review and to raise the question whether error of law appears on the face of the record." *In re Appeal of Broadcasting Corp.*, 273 N.C. 571, 160 S.E. 2d 728. "An appeal is itself an exception to the judgment and to any matter appearing on the face of the record proper." 1 Strong, N. C. Index 2d, Appeal and Error, § 26, p. 152. This includes the question whether the facts found support the judgment. *Sternberger v. Tannenbaum*, 273 N.C. 658, 161 S.E. 2d 116. In the case before us the facts found do support the judgment and no error appears on the face of the record.

> " 'It is established law in this jurisdiction that a real estate broker is not entitled to commissions or compensation unless he has found a prospect, ready, able and willing to purchase in accordance with conditions imposed in the broker's contract.' *Sparks v. Purser*, 258 N.C. 55, 127 S.E. 2d 765. Therefore, for a broker to recover he must establish (1) a binding contract and (2) performance on his part." *Thompson-McLean, Inc. v. Campbell*, 261 N.C. 310, 313, 134 S.E. 2d 671, 674.

Here, the trial court found the facts concerning the terms of the contract under which defendant's property was listed for sale with the plaintiff and found as a fact that plaintiff failed to perform that contract.

[3] It is true, of course, that as a general proposition "if property is placed in the hands of a broker for sale at a certain price, and a sale is brought about through the broker as a procuring cause, he is entitled to commissions on the sale even though the final negotiations are conducted through the owner,

who, in order to make a sale, accepts a price less than that stipulated by the broker." Annot., Broker—Sale by Owner at Lower Price, 46 A.L.R. 2d 848, § 3, p. 852. This is so because "[t]he law does not permit an owner 'to reap the benefits of the broker's labor without just reward' if he has requested a broker to undertake the sale of his property and accepts the results of services rendered at his request. In such case, in the absence of a stipulation as to compensation, he is liable for the reasonable value of those services." *Realty Agency, Inc. v. Duckworth & Shelton, Inc.*, 274 N.C. 243, 162 S.E. 2d 486. In the present case, however, the trial court found that there was an express understanding as to plaintiff's compensation under which he was to receive compensation only for amounts for which he might sell the property in excess of the sum of $25,000.00. This brings the present case within the exception to the general rule, which our Supreme Court recognized in *Thompson v. Foster*, 240 N.C. 315, 82 S.E. 2d 109, to the effect that "when the contract between the broker and his principal expressly makes the payment of commissions dependent on the obtaining of a certain price for the property the broker cannot recover, even though the owner sells at a lower price to a person to whom the broker has first shown the property, unless the broker is prevented from making the sale by the fault of the principal." Annot., 46 A.L.R. 2d 848, § 5, p. 859. There was no evidence in the present case even tending to show that plaintiff was ever able to produce a purchaser who was ready, able and willing to purchase defendant's land in accordance with the conditions imposed in the contract under which the land was listed with the plaintiff, nor was there any evidence tending to show that plaintiff was in any way prevented from making such a sale by any fault of defendants.

While, as previously noted, appellant's assignments of error do not present for our review on this appeal any question as to the competency or sufficiency of the evidence to support the trial court's findings of fact, from a review of the entire record we observe that these findings are fully supported by plaintiff's own testimony. The judgment appealed from is

Affirmed.

Judges CAMPBELL and MORRIS concur.

KARL J. CLAY v. VIRGIL M. GARNER

No. 7226SC796

(Filed 22 November 1972)

1. **Automobiles § 88; Negligence § 34— automobile collision — submission of question of contributory negligence to jury**

There was sufficient evidence to submit the question of contributory negligence to the jury in an action for personal injury arising out of an automobile collision.

2. **Trial § 33— jury instructions — statement of evidence and application of law thereto**

The trial judge's charge must summarize the material aspects of the evidence sufficient to bring into focus controlling legal principles, and failure to charge on the substantial features of the case is prejudicial error, even without a prayer for special instructions. Rule of Civil Procedure 51.

3. **Automobiles § 90; Negligence §§ 37, 38— automobile collision — personal injury action — jury instructions**

The trial judge in a personal injury action arising from an automobile collision correctly stated the principles of law with respect to the duty of a driver to exercise due care, to keep a proper lookout and to maintain control of the vehicle, and correctly defined the burden of proof, negligence, contributory negligence, proximate cause, and the element of foreseeability.

ON *Certiorari* to MECKLENBURG Superior Court to review a trial before *Friday, Judge,* 24 April 1972 Schedule "B" Civil Session.

This is a civil action to recover damages for personal injury arising out of an automobile collision in Winston-Salem, North Carolina on 13 December 1969.

A collision occurred about 7:30 p.m. on Peters Creek Parkway where the driveway from Clark's Department Store enters. Peters Creek Parkway (Parkway) is a six-lane highway divided by a median with three lanes going south and three lanes going north. The driveway leading to Clark's is located on the west side. The median at this point is open so that automobiles from both north and south may enter the parking lot. The Parkway each side of the median is 40 feet wide, and the speed limit was 45 m.p.h. The weather was clear and there were no obstructions to interfere with a view from the entrance to the driveway in both a northerly and southerly direction on the Parkway. Six

hundred and ninety-six feet north of the driveway along the Parkway there was an intersecting street where traffic was controlled by traffic signal lights.

The collision occurred directly in front of the driveway in the lane immediately adjacent to the median on the west side and at a point approximately 12 feet from the median.

The plaintiff testified that he was traveling south on the Parkway with headlights on. He was in the center lane and going at a speed of 35 to 40 m.p.h. He came through the intersection 696 feet north of the driveway with the green light, and he first saw the defendant's automobile near the exit from the parking lot with the front end extending slightly into the Parkway. At this time the plaintiff was 200 feet from the driveway. Plaintiff took his foot off the accelerator and began to turn from the center lane into the left lane next to the median. As plaintiff approached the driveway, defendant's car "just shot out. It looked like it stalled for a minute and then it just shot out and blocked the left-hand lane and part of the center lane."

Plaintiff further testified:

". . . I first saw Mr. Garner's car when I was about 200 feet away from where his car was. I am not sure if it was exactly 200 feet, but it was about a third of the way from the intersection, which might be nine or ten car lengths. . . . I did not look at anything except this car after I first saw it, not even my speedometer. I do not really know how fast I was going at that time, but I was going with the flow of traffic. There were other cars with me. There was a car behind me, but I don't know how close. There was not a car in front of me. . . . I told the patrolman that I was doing approximately 35 to 40. I didn't look at my speedometer. I don't know how fast but I'd say approximately. I wasn't speeding, but I didn't look at my speedometer and I don't know.

As soon as I saw Mr. Garner's car, it was into part of the right-hand lane and I was in the center lane and approximately 200 feet away, whereupon I took my foot off the accelerator and put it on my brakes, not slamming on my brakes, and then started moving from the middle lane into the left lane, which is the lane closest to the

median. I first slammed on brakes when he crossed over, paused, and then went over to the left-hand lane and had both lanes blocked. I don't know how close I was then. What I mean by his pausing is that he stopped out in the road, out in the lane. . . . This is the point where I first saw him. It was at this point that he paused and then he began crossing the roadway. He just took off. I was in the center lane at this time and I started to move into the left lane but didn't make it completely into the left lane. I had just about switched over. I had started switching over and this is where I really slammed down on my brakes and I locked it down. . . .

. . . . I have been convicted of traffic offense before, which was for speeding; but I don't know how many speeding tickets I have had. I have been convicted of 'scratching off,' and I think I have been convicted four times for speeding. . . ."

The investigating police officer, who was offered as a witness for the plaintiff, testified:

". . . The skidmarks behind Mr. Clay's vehicle were approximately 90 feet long. They were somewhat in the middle lane and led over toward the median strip in the road."

The defendant's evidence consisted only of his own testimony. His testimony tends to establish that on the evening in question he was leaving the parking lot of Clark's Department Store accompanied by his son. As he came out of the driveway of the parking lot, he stopped before entering the Peters Creek Parkway. He looked to his left and could see as far as the traffic control lights. He observed nothing coming but saw some automobiles stopped at the traffic light. He thereupon started across; and as he was crossing, he looked to his right to see if there was anything coming from that direction. He observed it was clear and then, "When I looked back around to my left, I saw a car coming, but the little boy saw it before I looked and hollered. I stepped on the accelerator, but driving a car of this model, it didn't jump very fast. When the collision occurred, my car was in . . . the lane closest to the median strip."

The defendant testified:

> "Mr. Clay was not there when I started out. I looked down this way and he was not past the stoplight. I looked up this way and I didn't see any car, and then I drove on out into the intersection and then looked to the right, as I was driving over there, as I was going to turn left. I was headed over into the traffic headed northbound across the median. The car wasn't past the stoplight when I started out. . . ."

He testified that the block to his left was clear before he entered the intersection, and he thought that was a sufficient distance to permit him to cross in safety.

The trial judge submitted three issues to the jury; namely, negligence, contributory negligence, and damages. The jury answered the first two issues yes; and from a judgment based thereon, the plaintiff obtained a writ of certiorari to review the trial.

Whitfield and McNeely by Richard P. McNeely for plaintiff appellant.

Helms, Mulliss & Johnston by Robert B. Cordle for defendant appellee.

CAMPBELL, Judge.

[1] This appeal presents two questions; the first being whether error was committed in failing to set aside the verdict on the second issue as being against the greater weight of the evidence. Basically, this assignment of error raises the point as to whether the evidence, taken in the light most favorable to the defendant on whom the burden of proof rested on the second issue, was sufficient to go to the jury. We think it was, and this assignment of error is denied.

The second question presented is whether the trial judge committed prejudicial error in the charge to the jury.

The sufficiency of the charge is hidden within a great maze of evidentiary facts. Five witnesses testified, and this testimony comprises 27 pages of the record. The judge's charge comprises 30 pages of the record.

[2] G.S. 1A-1, Rule 51, Rules of Civil Procedure, requires the trial judge to declare and explain the law arising on the

evidence given in the case. He is not required to recapitulate the evidence witness by witness. A summary of the material aspects of the evidence sufficient to bring into focus controlling legal principles is all that is required with respect to stating the evidence. *Rubber Company v. Distributors, Inc.*, 256 N.C. 561, 124 S.E. 2d 508 (1962).

> "The court, in reviewing the evidence offered by the respective parties, is not required to give the jury a verbatim recital of the testimony. It must of necessity condense and summarize the essential features thereof in short-hand fashion. All that is required is a summation sufficiently comprehensive to present every substantial and essential feature of the case. When its statement of the evidence in condensed form does not correctly reflect the testimony of the witnesses in any particular respect, it is the duty of counsel to call attention thereto and request a correction." *Steelman v. Benfield; Parsons v. Benfield,* 228 N.C. 651, 654, 46 S.E. 2d 829, 832 (1948).

The chief purpose of the charge is to aid the jury to understand clearly the case and to arrive at a correct verdict. Rule 51 confers a substantial legal right, and imposes upon the trial judge a positive duty, and his failure to charge on the substantial features of the case arising on the evidence is prejudicial error, even without a prayer for special instruction. *Faison v. Trucking Co.*, 266 N.C. 383, 146 S.E. 2d 450 (1966).

[3] In the instant case the trial judge correctly stated the principles of law with respect to the duty of a driver to exercise due care, to keep a proper lookout, and the duty to maintain control of the vehicle. He correctly defined the burden of proof, negligence, proximate cause, and the element of foreseeability.

On the issue of plaintiff's contributory negligence the trial judge charged:

> "The court instructs you that if you find by the greater weight of the evidence that the plaintiff, Karl J. Clay, on this occasion complained of, operated his motor vehicle on the public highway without maintaining a proper lookout, as the court has instructed you, or that he did not operate his motor vehicle and keep it under proper control at the time and place complained of, and if you find either of these and find it by the greater weight of the evidence, and further find by the greater weight of the evidence that

such negligence or acts of the plaintiff was one of the immediate and proximate causes of the collision, which combined and concurred with the negligence of the defendant, to produce this collision and resulting injury and damage to the plaintiff, then you would answer this second issue in favor of the defendant, that is, yes.

On the other hand, ladies and gentlemen of the jury, if after considering all the evidence the defendant has not so satisfied you or if you should find the evidence evenly balanced in your minds, or if you are unable to tell where the truth lies, then your verdict as to the issue must be for the plaintiff and your answer to this issue would be No. . . ."

We think this mandate was sufficient and no prejudicial error appears. *Freight Lines v. Burlington Mills* and *Brooks v. Burlington Mills,* 246 N.C. 143, 97 S.E. 2d 850 (1957).

We think the charge, when read contextually, reveals that the law of the case was presented to the jury in such manner as not to mislead or misinform the jury.

No error.

Judges MORRIS and PARKER concur.

STATE OF NORTH CAROLINA, EX REL. UTILITIES COMMISSION AND DRUG AND TOILET PREPARATION TRAFFIC CONFERENCE; NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE, INC.; NORTH CAROLINA TRAFFIC LEAGUE, INC.; TEXTILE FIBERS AND BY-PRODUCTS ASSOCIATION, INC.; AND NORTH CAROLINA TEXTILE MANUFACTURERS' ASSOCIATION, INC., INTERVENORS v. MOTOR CARRIERS' TRAFFIC ASSOCIATION, INC., AGENT; NORTH CAROLINA MOTOR CARRIERS' ASSOCIATION, INC., AGENT; AND SOUTHERN MOTOR CARRIERS' RATE CONFERENCE, AGENT, RESPONDENTS

No. 7210UC685

(Filed 22 November 1972)

1. Carriers § 5; Utilities Commission § 6— motor carrier rates — intrastate operating ratio

Just and reasonable rates for intrastate common carriers are to be determined by the Utilities Commission on the basis of the ratios of the carriers' intrastate operating expenses to their intrastate

operating revenues, and where the ratios do not reflect an actual separation of intrastate and interstate revenues and expenses, a rate increase based thereon cannot be sustained. G.S. 62-146(g).

2. **Carriers § 5; Utilities Commission § 6— rate hearing — rejection of competent evidence**

The Utilities Commission may not arbitrarily reject and refuse to consider competent and probative evidence in a hearing on intrastate common carrier rates.

3. **Carriers § 5; Utilities Commission § 6— motor carrier rates — consideration of carriers' evidence of operating ratios**

In a proceeding to determine intrastate motor carrier rates, the findings of fact of the Utilities Commission affirmatively show that respondents' evidence as to their operating ratios in North Carolina was not rejected or given only minimal weight, but was considered and found unconvincing because of weaknesses specified in the Commission's order.

4. **Carriers § 5; Utilities Commission § 6— disapproval of method for determining operating ratios — similar method used in prior case**

The Utilities Commission did not act arbitrarily in disapproving the method and formula used by respondent carriers in arriving at their intrastate operating ratios, although such method and formula were similar to those used in a prior case in which rate increases were allowed.

5. **Carriers § 5; Utilities Commission § 6— motor carrier rates — final order — stare decisis**

Final orders with respect to motor carrier rates are not within the doctrine of *stare decisis.*

APPEAL by respondents from order of North Carolina Utilities Commission denying increases in rates and charges for intrastate freight shipments. The order issued 28 February 1972.

In an order of 19 January 1971, the Utilities Commission allowed intrastate motor carriers of general commodities an increase in rates to become effective 25 January 1971. On 3 May 1971, respondents, acting as agents for various motor carriers in North Carolina, petitioned for relief from that order so that they could file tariffs containing further rate increases. (G.S. 62-79(b) provides that before changing transportation rates which have been in effect less than one year, relief must first be obtained from the order fixing the rates.) Relief from the order of 19 January 1971 was granted and respondents filed tariffs proposing rate increases, averaging about nine percent, to become effective in July of 1971. The Commission suspended

the proposed increases, ordered an investigation and declared the matter a general rate case under G.S. 62-137. Various parties were allowed to intervene as protestants and public hearings were held in December 1971.

The Commission summarized the evidence in its order, made extensive findings of fact, and concluded in substance that evidence presented at the hearing was of insufficient probative force to support findings of fact necessary to sustain an increase in rates.

Edward B. Hipp, Commission Attorney, and Maurice W. Horne, Assistant Commission Attorney, for plaintiff appellee North Carolina Utilities Commission.

Maupin, Taylor & Ellis by Thomas W. H. Alexander and Belnap, McCarthy, Spencer, Sweeney & Harkaway by Daniel J. Sweeney for intervenor appellees.

Bailey, Dixon, Wooten & McDonald by J. Ruffin Bailey and Ralph McDonald for respondent appellants.

GRAHAM, Judge.

[1] Just and reasonable rates for intrastate common carriers are to be determined by the Commission on the basis of the ratios of the carriers' operating expenses to their operating revenues. G.S. 62-146(g). (An operating ratio of 100% means that for every dollar of freight revenue received, the carrier spends a dollar in operating expenses.) A determination of intrastate operating ratios must be based on revenues and expenses incurred in North Carolina alone, and where ratios do not reflect an actual separation of intrastate and interstate revenues and expenses, a rate increase based thereon cannot be sustained. *Utilities Comm. v. Tobacco Association,* 2 N.C. App. 657, 163 S.E. 2d 638.

Respondents' principal contention is that the Commission arbitrarily rejected and failed to consider evidence offered by them as to their operating ratios in North Carolina.

[2] The weight to be given the evidence and the exercise of judgment thereon are ordinarily matters for the Commission. *Utilities Commission v. Coach Co.,* 261 N.C. 384, 134 S.E. 2d 689. However, the Commission may not arbitrarily reject and refuse to consider competent and probative evidence. Rather,

it must weigh such evidence in balanced scales, and to give it only minimal consideration may constitute error of law. *Utilities Commission v. Gas Co.*, 254 N.C. 536, 119 S.E. 2d 469.

Respondents, through the testimony of R. L. Steed, Secretary of the Southern Motor Carriers' Rate Conference, offered evidence of composite intrastate operating ratios for eighteen motor carriers operating in North Carolina. This evidence tended to show ratios of more than 100% for each weight category. Evidence was also offered by several individual carriers as to their intrastate operating ratios. Through the testimony of witnesses offered by the Commission staff and protestants, the method and formula used by respondents in arriving at these ratios were attacked as being unreliable and as tending to cause the ratios to be overstated. The Commission made findings consistent with this testimony and concluded that respondents' method and formula were unreliable and therefore rendered their evidence as to operating ratios of insufficient probative value to show a need for rate increases. Significant findings of fact tending to support this conclusion include the following: (Our numbering) (1) Cost figures used by respondents in arriving at operating ratios were from the year 1970 while the shipment data to which these costs were related was obtained from the year 1971. (2) The shipment data from 1971 included data from eighteen carriers while the cost data from 1970 included data from only eight of those carriers. (3) Cost comparisons consisted of cost against cost from one year to the next without any consideration for increases in tonnage moved and revenues received. (4) The five days used by the carriers as cost-study days were Monday, Tuesday, Wednesday, Thursday and Friday of five consecutive weeks within the first quarter of 1971; the first quarter of each year is usually lightest in regards to tonnage hauled and revenue received, and the number of days and dates used for the accumulation of data to establish separations between interstate and intrastate operations is insufficient to constitute material and substantial evidence required by law. (5) Separations evidence did not establish any reasonable approximation of the ratable proportion of respondents' operating ratios on intrastate operations and when examined with other facts and circumstances is not of sufficient probative force to support findings of fact required by statute. (6) Unit cost per 1,000 ton miles for the study carriers, as far as operating expenses are concerned, required a smaller percentage of each dollar of operating revenue in

1970 and in the first half of 1971 than in any year since 1966, and that even though operating expenses increased each year since 1966, the same have been offset by increased tonnage and revenue each year.

[3] The findings of fact set forth above affirmatively show that respondents' evidence was not rejected, or given only minimal weight, but was considered and found unconvincing because of the weaknesses specified in the order. To say that the Commission erred in failing to accept respondents' evidence as accurately reflecting operating ratios would be to substitute our judgment for that of the Commission in an area where we are without authority to pass judgment. A determination by the Commission may not be reversed or modified simply because we would have reached a different finding or determination upon the evidence. *Utilities Comm. v. Telephone Co.,* 281 N.C. 318, 189 S.E. 2d 705.

The question raised by respondents' principal contention is simply whether the Commission weighed the evidence fairly and made findings of fact which are supported by competent, material and substantial evidence in view of the entire record. We hold that it did.

[4, 5] Respondents contend that the separations method and formula which they used in this case were similar to those employed in a prior case wherein rate increases were granted. (T-825, Sub 143, Order dated 19 January 1971.) For this reason, respondents say the Commission acted arbitrarily in disapproving the formula and method used in this case. We disagree. Final orders with respect to rates are not within the doctrine of *stare decisis. Utilities Comm. v. Light Co. and Utilities Comm. v. Carolinas Committee,* 250 N.C. 421, 109 S.E. 2d 253. It is noted also that in the former case respondents were advised that their method and formula should be strengthened. In its order of 19 January 1971, the Commission stated that "[w]e do not conclude that the formula and method used in making the separations in this case reflect to a certainty, accurate results, and we advise and enjoin the respondents herein to continue their efforts for improvement in this area."

In weighing the separations evidence in the former case, the Commission apparently determined that in spite of possible weaknesses in respondents' method and formula, their evidence was sufficient to show that intrastate carrier operations did

not produce sufficient revenue to provide a fair operating ratio. Here, the Commission weighed respondents' evidence and determined that because of its inherent weaknesses, as well as other factors, respondents had failed to carry the burden of proving that the proposed rates were just and reasonable. In this we find no error of law.

The burden of proving that the proposed rates were just and reasonable was upon the respondent carriers. G.S. 62-75; G.S. 62-134(c). In order to sustain this burden it was necessary for the carriers to show the ratios of their intrastate operating expenses to their intrastate revenues, because as pointed out previously, it is on the basis of such ratios that just and reasonable rates are to be determined by the Commission. G.S. 62-146(g). Here, the Commission did not reach the point of determining actual operating ratios, concluding that the evidence was of insufficient probative force to support meaningful findings as to this essential element. Since we sustain the order with respect to this determination, it is unnecessary to discuss other assignments of error. Obviously, since the Commission could not make reasonably accurate findings as to operating ratios, it could not carry out its statutory duty of determining whether the proposed rates were just and reasonable, and it correctly denied the proposed increases.

Affirmed.

Judges HEDRICK and VAUGHN concur.

IN THE MATTER OF THE IMPRISONMENT OF: THOMAS JAMES REDDY, JAMES EARL GRANT, JR., AND CHARLES PARKER

No. 7226SC805

(Filed 22 November 1972)

1. Arrest and Bail § 9— bond pending appeal — no constitutional right

There is no constitutional right to bond pending appeal.

2. Arrest and Bail § 9— amounts of bonds pending appeal — discretion of court

The trial court did not abuse its discretion in setting appearance bonds of $50,000 each for two defendants and $25,000 for a third defendant pending their appeals from convictions of felonious burn-

ing, or in requiring defendants to abide by certain conditions in order to post bonds in lesser amounts.

3. **Arrest and Bail § 9— hearing to set bond pending appeal — rules of evidence**

In a hearing to determine the amount of an appearance bond pending appeal, the trial court was not bound by the rules of evidence as generally understood.

Judge GRAHAM concurs in the result.

ON writ of certiorari to review the order of *Snepp, Judge,* 10 July 1972 Session of Superior Court held in MECKLENBURG County.

Petitioners Thomas James Reddy, James Earl Grant, Jr., and Charles Parker, were convicted of "felonious burning" in violation of G.S. 14-62 at the 10 July 1972 Session of Superior Court held in Mecklenburg County. Pending appeal to the North Carolina Court of Appeals the trial judge set appearance bonds for each petitioner in the amount of $50,000.

On 2 August 1972 petitioners filed with this court a "motion for reduction of bail" which this court, ex mero motu, treated as a "petition for writ of habeas corpus" and allowed same, ordering that on 8 August 1972:

> "Judge Snepp shall conduct an evidentiary hearing, with movants and their counsel and the solicitor present, for the purpose of determining the reasonable and proper amount to be set for appearance bonds for movants. Judge Snepp shall make findings of fact from the current hearing and from the original trial and post trial proceedings from which he determines the reasonable and proper amount of appearance bonds for movants. Judge Snepp shall promptly set such amount as he deems proper as appearance bond for each of movants."

On 8 August 1972 pursuant to the order of this court, Judge Snepp conducted a hearing and made findings of fact which, except where quoted, are summarized as follows:

The movants were charged in valid bills of indictment with the unlawful burning of a barn at the "Lazy B Stables" on 24 September 1968 in violation of G.S. 14-62. The movants pleaded not guilty; whereupon the State offered evidence that the movants and others, in a series of meetings in September, 1968, "decided to blow up or burn some buildings in Charlotte to

protest what they considered racial injustice." After discussion, "it was suggested that they burn the 'Lazy B' stable because Reddy said that the owner had once refused to rent a horse to him because of his race." "Grant, who has a Ph.D. degree in chemistry, instructed them in the use of incendiary devices known as 'Molotov Cocktails'. Washington, [a State's witness] who had served in the Marines, instructed the group in the use of rifles which Grant provided." On the night of 24 September 1968 the six men drove to the vicinity of the "Lazy B" stables.

> "They were armed with rifles and were prepared to shoot any person who interfered. Reddy and Parker, carrying the 'Molotov Cocktails' went into a large barn in which some 11 tons of hay were stored and set the structure on fire with the incendiary devices. The building was completely destroyed, and the 15 horses stabled in it were burned to death. Other horses in a second nearby barn were injured."

Parker presented no evidence. Reddy testified and denied participation in the crime. Grant introduced evidence tending to establish an alibi.

The jury found Reddy, Grant, and Parker guilty as charged.

> "The Court, based upon the evidence heard at the trial, concluded that Grant and Reddy were the principal instigators and planners of the offense. They were sentenced to 25 years and 20 years imprisonment, respectively. Parker appeared to the Court to be of lesser culpability and to offer some prospect of rehabilitation. He was sentenced to 10 years imprisonment."

Appearance bond pending appeal was set at $50,000 in each case. After determining that Parker was an indigent, the trial court appointed counsel to represent him on appeal.

Grant, age 31, is unmarried. He has a Ph.D. degree in chemistry and worked in the Charlotte area for Vista "from which he was discharged for failure to perform his job" and for the American Friends Committee. He has written for publications known as the "Southern Patriot" and "African World."

> "He owns no property other than personal effects and perhaps an automobile. He was convicted at the January

31, 1972 term of the United States District Court for the Eastern District of North Carolina in case 63-71-CR, Raleigh Division, of combining, conspiring, confederating and agreeing with others, including his co-defendant Benjamin Franklin Chavis, Jr. to violate Title 18 USC, Sec. 3150, in violation of Title 18 USC, Sec. 371 and aiding, abetting, counseling, commanding, inducing, procuring and effecting the failure of Walter David Washington and Theodore Alfred Hood to appear for trial as required by the United States District Court for the Eastern District of North Carolina on September 14, 1970."

Reddy, age 26, is married and lacks one unit of gaining his A.B. degree. "He worked for the Charlotte Observer and in urban community center work. He owns no property in Mecklenburg County other than personal effects and perhaps an automobile."

"Parker is 24 years of age. He is not married and lives with his mother. He attended the University of North Carolina at Charlotte for three and a half years. He has been employed by the Mecklenburg County Mental Health Department. He was convicted for possession of heroin and served one year's active sentence, and has a three years suspended sentence. He denies heroin addiction. He owns no property and has been found by the Court to be an indigent."

Presently, Grant is under indictment in Mecklenburg County in three separate cases, charging him with the following offenses: assault with a deadly weapon with intent to kill inflicting serious injuries, discharging a firearm into an occupied building and the unlawful burning of a building. Parker is under indictment in Mecklenburg County for the unlawful burning of a building.

Based on the evidence heard at the trial and in this hearing, Judge Snepp concluded:

"1. [T]hat the movants Grant and Reddy pose a substantial danger to the community and that the movant Parker poses a lesser danger."

"2. [T]hat there is a substantial possibility that the movants, if at liberty pending the determination of

their appeal, will flee the jurisdiction of this court and possibly even attempt to reach some foreign country."

In light of these findings of fact the Court entered an order allowing movants Reddy and Grant to post an appearance bond in the amount of $50,000 or, in the alternative, to post an appearance bond in the amount of $35,000 and agree to abide by seven conditions, summarized as follows:

1. That they not depart from Mecklenburg County while free on bail;

2. That they remain in their residence or place of abode each night between the hours of 9:00 p.m. and 6:00 a.m.;

3. That they refrain from being in the presence of or communicating with their codefendants;

4. That they report to the Clerk of Superior Court of Mecklenburg County or his delegate before 12 noon each Monday while free on bond;

5. That they advise the Clerk of Superior Court of their place of residence and any change therein while released under bond;

6. That they execute, acknowledge and file with the Clerk of Superior Court of Mecklenburg County waivers of extradition in the event they leave the jurisdiction;

7. That they execute, acknowledge and file with the Clerk of Superior Court of Mecklenburg County a written consent that upon report of any infraction of these conditions to the court, capias may issue without notice to them.

Appearance bond for Parker, pending appeal, was set at $25,000 or alternatively at $15,000 should he elect to abide by the seven conditions, *supra.*

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

Chambers, Stein, Ferguson & Lanning by Jim Fuller for petitioner appellants.

HEDRICK, Judge.

In their brief, petitioners assert:

> "The Trial Court erred in violation of Petitioners' rights secured to them by the Sixth Amendment, the Eighth Amendment and the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States and Article I, Sections 1, 19, 23, 27, 35 and 36 of the Constitution of the State of North Carolina by setting an excessive bail for the Petitioners Grant and Reddy in the amount of $50,000.00 and Petitioner Parker in the amount of $25,000.00."

We do not agree.

[1] There is no constitutional right to bond pending appeal. *In re Ferguson,* 235 N.C. 121, 68 S.E. 2d 792 (1952). In their brief, petitioners state that "bail pending appeal is purely statutory."

With respect to appearance bonds pending appeal, G.S. 15-183 provides, "When any person convicted of a misdemeanor or felony other than a capital offense and sentenced by the court, shall appeal, the court shall allow such person to give bail pending appeal . . . . " The amount of bond pending appeal is largely within the discretion of the trial judge. *In re Ferguson, supra; State v. Parker,* 220 N.C. 416, 17 S.E. 2d 475 (1941); *State v. McDonald,* 6 N.C. App. 627, 170 S.E. 2d 551 (1969). It is fundamental that a discretionary ruling of a trial judge is conclusive on appeal in the absence of a showing of abuse of discretion. *Highway Commission v. Hemphill,* 269 N.C. 535, 153 S.E. 2d 22 (1967); *Highway Commission v. Coggins,* 262 N.C. 25, 136 S.E. 2d 265 (1964); *Samons v. Meymandi,* 9 N.C. App. 490, 177 S.E. 2d 209 (1970), cert. den. 277 N.C. 458, 178 S.E. 2d 225 (1971); *State v. Huffstetler,* 1 N.C. App. 405, 161 S.E. 2d 617 (1968).

[2] On the record before us, petitioners have failed to show that the trial judge abused his discretion when he set the appearance bond pending appeal for Reddy in the amount of $50,000, for Grant in the amount of $50,000 and for Parker in the amount of $25,000. The amounts of the appearance bonds are clearly reasonable and proper when considered in the light of the facts found by Judge Snepp.

Next petitioners contend that certain of the conditions upon which the bonds of the respective petitioners would be reduced are "unlawful and unconstitutional." We do not agree.

Obviously, if the trial judge did not abuse his discretion in setting appearance bond for Reddy in the amount of $50,000, for Grant in the amount of $50,000, and for Parker in the amount of $25,000, it would not be an abuse of discretion to impose conditions upon the petitioners to fix the bonds in a reduced amount.

[3] Finally, petitioners contend that the trial court erred in the admission and exclusion of testimony at the hearing on 8 August 1972. We do not agree.

In many kinds of judicial hearings the rules of evidence as generally understood are disregarded. *State v. Morton,* 252 N.C. 482, 114 S.E. 2d 115 (1960); *State v. Cooper,* 238 N.C. 241, 77 S.E. 2d 695 (1953); *State v. Peatross,* 11 N.C. App. 550, 181 S.E. 2d 763 (1971); Stansbury, N. C. Evidence 2d, § 4a.

The hearing before Judge Snepp on 8 August 1972 was ordered by this court "for the purpose of determining the reasonable and proper amount to be set for appearance bond for the movants." Clearly, Judge Snepp in the conduct of this hearing was not bound by the rules of evidence as generally understood.

Judge Snepp's order dated 8 August 1972 is

Affirmed.

Judge VAUGHN concurs.

Judge GRAHAM concurs in the result.

STATE OF NORTH CAROLINA v. CLARENCE EDWARD WIGGINS

No. 7214SC749

(Filed 22 November 1972)

1. **Criminal Law § 164— sufficiency of State's evidence — review on appeal**

Though defendant did not challenge the sufficiency of the evidence in the trial court in the manner prescribed by G.S. 15-173, the sufficiency of State's evidence is reviewable on appeal in a criminal case. G.S. 15-173.1.

2. **Criminal Law §§ 9, 10— principal — accessory before the fact — distinction**

Ordinarily, the only distinction between a principal and an accessory before the fact is that the latter was not present when the crime was actually committed.

3. **Criminal Law §§ 9, 10— principal — accessory before the fact — distinction in felony cases**

The distinction between a principal and an accessory before the fact still exists in this State in regard to general felonies.

4. **Criminal Law §§ 9, 10; Robbery § 4— armed robbery — defendant as principal — insufficiency of evidence to support conviction**

Evidence was insufficient in an armed robbery prosecution to convict defendant as a principal where such evidence tended to show that defendant was in a house ten to fifteen blocks away from the scene of the crime and was in no position to render the perpetrator any advice, counsel, aid, encouragement or comfort, if needed, during the commission of the offense; therefore, defendant would be guilty, at most, of being an accessory before the fact since he was neither actually nor constructively present at the time of the robbery.

5. **Indictment and Warrant § 18; Robbery § 2— indictment for armed robbery — conviction as principal or as accessory before the fact proper**

The crime of accessory before the fact to a felony charged in an original bill of indictment is included in the charge of the principal crime; consequently, defendant whose conviction as principal in armed robbery case will not stand is subject to trial under the original bill of indictment for the offense of being an accessory before the fact to armed robbery.

APPEAL by defendant from *Cooper, Judge,* 17 April 1972 Session of Superior Court held in DURHAM County.

Defendant was charged in case # 72CR1433 with armed robbery. In case # 72CR1432, he was charged with conspiring with several named individuals to commit the robbery charged

in case # 72CR1433. The cases were consolidated for trial and defendant entered pleas of not guilty. The jury found him guilty as charged in both cases, and judgments were entered imposing a prison sentence of 16 years in case # 72CR1433, and a prison sentence of 8 years in case # 72CR1432.

Attorney General Morgan by Associate Attorney Boylan for the State.

Nathaniel L. Belcher for defendant appellant.

GRAHAM, Judge.

[1] Defendant did not challenge the sufficiency of the evidence in the trial court in the manner prescribed by G.S. 15-173. He contends on appeal, however, that the evidence is insufficient to support his conviction for the offense of armed robbery. "The 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." G.S. 15-173.1. See also *State v. Conrad,* 275 N.C. 342, 168 S.E. 2d 39; *State v. Davis,* 273 N.C. 349, 160 S.E. 2d 75; *State v. Robinson,* 13 N.C. App. 200, 184 S.E. 2d 888; *State v. Pitts,* 10 N.C. App. 355, 178 S.E. 2d 632, *cert. denied,* 278 N.C. 301.

The State's evidence would support the following findings: On 18 January 1972 Melvin Anderson entered the Sherwin Williams Co., Inc. store in the Northgate Shopping Center in Durham, and with the threatened use of a pistol, removed in excess of $200.00 of the company's money from the presence of one company employee and one customer. The money was subsequently divided among Anderson, defendant, Charles Graham, who drove Anderson to the shopping center, and Amos Andrew Shaw, who accompanied Anderson and Graham there. The robbery was carried out pursuant to an agreement between these four men. Defendant, who had once worked for Sherwin Williams Co., Inc., suggested the robbery. He also pointed the store out to the others, furnished the pistol used by Anderson and arranged for Graham to drive Anderson to the scene for the purpose of the robbery. After having been advised of his constitutional rights, defendant stated to a Durham detective that "he was the brains behind the robbery." The evidence shows, however, that defendant was not present at the scene when the robbery took place but was at a house some ten or fifteen blocks away.

No question is raised concerning the sufficiency of the evidence to support defendant's conviction of the conspiracy charge. (Case # 72CR1432.) The evidence is obviously sufficient in this respect. "As soon as the union of wills for the unlawful purpose is perfected, the offense of conspiracy is complete." *State v. Knotts,* 168 N.C. 173, 188, 83 S.E. 972, 979. We are of the opinion, however, that while the evidence points strongly to defendant's guilt as an accessory before the fact to the offense of armed robbery, it does not support his conviction as a principal for that offense.

[2] The distinction between principals and accessories before the fact is set forth in *State v. Benton,* 276 N.C. 641, 653, 174 S.E. 2d 793, 800-01:

> " 'A principal in the first degree is the person who actually perpetrates the deed either by his own hand *or through an innocent agent.*' (Emphasis added.) Any other who is actually or constructively present at the place of the crime either aiding, abetting, assisting, or advising in its commission, or is present for that purpose, is a principal in the second degree. Miller, Criminal Law §§ 73, 74, 75 (1934). *Accord, State v. Burgess,* 245 N.C. 304, 96 S.E. 2d 54; *State v. Jarrell,* 141 N.C. 722, 53 S.E. 127. In our law, however, 'the distinction between principals in the first and second degrees is a distinction without a difference.' Both are principals and equally guilty. *State v. Allison,* 200 N.C. 190, 194, 156 S.E. 547, 549; *accord, State v. Gaines,* 260 N.C. 228, 132 S.E. 2d 485; *State v. Peeden,* 253 N.C. 562, 117 S.E. 2d 398. An accessory before the fact is one who was absent from the scene when the crime was committed but who procured, counseled, commanded or encouraged the principal to commit it. *State v. Benton,* 275 N.C. 378, 167 S.E. 2d 775; *State v. Bass,* 255 N.C. 42, 120 S.E. 2d 580; Miller, *supra,* § 76; 22 C.J.S. *Criminal Law* § 90 (1961).
>
> Thus, ordinarily, the only distinction between a principal and an accessory before the fact is that the latter was not present when the crime was actually committed."

By its express terms, G.S. 14-87 extends to one who aids or abets in the commission of an armed robbery. " 'It is well settled that one who is present, aiding and abetting in a crime actually perpetrated by another, is equally guilty with the actual

perpetrator.' *State v. Garnett,* 4 N.C. App. 367, 167 S.E. 2d 63." *State v. Berryman,* 10 N.C. App. 649, 652, 179 S.E. 2d 875. However, presence, either actual or constructive, is indispensable to the position of a principal in the second degree. "Statements in the decisions that one who advises, counsels, or procures another to commit a crime is an aider or abettor even though not present at the scene when the crime is committed, would seem to be inexact, since one who merely counsels, procures, or commands another to commit a felony is an accessory before the fact under the statute [G.S. 14-5]. In the cases containing such statements, the defendants were all present at the time." 2 Strong, N.C. Index 2d, Criminal Law, § 9, pp. 491-92. See also R. Perkins, Criminal Law, Ch. 6, § 8 (2d ed. 1969); 1 Wharton, Criminal Law and Procedure, § 110 (Anderson 1957), 22 C.J.S., Criminal Law, § 85, p. 250.

[3] In some jurisdictions, by statute, all distinction between a principal and an accessory before the fact has been abolished. *State v. Benton, supra,* and authorities cited. The distinction still exists in this State in regard to general felonies. "If any person shall counsel, procure or command any other person to commit any felony, whether the same be a felony at common law or by virtue of any statute, the person so counseling, procuring or commanding shall be guilty of a felony. . . . " G.S. 14-5. A person convicted as an accessory before the fact to the felony of armed robbery is subject to imprisonment for not more than ten years. G.S. 14-6.

[4] The evidence here shows that defendant was not actually present during the perpetration of the robbery but was in a house ten to fifteen blocks away. However, the actual distance of a person from the place where a crime is perpetrated is not always material in determining whether the person is constructively present. See for instance, *State v. Chastain,* 104 N.C. 900, 10 S.E. 519, where defendant was 150 yards from the scene, armed with a rifle which would be fatal at that distance, with intent to use it to back up his brother, the perpetrator, if required. A guard who has been posted to give warning, or the driver of a "get-away" car, may be constructively present at the scene of a crime although stationed a convenient distance away. See R. Perkins, Criminal Law, Ch. 6, § 8 (2d ed. 1969), and cases collected there. "One who procures or commands another to commit a felony, accompanies the actual perpetrator to the vicinity of the offense and, with the knowledge of the

actual perpetrator, remains in that vicinity for the purpose of aiding and abetting in the offense and sufficiently close to the scene of the offense to render aid in its commission, if needed, or to provide a means by which the actual perpetrator may get away from the scene upon the completion of the offense, is a principal in the second degree and equally liable with the actual perpetrator. *State v. Bell,* 270 N.C. 25, 153 S.E. 2d 741; *State v. Sellers,* 266 N.C. 734, 147 S.E. 2d 225." *State v. Price,* 280 N.C. 154, 158, 184 S.E. 2d 866, 869. A person is deemed to be constructively present if he is near enough to render assistance if need be and to encourage the actual perpetration of the felony. 22 C.J.S., Criminal Law, § 86, p. 254.

[5] There is no evidence in the record which would support a finding that at the time the robbery was committed, defendant was situated where he could give Anderson any advice, counsel, aid, encouragement or comfort, if needed, while Anderson was perpetrating the robbery. Thus, defendant was neither actually nor constructively present at the time, and he could be guilty, at most, of being an accessory before the fact. An accessory before the fact "is one who meets every requirement of a principal in the second degree *except that of presence at the time.*" (Emphasis added.) R. Perkins, Criminal Law, Ch. 6 at 663 (2d ed. 1969). The evidence here would support a conviction for an accessory before the fact to armed robbery. The crime of accessory before the fact to a felony charged in an original bill of indictment is included in the charge of the principal crime. *State v. Jones,* 254 N.C. 450, 119 S.E. 2d 213; *State v. Bryson,* 173 N.C. 803, 92 S.E. 698; *Richardson v. Ross,* 310 F. Supp. 134 (E.D. N.C. 1970); 4 Strong, N.C. Index 2d, Indictment and Warrant § 18, p. 368. Consequently, defendant is not entitled to have the charge dismissed, *State v. Gammons,* 260 N.C. 753, 133 S.E. 2d 649, and the case is remanded so that the solicitor, should he elect to do so, may try defendant under the original bill of indictment for the offense of being an accessory before the fact to armed robbery.

Defendant has brought forward several assignments of error to statements made by the solicitor and the judge during the course of the trial and to portions of the court's instructions to the jury. Insofar as these assignments of error relate to the offense of conspiracy, we find them without merit. Since case # 72CR1433 is subject to a new trial, it is unnecessary that we consider these assignments of error with respect to that case.

Case # 72CR1432 (conspiracy to commit the felony of armed robbery) no error.

Case # 72CR1433 (armed robbery) new trial.

Judges VAUGHN and HEDRICK concur.

STATE OF NORTH CAROLINA v. MORTIMER RAYMAND EISEN

No. 721SC684

(Filed 22 November 1972)

1. **Criminal Law § 114— jury charge — expression of opinion**

When considered as a whole, the charge of the trial court in an action for gambling and establishing, using and keeping a blackjack table did not contain an unlawful expression of opinion. G.S. 1-180.

2. **Gambling § 4— blackjack — element of chance dominant**

In the game of blackjack, the element of chance clearly dominates the element of skill; therefore, the trial court did not err in refusing to rule as a matter of law that the game of blackjack is a game of skill.

3. **Criminal Law § 51— failure to find witness blackjack expert — no error**

The trial court did not abuse its discretion in refusing to find defendant's witness an expert in the fields of blackjack and mathematics.

4. **Criminal Law § 50; Gambling § 4— expert testimony — blackjack as game of skill — exclusion proper**

The trial court properly excluded testimony by defendant's witness regarding his opinion that blackjack was a game of skill since the question of whether blackjack was a game of chance or of skill was one for the jury to decide from the evidence and not one for a witness who by extensive study and experience had evidently made a career of the game.

APPEAL by defendant from *Copeland, Judge,* 15 May 1972 Session DARE Superior Court.

By indictment proper in form defendant was charged with (1) gambling and (2) establishing, using and keeping a gaming table, to wit, a table marked and used for playing the game of blackjack, a game of chance, together with implements and devices used in playing said game. Defendant was first charged

with said offenses in district court, was convicted, and appealed to superior court where the solicitor elected to proceed on a bill of indictment.

Principal evidence for the State was provided by three agents of the State Bureau of Investigation. Their testimony pertinent to this appeal is summarized as follows:

On or about 23 October 1971 Agents Dowdy and Cross went to the Beachcomber Lounge at Nags Head, arriving there at approximately 9:15 p.m. They entered the front door which was open and into a small foyer area in which was a cigarette machine, a guest register stand and a cash register. They then observed (evidently in an adjoining room) a Miss Greenberg dealing cards at a half-moon table with five persons sitting around the table on stools. Those sitting at the table were playing blackjack. Cross entered the game by purchasing twenty $1.00 chips and four $5.00 chips; Cross proceeded to play for some thirty or forty minutes. Defendant was in the lounge supplying the chips to the players as they bought them; defendant also assisted Miss Greenberg remove the chips if she won or pay the players if they won. Dowdy gave $20.00 to Miss Greenberg, she handed it to defendant who put the money in a slot in the table and supplied Dowdy with twenty white chips. Dowdy played the game and lost his chips in about forty-five minutes; he did win an occasional hand. Miss Greenberg left the table and defendant dealt the cards for awhile. The agents were dressed in sport clothes and Dowdy drank two beers while he was in the lounge. Cross stopped playing for awhile but later reentered the game; when he finally stopped playing, he requested defendant to cash his remaining five chips which defendant did by paying Cross $5.00. At approximately 11:25 p.m. Dare County officers entered the lounge and stopped the game.

The only witness presented by defendant was one Alan Davis whose pertinent testimony is briefly summarized as follows: He is a computer programmer employed with a firm in Westchester, New York, and his job is to translate an idea or mathematical formula into language a computer can understand. As part of his work toward obtaining a Masters Degree, he is compiling a thesis on the game of blackjack. He has devoted over 500 hours to this thesis, gathering extensive material on the game of blackjack. He has played the game in many casinos

in several states and foreign countries. He attempted to show in some detail that in the game of blackjack skill and not chance is the dominating element.

A jury found defendant guilty as charged and from judgment imposing two one year prison sentences, defendant appealed.

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

Twiford & Abbott by Christopher L. Seawell and Wallace W. Dixon for defendant appellant.

BRITT, Judge.

[1] Defendant's first contention is that the trial court in its charge to the jury expressed an opinion on the evidence in violation of G.S. 1-180.

In designating the specific portion of the charge in which he contends the court expressed an opinion, the defendant attempts to take segregated portions of a long sentence and combine those portions into a sentence which he contends was prejudicial. We find no merit in the contention. It is a well established principle of law in this State that the charge of the court will be construed contextually, and segregated portions will not be held prejudicial error when the charge as a whole is free from any prejudice to defendant. *State v. Richards, et al,* 15 N.C. App. 163, 189 S.E. 2d 577 (1972), and cases therein cited. We have carefully reviewed the jury charge, with particular reference to the portion complained of, but conclude that the court did not express an opinion.

Defendant's next contention is that the court committed error in not holding as a matter of law that the game of blackjack is a game of skill.

The game of blackjack was described in the evidence as follows: The dealer and all players get one card face down and one card face up. Picture cards have a count of ten and an ace at the election of the player may have a count of one or eleven. The object is to beat the dealer by getting closer to the number 21 than the dealer without exceeding that number. Cards may be drawn by the players and the dealer. Neither the dealer nor the players can anticipate which card will be received when they are dealt an additional card.

Decisions of our Supreme Court on the subject of gambling date back many years. In *State v. Gupton,* 30 N.C. 271, 273-274 (1848), the court held that the game of tenpins is not a game of chance. In discussing what is and what is not a game of chance, Chief Justice Ruffin said: "Though our knowledge on such subjects is very limited, yet we believe that, in the popular mind, the universal acceptation of 'a game of chance' is such a game as is determined entirely or in part by lot or mere luck, and in which judgment, practice, skill or adroitness have honestly no office at all, or are thwarted by chance. As intelligible examples, the games with dice, which are determined by throwing only, and those in which the throw of the dice regulates the play, *or the hand at cards depends upon a dealing with the face down,* exhibit the two classes of games of chance. A game of skill, on the other hand, is one in which nothing is left to chance, but superior knowledge and attention, or superior strength, agility and practice gain the victory." (Emphasis ours.)

In *State v. Taylor,* 111 N.C. 680, 681-682, 16 S.E. 168 (1892), Justice Avery speaking for the court said: "It is a matter of universal knowledge that no game played with the ordinary playing cards is unattended with risk, whatever may be the skill, experience or intelligence of the gamesters engaged in it. From the very nature of such games, where cards must be drawn by and dealt out to players, who cannot anticipate what ones may be received by each, the order in which they will be placed or the effect of a given play or mode of playing, there must be unavoidable uncertaintly (sic) as to the results."

In *State v. Stroupe,* 238 N.C. 34, 38, 76 S.E. 2d 313 (1953), a case involving the legality of a particular game of pool, Justice (later Chief Justice) Parker, speaking for the court said: "It would seem that the test of the character of any kind of a game of pool as to whether it is a game of chance or a game of skill is not whether it contains an element of chance or an element of skill, but which of these is the dominating element that determines the result of the game, to be found from the facts of each particular kind of game. Or to speak alternatively, whether or not the element of chance is present in such a manner as to thwart the exercise of skill or judgment."

[2] In the game of blackjack described above, we think the element of chance clearly dominates the element of skill; cer-

tainly, "the element of chance is present in such a manner as to thwart the exercise of skill or judgment." We hold that in the case at bar the court did not err in refusing to rule as a matter of law that the game of blackjack is a game of skill.

[3] Finally, defendant contends the trial court erred in not qualifying his witness Alan Davis as an expert in the fields of blackjack and mathematics and in not allowing Davis to testify as to the results of his tests and knowledge of the game of blackjack.

The record reveals that the court found Davis to be an expert in the field of computer science. It is well settled that the competency of a witness to testify as an expert in a particular matter at issue is addressed primarily to the discretion of the trial court, and its determination is ordinarily conclusive unless there be no evidence to support the finding or unless there is abuse of discretion *State v. Moore,* 245 N.C. 158, 95 S.E. 2d 548 (1956). We hold that the court did not abuse its discretion in not finding Davis to be an expert in the fields of blackjack and mathematics.

[4] As to the testimony proffered by Davis and disallowed by the court, we find it unnecessary to fully set forth the excluded evidence here. Davis was allowed to testify at length regarding his studies of and familiarity with the game of blackjack and how the game is played and how a player can improve his skill. The gist of the excluded testimony was that by extensive study and experience Davis had become an expert in the game of blackjack and considered it predominantly a game of skill. Examples of his excluded testimony are: "I believe that through study and practice we can make a person good enough to beat the game of blackjack. Some people take more time and practice and some people attain high skill. It varies with each person how much skill they can attain. * * * I consider it (blackjack) to be predominantly a game of skill. * * * The element of skill predominates the game of blackjack or 21."

We think the court properly excluded the testimony. Whether blackjack as described in the evidence was a game of chance or one of skill was a question for the jury to decide from the evidence and not a question for one who by extensive study and experience has evidently made a career of the game. If all

persons who played the game were as qualified as Davis, a different view might be justified, but, of course, that is not the case.

We hold that defendant received a fair trial free from prejudicial error and the sentences imposed were within the limits allowed by statute.

No error.

Chief Judge MALLARD and Judge BROCK concur.

STATE OF NORTH CAROLINA v. JOHNNY A. FRANKLIN
— AND —
STATE OF NORTH CAROLINA v. BILLY EUGENE HUGHES

No. 7229SC776

(Filed 22 November 1972)

1. **Larceny § 7— larceny of automobile — directed verdict — sufficiency of evidence**

The trial court erred in denying defendant Hughes' motion for directed verdict at trial on a felonious larceny charge where the State presented no evidence tending to show that Hughes was in joint possession of the stolen vehicle in which he was a passenger at the time of his arrest some 24 hours after the vehicle had been stolen.

2. **Larceny §§ 5, 7— possession of recently stolen property — directed verdict — sufficiency of evidence**

The trial court properly denied defendant Franklin's motion for directed verdict in a felonious larceny case where the evidence tended to show possession of recently stolen property in that defendant was arrested while in possession and control of a station wagon approximately 24 hours after it had been reported stolen and a registration certificate found inside the automobile indicated ownership by another.

APPEAL from *Wood, Judge,* 17 April 1972 Session of Superior Court, MCDOWELL County.

Defendants Franklin and Hughes were charged in separate bills of indictment with felonious larceny of a 1966 Rambler station wagon. Upon motion of the State and counsel for defendants, the two cases were consolidated for the purpose of trial. Each defendant entered a plea of not guilty.

The State presented evidence which tended to show the following:

On the night of 26 August 1971 between 10:00 p.m. and 11:00 p.m., a green 1966 Rambler station wagon belonging to J. D. Young was taken from in front of his home in Marion and driven away without his permission. Mr. Young then notified the police.

Approximately 24 hours later, at about 11:00 p.m. on the night of 27 August 1971, Patrolmen S. G. Ball and L. A. Turner were investigating an accident involving an automobile that had run into a ditch along Rural Paved Road No. 1416. Their attention was attracted to a green Rambler station wagon that rounded a curve and came to a fast stop approximately 50 feet from where they were standing. They observed the station wagon turn onto a gravel road, and a few minutes later, while they were still involved in getting the other vehicle out of the ditch, the Rambler came out of the gravel road and headed back in a southerly direction on 1416 away from the patrolmen. Patrolman Ball got into his patrol car and gave pursuit, thinking that there was something suspicious in the abrupt way the station wagon had earlier stopped plus the fact he had been notified to watch out for a stolen vehicle fitting the description of the vehicle he was following.

Patrolman Ball easily overtook and stopped the vehicle and stated at trial that the defendants were "not trying to outrun me." He further testified that Johnny Franklin was driving the vehicle and that defendant Hughes and Franklin's brother Nevel (not involved in this action) were passengers.

A registration certificate found in the vehicle indicated that J. D. Young was the owner and this was confirmed by a "Master Check" with the North Carolina Department of Motor Vehicles.

Neither defendant offered evidence in his behalf. Each defendant was convicted by the jury, and from judgment entered on the verdict each defendant appealed.

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

Story and Hunter, by Paul J. Story, for defendant appellants.

MORRIS, Judge.

Each defendant has assigned as error the trial judge's denial of his motions for directed verdict at the close of the State's evidence and at the close of all the evidence. A motion for a directed verdict of not guilty like the motion of nonsuit challenges the sufficiency of the evidence to go to the jury. *State v. Woodlief,* 2 N.C. App. 495, 163 S.E. 2d 407 (1968). Also it is established in North Carolina that upon a motion for nonsuit in a criminal case, the evidence must be interpreted in the light most favorable to the State, giving the State the benefit of all reasonable inferences that may be drawn. *State v. Bridgers,* 267 N.C. 121, 147 S.E. 2d 555 (1966).

APPEAL OF DEFENDANT HUGHES

[1] Defendant Hughes contends that the State presented no evidence tending to show that he was in joint possession of the stolen vehicle with defendant Franklin who was driving the automobile when they were arrested.

The State argues that defendant Hughes was found to be riding in the stolen vehicle approximately 24 hours after it was stolen and this, coupled with the alleged attempt to evade the arresting officers by turning in a gravel road and then doubling back, is enough to raise the inference created by the doctrine of possession of recently stolen property. The State further contends that since Hughes has given no contrary explanation as to why he was riding in the stolen vehicle, this is enough to sustain his conviction.

> "The possession of stolen property recently after the theft, and under circumstances excluding the intervening agency of others, affords presumptive evidence that the person in possession is himself the thief, and the evidence is stronger or weaker, as the possession is nearer to or more distant from the time of the commission of the offense." *State v. Cotten,* 2 N.C. App. 305, 310, 163 S.E. 2d 100 (1968).

As to the possession required to give rise to the above inference, Justice Bobbitt, now C.J., quoted in *State v. Frazier,* 268 N.C. 249, 150 S.E. 2d 431 (1966), the following at page 252:

> "In 52 C.J.S., Larceny § 107(b), the author, in discussing the significance of proof of possession by the accused of recently stolen property, says: 'Possession may be personal and exclusive, although it is the joint possession of two or more persons, if they are shown to have acted in concert, or to have been *particeps criminis*, the possession of one participant being the possession of all.'"

The State in its brief relies on the Frazier case to support its position. *Frazier* involved a prosecution of two defendants for taking an automobile, without the consent of the owner, with intent to deprive him temporarily of possession of the automobile, without intent to steal in violation of G.S. 20-105. In *Frazier* there was evidence that an automobile was stolen by someone from a parking lot, and that approximately 10 hours later, officers saw one defendant driving that automobile and the second defendant sitting in the front seat with him, and that the officers drove up to question the defendants while the defendants were stopped at an intersection in obedience to a stop light. When one of the officers got out of the police car to talk to defendants "they started pulling off" and in doing so, the front of their car hit the police car. Both defendants jumped from the automobile and attempted to flee on foot. The Court stated:

> "In our view, the unlawful and unexplained occupancy and use of Morton's Dodge by Frazier [driver] and Givens [passenger] under the circumstances disclosed by the evidence, and precipitous flight of both defendants when approached by the officers, was sufficient to permit and to support a finding by the jury that the Dodge was in the *joint possession* of Frazier and Givens." *Frazier* at p. 252. (Emphasis added.)

The Frazier case is distinguishable on its facts from the case at hand. Taking the evidence in the light most favorable to the State, all that is shown is that defendant Hughes was a passenger in a stolen vehicle. The arresting patrolman testified that defendants were "not trying to outrun me." And once the vehicle was stopped, defendant Hughes did not attempt to flee on foot. There is no evidence that defendant Hughes was acting in concert with defendant Franklin or that they were *particeps criminis*. From the face of the record it could just as easily be inferred that defendant Hughes was a hitchhiker or

an innocent friend just along for the ride. Therefore, the trial judge erred in denying defendant Hughes' motion.

APPEAL OF DEFENDANT FRANKLIN

[2] In relation to the denial of his motion for a directed verdict, defendant Franklin contends that evidence presented at trial is sufficient to rebut the inference of his guilt arising from his possession of recently stolen property which he concedes is established by the evidence presented. More specifically defendant Franklin argues that had he actually stolen the car and known he was suspected, then in a 24-hour period, he could have placed himself far beyond the reach of any officer in North Carolina. We find no merit in the somewhat strained logic of this argument.

In *State v. Jetton,* 1 N.C. App. 567, 162 S.E. 2d 102 (1968), the evidence tended to show that the automobile in question was owned by and was in the lawful possession of a credit corporation; that the automobile was taken from the premises of the credit corporation without its consent. When apprehended at least four days later, defendant had possession and control of the automobile but had no evidence of ownership. This Court in *Jetton* held that this evidence was sufficient to submit to the jury on the issue of defendant's guilt of larceny of an automobile upon instructions as to the "recent possession" of stolen property.

Taking the evidence in the light most favorable to the State, defendant Franklin was arrested in possession and control of the station wagon, being identified by the arresting officer as its driver, approximately 24 hours after it had been reported stolen, with a registration certificate found inside the automobile indicating ownership by another. Defendant's possession in this case was much more "recent" than the defendant's in the Jetton case. Here there is also the factor of the registration certificate indicating ownership in another. There was ample evidence to go to the jury, and defendant Franklin's assignment of error is overruled.

As to defendant Hughes—Reversed.

As to defendant Franklin—No error.

Judges CAMPBELL and PARKER concur.

STATE OF NORTH CAROLINA v. JAMES WILLIAM TURNBULL

No. 7228SC786

(Filed 22 November 1972)

1. **Criminal Law § 84; Searches and Seizures § 1— valid search warrant — reasonable search — admissibility of fruits of search**

The trial court did not err in failing to find that an entry and search by officers was conducted in an unreasonable manner where the evidence on voir dire showed that an officer had reasonable grounds to believe that a felony was being committed upon the premises in question, that the officer entered the premises under a valid search warrant after observing them for two hours, and that the officer identified himself and indicated his authority to search immediately upon his entry; therefore, defendant's motion to suppress evidence obtained during the search was properly denied.

2. **Narcotics § 4— possession of heroin — sufficiency of evidence for submission of case to jury**

Evidence was sufficient to submit the case to the jury in a prosecution for possession of heroin where such evidence tended to show that defendant, at the time he was approached by officers, was no more than eight feet from an open closet in which heroin was found, that his eyes were glassy and sensitive to light, that he was slow in responding to questions, that there was evidence of fresh needle marks on his arm, that there was no odor of alcohol about him and that there was testimony that he was apparently under the influence of a depressant drug.

APPEAL from *Thornburg, Judge,* 10 July 1972 Session of Superior Court held in BUNCOMBE County.

Defendant was convicted on a valid indictment charging him with unlawful possession of heroin in violation of Schedule I of the North Carolina Controlled Substances Act.

Defendant entered a plea of not guilty and then moved to suppress evidence seized as a result of the search of the house in which defendant was arrested. Prior to empaneling the jury, the court conducted a *voir dire* during which defendant offered no evidence. The court made findings of fact to the effect that a law enforcement officer, armed with a valid search warrant, observed the premises in question for approximately two hours, stepped into the house through a door which was approximately six to eight inches open and, as he did so, identified himself to the persons in the house and indicated his authority to

search. No one objected to his entry and it was not necessary to forcibly break open anything blocking entry. The court further found that the officer had reasonable grounds to believe that a felony or other infamous crime was being committed on the premises. The court then concluded as a matter of law that: (1) the Constitution of North Carolina, the Constitution of the United States and the laws of North Carolina were not violated by the officer in his manner of entry; (2) the search warrant under which he entered was a valid warrant; and (3) the evidence obtained pursuant to that warrant was admissible, having been legally obtained.

The State's evidence tended to show that when the officers entered the house, defendant was in the living room about six to eight feet from a doorless closet in which was found a cigarette package containing a bag of what was later identified as heroin. There were eleven other persons present in the house. After being advised of his rights, defendant was examined by the officers. They testified that defendant's eyes were "glassed," his pupils were very sensitive to light, he was "slow talking" and slow to respond to questions, he did not appear at all as a normal person would, there was no odor of alcohol on his breath and there was evidence of fresh needle punctures on defendant's arm. In the opinion of the officer, defendant's physical and mental faculties were appreciably impaired by the use of some depressant type drug. Heroin is a depressant. The search of the premises revealed two bags of heroin, six needles and syringes and two bottle cap "cookers" used to heat a mixture of heroin and water in preparation for injection. No illegal substances were found on defendant's person.

Defendant's evidence tended to show that he had not possessed or used any controlled substance, needle or syringe on the night of his arrest. He testified that he had been at the house about twelve hours, having left and returned once during that period. He testified to having consumed three or four beers prior to coming to the house. Defendant admitted having used drugs about three months prior to this arrest and he asserted that some of the needle puncture marks on his arm were from that previous use. He testified that he had discontinued the use of drugs due to having contracted hepatitis from a dirty needle. He also stated that he had a fresh needle mark on his left arm as a result of a blood test conducted in connection with tests for hepatitis.

Defendant was sentenced to serve three years imprisonment.

Attorney General Robert Morgan by Parks H. Icenhour, Assistant Attorney General, for the State.

George W. Moore for defendant appellant.

VAUGHN, Judge.

[1] Defendant challenges the court's ruling denying his motion to suppress the evidence obtained as a result of the search of the premises. Defendant contends that the entry made by the officers was illegal as a violation of G.S. 15-44. Defendant correctly observes that the question of whether there was an actual breaking of the door is not determinative of the issue. The right sought to be protected is the right against unreasonable searches and seizures. U.S. Const. amend. IV; N.C. Const. art. 1, § 20.

Ordinarily, an officer of the law may not enter a citizen's dwelling except under authority of a search warrant issued in accord with pertinent statutory provisions. *In re Walters,* 229 N.C. 111, 47 S.E. 2d 709. North Carolina has defined an unreasonable search to be an examination or inspection without authority of law of one's premises or person with a view to the discovery of some evidence of guilt to be used in the prosecution of a criminal action. *State v. Colson,* 274 N.C. 295, 163 S.E. 2d 376; *State v. Robbins,* 275 N.C. 537, 169 S.E. 2d 858.

"It is well settled, in both federal and state courts, that evidence obtained by unreasonable search and seizure is inadmissible. Fourth and Fifth Amendments to the United States Constitution; Article I, Section 15, [now Section 20], North Carolina Constitution; G.S. 15-27; *Mapp v. Ohio,* 367 U.S. 643, 6 L.Ed. 2d 1081, 81 S.Ct. 1684; *State v. Colson,* 274 N.C. 295, 163 S.E. 2d 376. However, the constitutional protection claimed by defendant does not extend to all searches and seizures, but only to those which are unreasonable." *State v. Reams,* 277 N.C. 391, 395, 178 S.E. 2d 65, cert. den. 404 U.S. 840, 30 L.Ed. 2d 74, 92 S.Ct. 133.

The wording of the Fourth Amendment to the United States Constitution would indicate that a valid search warrant is *prima facie* evidence of the reasonableness of the search. *Gouled v. U.S.,* 255 U.S. 298, 65 L.Ed. 647, 41 S.Ct. 261; *State v. Smith,*

251 N.C. 328, 111 S.E. 2d 188. In any event, the reasonableness of the search is in the first instance a substantive determination to be made by the trial court from the facts and circumstances of the case and in the light of the criteria laid down by the Fourth Amendment and opinions which apply that amendment. *Ker v. California,* 374 U.S. 23, 10 L.Ed. 2d 726, 83 S.Ct. 1623; *State v. Howard,* 274 N.C. 186, 162 S.E. 2d 495; *State v. Robbins, supra; State v. Reams, supra.*

The findings of fact made by a trial judge at the end of a *voir dire* examination, if supported by competent evidence, are conclusive and no reviewing court may properly set aside or modify such findings. *State v. Barber,* 278 N.C. 268, 179 S.E. 2d 404. In the instant case, the findings of the trial court, supported as they are by competent evidence, support that court's conclusions of law holding the search valid. We hold that, upon the facts of this case, the court did not err in failing to find that the entry and search by the officers was conducted in an unreasonable manner. The evidence was admissible and defendant's motion to suppress the same was properly denied.

Defendant argues that the trial court erred in admitting evidence of controlled substances found in the bedroom of the house in which defendant was arrested. Defendant contends he was not a lessee of the premises and the introduction of evidence found in an area not clearly under his control was error. Defendant cites nothing in support of his position. In *State v. Cook,* 273 N.C. 377, 160 S.E. 2d 49, defendant Furr was not named in the search warrant nor was she a lessee of the premises, but she was present when a search revealed barbiturate capsules in the same room with the defendant and barbiturates found elsewhere in the house were held admissible against her. The evidence was properly admitted.

[2] Defendant contends that there was insufficient evidence to sustain the charge of possession of controlled substances and the trial court erred in denying defendant's motion to dismiss. If there is substantial evidence—direct, circumstantial or both—to support a finding that (1) the offense charged has been committed and (2) the defendant committed it, it is a case for the jury. *State v. Cook, supra; State v. Hart,* 12 N.C. App. 14, 182 S.E. 2d 254. In *State v. Cook, supra,* the North Carolina Supreme Court held that evidence that defendant Furr was unsteady on her feet, had glassy, dilated eyes, mumbled unin-

telligibly, seemed to be in a stupor, had no odor of alcohol about her and was apparently under the influence of drugs was evidence from which a reasonable inference of guilt could be drawn and required submission to the jury. In the present case, defendant was no more than eight feet from an open closet in which heroin was found, his eyes were glassy and sensitive to the light, he was slow in responding to questions, there was evidence of fresh needle marks on his arm, there was no odor of alcohol about him and there was testimony that he was apparently under the influence of a depressant drug. We hold that the evidence was sufficient to require submission of the case to the jury.

Defendant's remaining assignments of error have been considered and found to be without merit.

No error.

Judges HEDRICK and GRAHAM concur.

STATE OF NORTH CAROLINA v. MELVIN DEWALT

No. 7227SC703

(Filed 22 November 1972)

1. **Criminal Law § 92— consolidation of charges against two defendants — confessions implicating each other — only one confession used**

Defendant was not prejudiced by the consolidation for trial of charges against defendant and a co-defendant for the identical crimes of breaking or entering and larceny, notwithstanding each defendant had made a statement incriminating the other, where only defendant's statment was admitted in evidence at the trial.

2. **Criminal Law § 128— denial of mistrial — co-defendant's change of plea to guilty**

The trial court did not err in the denial of defendant's motion for mistrial when his co-defendant changed his plea from not guilty to guilty where the co-defendant's guilty plea was entered during a voir dire hearing in the absence of the jury, the co-defendant was removed from the courtroom during the jury's absence, the jury was not informed that the co-defendant had pled guilty and there was nothing in the remainder of the trial which would have indicated to the jury that the co-defendant had entered such plea.

3. Criminal Law § 76— admissibility of confession — conflicting evidence

The trial court's determination that defendant's confession was made freely, understandingly and voluntarily was supported by competent evidence on voir dire, although the evidence was conflicting, and the confession was properly admitted in evidence.

4. Burglary and Unlawful Breakings § 5; Larceny § 7— breaking and entering — larceny — sufficiency of evidence — confession

The State's evidence was sufficient to be submitted to the jury as to defendant's guilt of breaking or entering a service station and larceny of property therefrom where there was evidence that a service station was entered and merchandise taken therefrom, a witness testified he saw three people carrying merchandise from the station and putting it into two cars, and defendant's confession established that he was one of the three people who entered the station and took merchandise therefrom and placed it in his car.

APPEAL from *Harry C. Martin, Judge,* 9 May 1972 Criminal Regular Session, Superior Court, LINCOLN County.

Defendant was charged in two separate bills of indictment with felonious breaking or entering and larceny. Through court-appointed counsel, he entered a plea of not guilty to each charge. The two cases and identical charges in *State v. Freddie Luckey,* 71CR3946 and 71CR3950, were consolidated for trial. The jury found defendant guilty of two offenses of felonious breaking or entering and two offenses of felonious larceny. From judgment entered on the verdicts of the jury, defendant appealed and is represented on appeal by court-appointed counsel. The record reveals that defendant moved that he be allowed to withdraw his appeal. Upon a hearing, with defendant and his counsel present, the court entered an order allowing him to withdraw his appeal. Six days thereafter, by letter, he instructed the court that he would like to appeal. Thereafter, the court entered an order treating the letter as notice of appeal, setting time for service of statement of case on appeal, and appointing counsel to prosecute the appeal.

Attorney General Morgan, by Associate Attorney Witcover, for the State.

C. E. Leatherman for defendant appellant.

MORRIS, Judge.

[1] Defendant's first assignment of error is directed to the court's allowing the State's motion to consolidate for trial the

charges against defendant and the charges against Freddie Luckey. Both were charged with breaking into the same two service stations at the same time and the larceny of goods from both stations. Defendant objected to the consolidation as prejudicial to him. Defendant contends the trial court abused its discretion because the "trial judge knew or should have known enough about the cases beforehand to foresee the possible prejudices to the defendant DeWalt." Each defendant had made a confession implicating the other. Defendant was certainly in a better position than the judge to know about the confessions. The defendant gave the court no reasons for possible prejudice to defendant. He argues on appeal that the court should not have allowed consolidation because each defendant had made a statement incriminating the other. Defendant relies on *State v. Fox,* 274 N.C. 277, 163 S.E. 2d 492 (1968), wherein the Court discussed at length the question of whether a defendant jointly indicted with another who moves for severance has a right to a separate trial when the State will offer in evidence the confession or admission of a co-defendant which implicates moving defendant in the crime charged and is inadmissible against him. In that case, one of the co-defendants testified and was cross-examined by his co-defendants. His statement was admissible. However, no other defendant testified and the confession of each, implicating all the others, was admitted into evidence. The Court held that *Bruton v. U.S.,* 391 U.S. 123, 20 L.Ed. 2d 476, 88 S.Ct. 1620 (1968), required that defendants be given a new trial. *Bruton* granted a new trial to a defendant against whom a co-defendant's statement had been used. The trial court had instructed the jury that the statement could be considered only as to the defendant making it. The Supreme Court of the United States, speaking through Mr. Justice Brennan, said:

> " . . . We hold that, because of the substantial risk that the jury, despite instructions to the contrary, looked to the incriminating extrajudicial statements in determining petitioner's guilt, admission of Evans' confession in this joint trial violated petitioner's right of cross-examination secured by the Confrontation Clause of the Sixth Amendment. We therefore overrule *Delli Paoli* and reverse." Id. at 126, 20 L.Ed. 2d at 479, 88 S.Ct. at 1622.

Bruton and *Fox* are not applicable here. Although neither defendant testified, the evidence with respect to Luckey's con-

fession was given in the absence of the jury. The only evidence of a confession heard by the jury was the evidence with respect to defendant's own statement. Additionally, each defendant's statement was made in the presence of the other. See *State v. Bryant,* 250 N.C. 113, 108 S.E. 2d 128 (1959). Defendant gave no reasons for his statement of prejudice to defendant when he made his motion, nor has he shown on appeal any prejudice resulting to defendant. This assignment of error is overruled.

[2] During the course of the trial defendant Luckey changed his plea from not guilty to guilty. Defendant moved for mistrial. This motion was denied, and defendant assigns this action of the court as prejudicial error. At the time Luckey changed his plea, three witnesses had testified for the State in the presence of the jury. The *voir dire* examination of the officer as to the voluntariness of the confessions was being conducted. The jury was, of course, out of the courtroom. The court interrogated Luckey, found that his plea was entirely voluntary, and accepted the plea. The *voir dire* examination of the officers and defendant continued. During the absence of the jury the court directed that Luckey be taken from the courtroom. When the jury returned, the court advised them that he had removed the case of Freddie Luckey from their consideration. The jury was not informed that Luckey had entered a plea, nor was there anything in the remainder of the trial which would indicate to them that that was the disposition of Luckey's case. We find no prejudice to defendant, and overrule this assignment of error.

[3] Defendant next contends that the court committed error in admitting into evidence the confession of defendant. In support of this position he simply points out that defendant testified he was mistreated and threatened by the officers, and his confession was not voluntary. The court conducted a lengthy *voir dire* examination. Evidence given by the officers and evidence given by defendant was in sharp conflict. The court found facts and adjudged that the confession was freely, understandingly and voluntarily given without threat or fear or compulsion. The facts found are supported by competent evidence. "The conflict in the testimony on the *voir dire* raised a question of credibility of the witnesses, which was for the determination of the trial court. His findings of fact, supported by competent evidence, are conclusive." (Citations omitted.) *State v. Blackmon,* 280 N.C. 42, 48, 185 S.E. 2d 123 (1971).

[4] Finally, defendant contends that his motions for nonsuit should have been allowed because although there was evidence establishing the *corpus delicti,* that same evidence also established the guilt of someone other than defendant. We said, in *State v. Macon,* 6 N.C. App. 245, 253, 170 S.E. 2d 144 (1969), aff'd. 276 N.C. 466, 173 S.E. 2d 286 (1970) :

> " 'The proof of every crime consists of: (1) proof that the crime charged has been committed by someone; and (2) proof that the defendant is the perpetrator of the crime. The first element is the body of the crime, or the *corpus delicti;* the second is the proof of defendant's connection with the crime, *i.e.,* his guilty participation or agency therein.' Wharton's Criminal Evidence (12th Ed.), Vol. 2, § 393, p. 130. In North Carolina it is required that ' . . . the confession be "corroborated" by independent evidence of the *corpus delicti.* By this is meant, evidence that the offense charged was committed by someone, not necessarily by the defendant himself. The corroborative evidence need not be direct; it may be circumstantial, and it is sufficient (if) the circumstances are such "as will, *when taken in connection with the confession,* establish the prisoner's guilt in the minds of the jury beyond a reasonable doubt." ' Stansbury, N.C. Evidence 2d, § 182."

Here there was evidence that two service stations were entered and merchandise taken therefrom. A witness saw two cars in front of one of the stations and three people carrying merchandise from the building and putting it in the cars. One was a blue car and the other a brown car. Defendant's confession established that he was driving a tan car and was one of the three people who entered the station and took merchandise therefrom and placed it in his car. This assignment of error is also without merit.

Defendant has been given a fair trial free from prejudicial error.

No error.

Judges CAMPBELL and PARKER concur.

STATE OF NORTH CAROLINA v. DONNY D. SCOTT

No. 7226SC795

(Filed 22 November 1972)

1. **Criminal Law § 88; Witnesses § 8— contradiction of answers elicited on cross-examination — collateral matters**

It is a general rule of evidence in this State that answers made by a witness to collateral questions on cross-examination are conclusive, and that the party who draws out such answers will not be permitted to contradict them except to connect the witness with the cause or the parties or to show motive or disposition of the witness toward the cause or the parties.

2. **Criminal Law § 88; Witnesses § 8— cross-examination — contradictory evidence — collateral matters — test**

The proper test for determining what is material and what is collateral is whether the evidence offered in contradiction would be admissible if tendered for some purpose other than mere contradiction.

3. **Criminal Law § 88; Witnesses § 8— cross-examination — contradictory evidence improperly admitted**

Where a witness's testimony concerning her observations of defendant's witness Clow in her backyard served only to contradict Clow's denial on cross-examination that he had been there, the trial court erred in allowing the witness to testify since Clow's presence or absence in the witness's yard clearly involved a collateral matter.

APPEAL by defendant from *Friday, Judge,* 15 May 1972 Schedule B Criminal Session of Superior Court held in MECKLENBURG County.

By indictment proper in form defendant was charged with (1) the felonious breaking and entering on 10 June 1971 of a particularly described premises occupied by one Willie Daniel Hartsell and (2) the felonious larceny after such breaking and entering of a color television set. The State presented the testimony of Willie D. Hartsell, who testified that he left his house on the Huntersville-Mount Holly Highway about 6:40 a.m. on 10 June 1971 and that when he returned about 4:30 p.m. he found his house had been broken into and his color television set valued at $600.00 was missing. The State then presented the testimony of Danny Reid Zeigler, who testified in substance to the following: Zeigler and defendant are first cousins. On 10 June 1971 Zeigler lived with his parents on Eastfield Road in the northern part of Mecklenburg County. It is approxi-

mately nine miles from Mr. Hartsell's house to where Zeigler was living. Defendant's parents lived on the same road about half a block away. About 10:00 or 11:00 a.m. on 10 June 1971 Zeigler and defendant went to defendant's mother's house and borrowed her car to go fishing. They arrived at a pond off of Huntersville-Mount Holly Road about noon. After fishing two or three hours they drove up the road looking for a house to break in. Between 3:00 and 4:00 p.m. they broke into the Hartsell residence and stole the television set, carrying it away in the automobile. Later that afternoon they sold the television for $100.00, which they split. On cross-examination Zeigler testified that he knew Donald Clow but did not see him at the pond that day.

Defendant testified to the following: About 10:30 a.m. on the day in question Zeigler had come to his trailer and asked him to go fishing. Defendant told Zeigler to go ahead and he would meet him at the pond. After Zeigler left, defendant went to his mother's home and borrowed her car. He then drove to Derrick's Trailer Park, where he picked up a friend, Donald Clow, about 11:30. Defendant and Clow then drove to the pond, where they found Zeigler already fishing. About 1:00 p.m. Zeigler asked defendant if he could borrow defendant's mother's car, as he wanted to go get more fishing bait and his own car was not running good. Defendant told him he could, whereupon Zeigler left in defendant's mother's car and did not return until after 4:00 p.m. They continued fishing twenty or thirty more minutes, and then defendant drove Clow home. Zeigler left about ten or fifteen minutes before they did. Clow was with defendant the entire time Zeigler was gone.

Clow, called as a witness by the defense, corroborated defendant's testimony.

The jury found defendant guilty as charged in the bill of indictment. On the verdict finding defendant guilty of felonious breaking and entering, judgment was entered sentencing defendant to prison for a period of not less than five nor more than seven years. On the verdict finding defendant guilty of larceny, prayer for judgment was continued from term to term for a period of five years. From the judgment imposing the prison sentence, defendant appealed.

Attorney General Robert Morgan by Associate Attorney George W. Boylan for the State.

Cole & Chesson by Calvin W. Chesson for defendant appellant.

PARKER, Judge.

[1] On cross-examination of defendant's witness, Clow, the solicitor asked the following question and received the following answer:

> Question: "All right. Mr. Clow, on the morning of June 10th, 1971, between eight and 9:45 in the morning, weren't you in the backyard of Mrs. Saunders' home on Eastfield Road?"
>
> Answer: "No, sir. I don't even know her."

In rebuttal, the State called Mrs. J. R. Saunders, who testified that she lived on Eastfield Road, that the Zeiglers lived about three-fourths of a mile further down the road, and the Scotts lived at approximately the same location. Over defendant's objections Mrs. Saunders was permitted to testify that about 9:45 a.m. on 10 June 1971 she observed defendant's witness, Donald Clow, and another person, who was not identified, in the backyard of her home trying to lift a motor from her husband's boat, she screamed, and Clow and the other person ran away. The admission of this testimony is the basis of defendant's only assignment of error. This assignment of error must be sustained.

> "It is a general rule of evidence in North Carolina 'that answers made by a witness to collateral questions on cross-examination are conclusive, and that the party who draws out such answers will not be permitted to contradict them; which rule is subject to two exceptions, first, where the question put to the witness on cross-examination tends to connect him directly with the cause or the parties, and second, where the cross-examination is as to a matter tending to show motive, temper, disposition, conduct, or interest of the witness toward the cause or parties.' " *State v. Long,* 280 N.C. 633, 639, 187 S.E. 2d 47, 50.
>
> "The principal reasons of the rule are, undoubtedly, that but for its enforcement the issues in a cause would

be multiplied indefinitely, the real merits of the controversy would be lost sight of in the mass of testimony to immaterial points, the minds of jurors would thus be perplexed and confused, and their attention wearied and distracted, the costs of litigation would be enormously increased, and judicial investigation would become almost interminable." 58 Am. Jur., Witnesses, § 784, p. 433.

[2] The proper test for determining what is material and what is collateral is whether the evidence offered in contradiction would be admissible if tendered for some purpose other than mere contradiction; or in the case of prior inconsistent statements, whether evidence of the facts stated would be so admissible. *State v. Long, supra; State v. Taylor,* 250 N.C. 363, 108 S.E. 2d 629; 3A Wigmore, Evidence, §§ 1003, 1020 (Chadbourn rev. 1970); 58 Am. Jur., Witnesses, § 785.

[3] In the case now before us, had Mrs. Saunders' testimony that she saw Clow in her backyard on the morning of 10 June 1971 placed him at such a distance as to make it unlikely that he could have been with defendant later that day during the time and at the places defendant and Clow testified they were together, such testimony would have tended directly to rebut defendant's alibi and would have been admissible for that purpose. All of the evidence, however, indicates that the home of Mrs. Saunders was sufficiently near to all places relevant to this case that the fact that Clow may have been in her backyard at 9:45 in the morning in no way tends to show that he could not also have been in defendant's company later in the day at all of the places and times they testified they were together. Therefore, Mrs. Saunders' testimony in no way tended to rebut defendant's alibi defense and its only purpose was to contradict Clow's denial that he had been in her yard. This was clearly a collateral matter and one which in no way tended to connect Clow with the defendant or with the State's case against the defendant, nor did it in any way tend to show Clow's "motive, temper, disposition, conduct, or interest toward the cause or parties."

Evidence that Clow attempted to steal a motor from the boat in Mrs. Saunders' backyard certainly reflected upon his good character, but as a witness his character was only collaterally in issue. While the solicitor was free to cross-examine him in an attempt to show his bad character, his answer on

cross-examination was conclusive and could not be contradicted by other testimony. Stansbury, N. C. Evidence 2d, § 111, p. 254. "Thus, if the witness denies the alleged misconduct, the examiner must 'take his answer,' not in the sense that he may not further cross-examine to extort an admission, but in the sense that he may not call other witnesses to prove the discrediting acts." McCormick, Handbook of the Law of Evidence," § 42, p. 89.

In this case the trial court committed error in overruling defendant's timely objections and motions to strike Mrs. Saunders' testimony concerning her observations of defendant's witness Clow.

For the error noted, defendant is entitled to a

New trial.

Judges CAMPBELL and MORRIS concur.

STATE OF NORTH CAROLINA v. GARY PATTON BRADY

No. 7226SC772

(Filed 22 November 1972)

1. **Criminal Law § 154— failure to serve case on appeal in time — review of record**

Where defendant failed to serve the case on appeal in time, the Court of Appeals will review only the record proper and determine whether errors of law are disclosed on the face thereof.

2. **Searches and Seizures § 3— attachment of affidavit to warrant**

There was sufficient evidence for the trial court to find that the warrant and affidavit were properly attached as required by G.S. 15-26.

3. **Searches and Seizures § 3— warrant to search for narcotics — sufficiency of affidavit**

An affidavit alleging that the affiant believed from information of a reliable informant that defendant had narcotics on his premises, describing the house specifically, stating that the informant had purchased heroin in defendant's home within the last 12 hours and stating that the informant had in the past given information leading to the arrest of two named individuals was sufficient to show probable cause and support issuance of a search warrant.

4. Narcotics § 4— felonious possession of heroin — sufficiency of evidence to support conviction

There was sufficient evidence to support conviction of defendant for felonious possession of heroin where such evidence tended to show that defendant rented a three-bedroom house which he shared with two others, that the co-tenants, but not defendant, were present on the night of the search and that a variety of items containing heroin or traces of heroin were found in defendant's bedroom.

APPEAL by defendant from *Chess, Special Judge,* April 1972 Session of MECKLENBURG Superior Court.

Defendant was charged in a valid bill of indictment with the felonious possession of heroin. He entered a plea of not guilty, was tried before a jury which returned a verdict of guilty, and was sentenced to imprisonment for two to three years.

Attorney General Robert Morgan by Assistant Attorneys General Raymond W. Dew, Jr., and Rafford E. Jones for the State.

James J. Caldwell for defendant appellant.

CAMPBELL, Judge.

The judgment from which defendant appeals was entered on 21 April 1972 and was signed by Judge Chess. The appeal entry shows that defendant was given 60 days from 21 April 1972 to serve his case on appeal. Service of the case on appeal had to have been made by 20 June 1972. It was not served until 18 August 1972.

On 14 June 1972 an order signed by Judge Hasty allowed defendant an additional 60 days to docket the record with the Court of Appeals *and* to *serve* the case on appeal. Because of Judge Hasty's order the record on appeal was docketed in this Court in apt time.

However, defendant's case on appeal was not served on the solicitor within the proper time. Rule 50 of the North Carolina Court of Appeals Rules of Practice provides that the *trial judge* may, for good cause and after reasonable notice to the opposing party or counsel, enter an order or successive orders extending the time for service of the case on appeal. Rule 5 of the Rules of Practice in this Court provides that the *trial tribunal* may, for good cause, extend the time not exceeding 60 days, for docketing the record on appeal.

When the order extending the time to serve the case on appeal is not signed by the trial judge who signed the original judgment appealed from as required by Rule 50, the appeal is subject to dismissal by authority of Rule 48. *State v. Shoemaker*, 9 N.C. App. 273, 175 S.E. 2d 781 (1970).

[1] However, with respect to failure to *serve* the case on time, as distinguished from failure to docket the case on time, this Court has held that rather than dismiss the appeal, the Court of Appeals will review only the record proper and determine whether errors of law are disclosed on the face thereof. *State v. Lewis*, 9 N.C. App. 323, 176 S.E. 2d 1 (1970).

Defendant appellant has cited this Court no authority to support some of his contentions, and scant authority to support the others. We have searched the record and find no error which could justify disturbing the judgment below.

Defendant contends that there was no probable cause for issuance of the search warrant; that it was error for the court, on voir dire examination, to hear evidence not included in the affidavit to determine if probable cause existed for issuance of the warrant; and that it was error to refuse to allow his attorney to testify at the trial to contradict the police officer to the effect that at a preliminary hearing he had testified differently.

[2] There was sufficient evidence for the court to find that the warrant and affidavit were properly attached as required by G.S. 15-26. Both the police officer who procured the warrant and the magistrate who issued the warrant testified that the affidavit was attached to the warrant when issued and served.

[3] Both the warrant and affidavit were examined in court by the trial judge, and the existence of probable cause may be determined from those documents themselves. The affidavit alleged that the police officer-affiant believed from information of a reliable informant that defendant had narcotics on his premises. The house was specifically described and identified by its postal address. The affiant stated that the informant had purchased two bags of heroin in defendant's home within the last 12 hours, which heroin had been given to the affiant. The affiant further stated that the informant had in the past given information leading to the apprehension and arrest of two named individuals. This information is sufficient to support the

warrant. *State v. Altman,* 15 N.C. App. 257, 189 S.E. 2d 793, *cert. denied,* 281 N.C. 759, 191 S.E. 2d 362 (1972).

[4] The evidence presented at trial tended to show that defendant and two companions lived in a three-bedroom house which defendant rented; that defendant occupied bedroom number two, that on the night of the search defendant was not present in the house but that his two co-tenants were present; and that the officers found a variety of items which contained heroin or traces of heroin, as determined by expert laboratory tests.

The officers found the following items: (1) three aluminum foil bags containing a white powder; (2) five glassine bags containing a white powder (found in bedroom two); (3) one brown manila envelope containing a white powder (bedroom two); (4) three brown envelopes containing a white powder (bedroom two); (5) 21 empty brown envelopes (bedroom two); (6) 301 empty glassine bags (bedroom two); (7) ten needles and syringes; (8) nine spoons burned on the bottom and containing a vegetable residue; (9) one 7-Up bottle cap burned on the bottom and containing a vegetable residue (bedroom two); (10) one brass bowl containing a vegetable residue (bedroom one); (11) one brown envelope containing a vegetable material (bedroom one); (12) two rubber hoses 2½ feet long (bedroom one); (13) 48 capsules of white powder (bedroom two).

Items (2), (3), and (9), all found in defendant's bedroom, number two, were chemically tested by the police laboratory. The white powder in items (2) and (3) was found to be heroin; the residue in the burned bottle cap was also found to have been heroin.

The evidence is certainly sufficient to support the verdict. If defendant's attorney wished to testify as a witness he should have withdrawn as counsel prior to the trial; there was no abuse of the court's discretion in refusing to allow counsel to withdraw after the trial had begun. There is no prejudicial error in the court's charge to the jury, and a sentence of imprisonment for two to three years is within the five-year maximum allowed by G.S. 90-95(c) for possession of a Schedule I controlled substance.

No error.

Judges MORRIS and PARKER concur.

STATE OF NORTH CAROLINA v. WILLIE J. BARKSDALE

No. 7228SC583

(Filed 22 November 1972)

1. **Robbery § 2— common law robbery — attempted common law robbery — punishable as felony**

Common law robbery or attempted common law robbery when aggravated by the use or threatened use of a firearm or other dangerous weapon is a felony punishable in accordance with the provisions of G.S. 14-87.

2. **Robbery § 5— conviction for attempted armed robbery and lesser included offense — error**

The trial court erred in allowing the jury to convict defendant of attempted armed robbery and of aiding and abetting in common law robbery, a lesser included offense of armed robbery.

3. **Criminal Law § 115; Robbery § 5— guilt of lesser degree of crime — alternative finding**

The question of guilt of a lesser included offense must be submitted as an alternative to a finding of guilt of a greater offense, not as an additional offense.

4. **Robbery § 2— indictment for armed robbery — conviction for one offense only**

A bill of indictment for armed robbery can support a conviction of attempted armed robbery or common law robbery, but not both for the same conduct.

5. **Robbery § 5— armed robbery — submission of possible verdicts to jury**

Where the uncontradicted evidence showed that defendant in an attempted robbery accosted a gas station attendant with a shotgun outside the station while defendant's accomplice assaulted an attendant inside the station and accomplished the robbery, the jury would be justified in finding defendant guilty only of armed robbery or attempted armed robbery, or not guilty.

APPEAL by defendant from *Thornburg, Judge,* 13 March 1972 Session of Superior Court held in BUNCOMBE County.

Defendant was charged in a bill of indictment with armed robbery in violation of G.S. 14-87. The State's evidence tended to show the following: That on 2 January 1972 at about 11:00 p.m. William Walker and Fred Vaughn, employees of Smile Oil Company Service Station in Asheville, North Carolina, were preparing to close the station for the night; that Vaughn was inside the station building counting the day's money, and that Walker was outside engaged in routine closing operations; that

while outside, Walker was approached by defendant, who stuck a single-barrel shotgun in his side, and demanded "Give me that money"; that Walker grabbed the barrel of the gun; that defendant continued to ask for the money, and Walker told him the money was inside; that Walker backed up toward the station door, still holding the shotgun barrel that defendant nudged and aimed at him; that as defendant and Walker approached the station door, Walker, his back to the door, heard the station door open and heard a man run out; that defendant then jerked the barrel of the shotgun from Walker's grasp and ran in the direction taken by the man who ran out of the station; that inside the station Vaughn had been assaulted by one Otis Abney who took most of the day's money and ran out of the door.

The Court instructed the jury that they could find defendant guilty or not guilty of attempted armed robbery, and also guilty or not guilty of common law robbery by aiding and abetting Otis Abney. The jury returned a verdict of guilty of attempted armed robbery and guilty of common law robbery. Defendant appealed.

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

George W. Moore for defendant.

BROCK, Judge.

Defendant assigns as error the court's instruction to the jury that " . . . regardless of how you find the defendant, whether you find him guilty or not guilty of attempted armed robbery, you will consider whether or not he is guilty of aiding and abetting in the crime of common law robbery." This instruction allowed the jury to find defendant guilty of both attempted armed robbery and common law robbery. One who aids and abets another in the commission of a crime is equally guilty with the actual perpetrator. *State v. Wall,* 9 N.C. App. 22, 175 S.E. 2d 310.

[1] G.S. 14-87 specifically provides that: "Any person . . . (who) with the use or threatened use of any firearms . . . unlawfully takes or *attempts* to take personal property from another . . . shall be guilty of a felony . . . " punishable by imprisonment from 5-30 years. (Emphasis added.) Our courts have held that this statute creates no new offense, but merely

provides for more severe punishment for the commission, or attempt to commit, common law robbery when that offense is committed or attempted with the use or threatened use of firearms or other dangerous weapons. *State v. Smith,* 268 N.C. 167, 150 S.E. 2d 194. Common law robbery or attempted common law robbery, therefore, when aggravated by the use or threatened use of a firearm or other dangerous weapon is a felony punishable in accordance with the provisions of G.S. 14-87.

[2] Defendant was charged in a bill of indictment with armed robbery. The jury was instructed it could find defendant guilty or not guilty of both attempted armed robbery and aiding and abetting in common law robbery. G.S. 15-170 provides in part: "Upon the trial of any indictment the prisoner may be convicted of the crime charged therein or of a less degree of the same crime. . . . " However, in addition to attempted armed robbery, the jury was allowed to convict defendant of aiding and abetting in common law robbery, a lesser included offense of armed robbery. We hold this to be error.

[3] When justified by the evidence, in a trial based on an indictment for armed robbery, the question of guilt of common law robbery is properly submitted to the jury, because it is a lesser included offense of armed robbery. *State v. Bailey,* 278 N.C. 80, 178 S.E. 2d 809. However, the question of guilt of a lesser included offense must be submitted as an alternative to a finding of guilt of a greater offense, not as an additional offense. It is anomalous that defendant was convicted of both an attempt to commit common law robbery (aggravated by the use of firearms) and common law robbery for the same conduct. It would seem that defendant either robbed his victim or just attempted to rob him, but not both. Whether a firearm was used would constitute an aggravation of either offense, but it would not constitute an additional offense.

[4] A bill of indictment for armed robbery can support a conviction of attempted armed robbery or common law robbery, but not both for the same conduct. *See State v. Hatcher,* 277 N.C. 380, 177 S.E. 2d 892.

[5] It seems that the trial judge viewed the conduct of defendant on the outside of the station and that of Otis Abney, defendant's alleged accomplice, on the inside of the station as two distinct offenses. However, it appears clear that defendant

and his accomplice were there to rob whoever the attendants of the station might be. While defendant was outside the station undertaking to get the money by the threatened use of a firearm on one attendant, his accomplice succeeded in getting the money by assaulting the other attendant on the inside of the building. In our view, this constitutes a single transaction, and, under the uncontradicted evidence, defendant could be found guilty only of armed robbery or attempted armed robbery. There is no evidence that defendant participated in the event other than with the use of the shotgun. The only evidence from which it can be argued that defendant aided and abetted his accomplice in common law robbery was the evidence of defendant's participation in the event with the threatened use of the shotgun. From this uncontradicted evidence the jury would be justified in finding defendant guilty only of armed robbery or attempted armed robbery, or not guilty.

We have examined defendant's other assignments of error and find no prejudicial error.

The verdict of guilty of common law robbery is vacated and the judgment rendered thereon is arrested.

No error in the trial, conviction, and judgment for attempted armed robbery.

Chief Judge MALLARD and Judge BRITT concur.

STATE OF NORTH CAROLINA v. MILLARD WRIGHT, JR.

No. 722SC764

(Filed 22 November 1972)

1. **Criminal Law § 99— questions by trial judge — no prejudicial expression of opinion**

Questions put to witnesses by the trial judge in an assault case in no way constituted an expression or implication of an opinion by the court which would be prejudicial to defendant.

2. **Criminal Law § 169— failure to show what testimony would have been — no prejudice in exclusion**

Defendant failed to show any prejudice to himself in the exclusion of witnesses' testimony where the record did not include what the testimony would have been had the witnesses been permitted to give it.

3. Criminal Law § 89— character of witness — participation in work release — testimony properly excluded

The trial court properly refused to allow defendant to give an indication of his witness's character by asking whether the witness was on work release and where he was employed since the rule is that the reputation of a witness may be shown only with evidence of his general reputation in the community.

4. Criminal Law § 161— assignments of error deemed abandoned

Assignments of error not supported by reason or argument in defendant's brief are deemed abandoned. Court of Appeals Rule 28.

5. Criminal Law § 161— assignment of error not supported by exception in record

Assignments of error failing to cite specific numbered exceptions appearing in the record will be considered only within the discretion of the court on appeal. Court of Appeals Rule 21.

ON Writ of *Certiorari* to review trial before *Cohoon, Judge,* 20 March 1972 Session of Superior Court held in BEAUFORT County.

Defendant was convicted of assault with a deadly weapon, inflicting serious injury. Defendant's appeal was not docketed within the time allowed and we granted certiorari.

The State's evidence tended to show, among other things, that the prosecuting witness, David T. Perry, Jr., entered into a discussion with the defendant and defendant's brother, Russell, at a combination eating establishment and gasoline station. Defendant, angered by part of the conversation, advanced upon Perry causing him to retreat past defendant's pickup truck and back to the gasoline pumps of the service station. Perry displayed no weapon but defendant grabbed a truck bumper jack from his pickup truck and took several swings at Perry with the jack. Both defendant and his brother struck the prosecuting witness who was finally knocked unconscious when defendant hit him in the head with the jack. He suffered, among other things, a fractured skull which resulted in bone being driven into the brain. After the victim fell, defendant said several times, "I told you I would kill you." A police officer was summoned and found Perry face down on the ground, unconscious, with blood running from a large opening in his forehead. The officer turned him over and saw an open pocket knife under his body. Perry later identified the pocket knife as his and stated he had been carrying it in his pocket on the night in

question but that he had never opened it. Witnesses testified that Perry had an odor of alcohol.

Defendant's evidence tended to show that defendant and the prosecuting witness had a conversation during which defendant was accused of talking about the prosecuting witness. An argument ensued. When defendant tried to get off the hood of his truck where he had been sitting, the prosecuting witness grabbed him and forced him to lean back over the front of the truck. Defendant did not see any knife at this point. Defendant's brother then wrestled the prosecuting witness to the ground and stated that the prosecuting witness had a knife. Once he got up from the ground, Perry advanced upon defendant and his brother with an open knife and would not permit them to leave the area. At this point defendant armed himself with the truck jack and struck the prosecuting witness.

Defendant was sentenced to serve a term of five years imprisonment.

Attorney General Robert Morgan by Henry T. Rosser, Assistant Attorney General, for the State.

Bryan Grimes for defendant appellant.

VAUGHN, Judge.

[1] Defendant's first assignment of error challenges questions directed by the trial judge to various witnesses and asserts that these questions, by indicating to the jury that the trial judge held the opinion that defendant was guilty, were prejudicial to defendant. The standard to be followed in the examination of witnesses by a trial judge was stated in *State v. Colson,* 274 N.C. 295, 163 S.E. 2d 376, cert. den. 393 U.S. 1087. "If by their tenor, their frequency, or by the persistence of the trial judge [the questions] tend to convey to the jury in any manner at any stage of the trial, the 'impression of judicial leaning,' they violate the purpose and intent of G.S. 1-180 and constitute prejudicial error." Colson, *supra,* at p. 308. In order to properly perform his duties, the trial judge may ask questions of a witness in order to gain a proper understanding and clarification of the testimony of the witness. *State v. Freeman,* 280 N.C. 622, 187 S.E. 2d 59; *State v. Best,* 13 N.C. App. 204, 184 S.E. 2d 905, cert. den. 280 N.C. 495. A careful examination of the questions posed by the trial judge and of the context in

which they appear in the record reveals nothing which can be reasonably construed as either expressing or implying any opinion of the court as would be prejudicial to the defendant.

[2, 3] Defendant's assignments of error numbered five, seven and eight challenge the exclusion of evidence. In the first two of these assignments, the record fails to show what the witnesses' answers would have been had they been permitted to respond to the questions. It is, therefore, not possible to determine what effect the rulings sustaining objections to the questions may have had on the outcome of the trial. Since the presumption is in favor of the regularity of the proceedings and defendant has failed to show any prejudice resulting to him, defendant's fifth and seventh assignments of error are held to be without merit. In support of his eighth assignment of error, defendant urges that his questions asking whether defendant's witness was on work release and, if so, where was he employed, should have been allowed in order to give an indication of the witness's character and to speak to his credibility. This argument is without foundation. The rule in North Carolina is that the reputation of a witness may be shown only with evidence of his general reputation in the community. *Light Co. v. Smith,* 264 N.C. 581, 142 S.E. 2d 140.

[4] Defendant's second, fourth and ninth assignments of error are considered abandoned since "no reason or argument is stated or authority cited" in their support as required by Rule 28, Rules of Practice in the Court of Appeals of North Carolina.

[5] Defendant's tenth, eleventh and twelfth assignments of error fail to cite specific numbered exceptions appearing in the record. Exceptions which have not been duly noted in accordance with Rule 21, Rules of Practice in the Court of Appeals of North Carolina, and which appear for the first time in the assignments of error will not be considered. *Midgett v. Midgett,* 5 N.C. App. 74, 168 S.E. 2d 53, cert. den. 275 N.C. 595. In our discretion, we have examined these assignments of error and find them to be without merit. Defendant's arguments in support thereof are answered as follows: (1) the court gave full instructions on the theory of self-defense; (2) defendant failed to call any inadvertency in the court's recapitulation of the evidence to the attention of the court in time to afford an opportunity for correction *(State v. Goines,* 273 N.C. 509, 160 S.E. 2d 469) ; and (3) there is no indication the defendant ten-

dered certain documents for introduction into evidence or that he was denied the opportunity to do so.

All of defendant's assignments of error have been considered and fail to disclose prejudicial error.

No error.

Judges HEDRICK and GRAHAM concur.

STATE OF NORTH CAROLINA v. GEORGE HERMAN LYNN

No. 7225SC744

(Filed 22 November 1972)

Homicide § 21— sufficiency of evidence to submit case to jury

Evidence was sufficient in a murder prosecution to require submission of the case to the jury and to support the verdict of guilty of manslaughter where such evidence tended to show that defendant and deceased had been drinking, that they became involved in an argument, that deceased cut defendant with a knife and that defendant then went into another room of his home, obtained his gun and shot deceased.

APPEAL by defendant from *Godwin, Judge,* 20 March 1972 Session of Superior Court held in BURKE County.

The defendant George Herman Lynn was charged in a bill of indictment, proper in form, with the murder of Bobby Lee Smith. The defendant pleaded not guilty and was found guilty of manslaughter. The defendant appeals from a judgment imposing a prison sentence of ten years, which was suspended and the defendant placed on probation.

Attorney General Robert Morgan and Assistant Attorney General Charles A. Lloyd for the State.

Hatcher, Sitton & Powell by Claude S. Sitton for defendant appellant.

HEDRICK, Judge.

The defendant's only assignments of error challenge the sufficiency of the evidence to take the case to the jury and to support the verdict. When the evidence is considered in the light most favorable to the State, it tends to show the following:

On 27 November 1971 the deceased, Bobby Lee Smith, was taken to Valdese General Hospital for treatment of a stab wound to the chest and two shotgun wounds to the left side of the body. Because of the severity of the injuries to the abdominal region, the deceased was promptly transferred to Baptist Memorial Hospital in Winston-Salem where he died on 25 December 1971 from "septicemia" which was "apparently caused by the entrance of the pellets into the abdominal cavity, that is by the entrance of the gunshot pellets."

The defendant George Lynn was admitted to Valdese General Hospital on 27 November 1971 for treatment of a stab wound to the abdomen.

J. W. Carswell, a Burke County deputy sheriff, arrived at the Lynn home at approximately 8:15 p.m. on 27 November 1971 and found the defendant armed with a loaded double barrel 12 gauge shotgun and Bobby Lee Smith "thrashing around on the floor." Defendant stated to Carswell, "It is my cousin, Bob Smith." "I shot him. There he lays."

After being advised of his constitutional rights at the hospital, and signing a waiver thereof, the defendant on 28 November 1971 made and signed a "voluntary statement" in which he stated, *inter alia:*

"Q. Is this the knife that cut you?

A. No, this is my knife.

Q. Did you have an argument with Bob Smith?

A. We were arguing about something, both of us were drunk.

Q. Did he cut you first?

A. Yes.

Q. Did you cut him?

A. I swung at him with my knife that I had in my pocket. I don't know if I cut him. I was protecting myself. I went outside and he (Smith) followed and was still swinging at me with his knife. I told him I was bleeding too bad and to leave. He (Smith) said he was going to let me bleed down and then cut me to death. He tried to cut me again as I made a run into the house to get

my gun. I knew I was getting weak. I went into the bedroom and got my gun and came back out. He (Smith) was standing near the television when I shot both barrels. I put two more shells in the gun and went to Ode Young's house and told him to call the law and an ambulance. I went back down to the house and sat down in the chair and waited for the law.

Q. Do you remember anything after I (Deputy Carswell) arrived at the scene?

A. I remembered a deputy pulling his gun and telling me to drop my gun on the floor, but nothing after that.

Q. Do you remember what started the argument?

A. I don't remember at all.

Q. How much had each of you had to drink?

A. We both drank the bigger part of the day, beer and rum."

At the conclusion of the State's evidence, defendant testified that he first saw the deceased around 12 or 12:30 p.m. on Saturday, 27 November 1971, at which time they drank "rum and coke." Thereafter, the deceased and the defendant went to the home of defendant's sister in Hudson, arriving at about 3:00 p.m. On the way to Hudson, they "stopped at a package store and got a full case of Budweiser beer." Defendant testified that while at the home of defendant's sister, "Bobby Smith and I sat there and drank some beer and got into an argument. I do not exactly know what the argument was about. He (Smith) threatened to cut me and I told him I wasn't going to stand and let no one whittle on me." Between 5:00 and 6:00 p.m., defendant was driven to his home by his sister and brother-in-law. The deceased arrived at defendant's home "later that evening" in another automobile and "brought the remains of the beer back to the house." "Me and him set there in the living room and drank several more beers apiece and there was some argument there, I don't recall what it was, but it was about the cutting again; that was an hour and a half or so later. During the period of time that we were at the house, Bobby Smith and I continued to drink beer. There were some words exchanged between the two of us."

The remainder of defendant's testimony closely parallels that which was contained in the quoted portions of his "voluntary statement" *supra,* and will not be repeated.

We hold that the evidence was sufficient to require submission of the case to the jury and to support the verdict. *State v. Todd,* 264 N.C. 524, 142 S.E. 2d 154 (1965); *State v. Stinson,* 263 N.C. 283, 139 S.E. 2d 558 (1965); *State v. Norris,* 242 N.C. 47, 86 S.E. 2d 916 (1955).

We have carefully examined the entire record and find that the defendant had a fair trial free from prejudicial error.

No error.

Judges VAUGHN and GRAHAM concur.

STATE OF NORTH CAROLINA v. WILLIAM CANNADY

No. 727SC600

(Filed 22 November 1972)

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

State's evidence was sufficient to withstand nonsuit in a murder case where such evidence tended to show that defendant and deceased argued over payment to defendant's mother for a telephone call made by deceased, that defendant approached deceased with a shotgun, that deceased retreated to the wall and that defendant struck deceased on his head with the shotgun which discharged, killing deceased.

2. **Homicide §§ 14, 30— killing with a deadly weapon — presumption of malice — involuntary manslaughter improper**

Where the evidence in a murder case established a killing with a deadly weapon, a presumption of malice arose which was not dispelled by the evidence; therefore, the trial court did not err in refusing to submit the lesser included offense of involuntary manslaughter as a possible verdict.

APPEAL by defendant from *Harry C. Martin, Judge,* February 1972 Criminal Session WILSON Superior Court.

Defendant was indicted at the February 1971 Session of Wilson Superior Court for the murder of Joe Nathan Moore on 5 December 1970. At the May 1971 Session of the Court, defend-

ant was found guilty of second-degree murder and from judgment rendered on the verdict, he appealed to the Court of Appeals.

By opinion filed 15 December 1971, reported in 13 N.C. App. 240, 185 S.E. 2d 287, this court ordered a new trial for the reason that police officers gave testimony relative to an in-custody statement made by defendant when the procedure prescribed by *State v. Lynch,* 279 N.C. 1, 181 S.E. 2d 561 (1971) was not followed.

At the retrial defendant was tried for second-degree murder, was found guilty of voluntary manslaughter, and from judgment imposing 10 years prison sentence to be credited with 10 months spent in jail awaiting trial, defendant appealed.

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

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

BRITT, Judge.

[1] Defendant assigns as error the failure of the court to allow his timely made motions for nonsuit.

The evidence, viewed in the light most favorable to the State, tended to show: On 5 December 1970 defendant and decedent were at a place of business operated by defendant's stepfather, Sam Smith. The business was located in the Smith residence; a room was provided for a jukebox and dancing, and various items including soft drinks and cigarettes were offered for sale. Decedent made a long distance telephone call from the residence and an argument arose between decedent and defendant's mother over payment for the call. Defendant stated that he was tired of people running over his mother. While on his way to the kitchen Smith heard his wife (defendant's mother) scream. He hurried to the bedroom and found her pulling at defendant, trying to keep him from going to the jukebox room where decedent was. In spite of the efforts of Smith and his wife, defendant went into the room where decedent was. Decedent did nothing to defendant but retreated to the wall. Defendant struck decedent on his head with a sawed-off shotgun which discharged, the load entering decedent's head causing death.

We hold that the evidence was sufficient to survive the motions for nonsuit and the court properly submitted the case to the jury.

Defendant assigns as error the failure of the court to submit involuntary manslaughter as a possible verdict.

Where, under the bill of indictment, it is permissible to convict defendant of a lesser degree of the crime charged, and there is evidence to support a milder verdict, defendant is entitled to have the different permissible verdicts arising on the evidence presented to the jury under proper instructions. *State v. Riera,* 276 N.C. 361, 172 S.E. 2d 535 (1970); *State v. Keaton,* 206 N.C. 682, 175 S.E. 296 (1934). This principle applies, however, only in those cases where there is evidence of guilt of the lesser degree. *State v. Smith,* 201 N.C. 494, 160 S.E. 577 (1931).

Murder in the second-degree is the unlawful killing of a human being with malice but without premeditation and deliberation. *State v. Foust,* 258 N.C. 453, 128 S.E. 2d 889 (1963). Voluntary manslaughter is the unlawful killing of a human being without malice and without premeditation and deliberation. *State v. Benge,* 272 N.C. 261, 158 S.E. 2d 70 (1967). Involuntary manslaughter is the unlawful killing of a human being without malice, without premeditation and deliberation, and without intention to kill or inflict serious bodily injury. *State v. Foust, supra; State v. Honeycutt,* 250 N.C. 229, 108 S.E. 2d 485 (1959); *State v. Satterfield,* 198 N.C. 682, 153 S.E. 155 (1930). When the killing with a deadly weapon is admitted or established, two presumptions arise: (1) that the killing was unlawful; (2) that it was done with malice; and an unlawful killing with malice is murder in the second-degree. *State v. Gordon,* 241 N.C. 356, 85 S.E. 2d 322 (1955).

[2] Evidence in the case at bar established a killing with a deadly weapon, therefore, a presumption of malice arose. Furthermore, the evidence tended to show malice on the part of defendant. Defendant did not testify in his own behalf and there was no evidence to dispel the presumption of malice. We hold that the court did not err in failing to submit involuntary manslaughter as a possible verdict. We are not called upon to say if the court improperly submitted voluntary manslaughter as a possible verdict as any error on that point was favorable to defendant.

Defendant's other assignments of error relate to the admission of evidence and the court's instructions to the jury. We have carefully considered those assignments of error but find them to be without merit.

We hold that defendant received a fair trial, free from prejudicial error, and the sentence imposed was within the limits prescribed by statute.

No error.

Chief Judge MALLARD and Judge BROCK concur.

CATHERINE H. DAVENPORT v. THE TRAVELERS INDEMNITY COMPANY (A FOREIGN INSURANCE CORPORATION)

No. 7226DC747

(Filed 22 November 1972)

1. **Appeal and Error § 24— necessity for exceptions**

Assignments of error not based on exceptions duly noted in the record are ineffectual. Court of Appeals Rule 21.

2. **Appeal and Error § 28— broadside exception — review of record proper**

Defendant's broadside exception in its appeal entries to the "Findings of Fact, Conclusions of Law and Judgment entered thereon" did not bring up for review the findings of fact or the evidence on which they were based; however, the appeal itself was sufficient to present the record proper for review.

APPEAL by defendant from *Winner, District Judge,* 29 May 1972 Session of District Court held in MECKLENBURG County.

Plaintiff sued to establish defendant's liability on a judgment entered on 11 September 1967 for $5,000 damages for personal injuries awarded by a jury to plaintiff after a hearing on default and inquiry arising out of the operation of the Mills Motor Company, said judgment having been entered against Thomas Mills as one of two partners trading as Mills Motor Company.

At the time the aforesaid judgment was entered, defendant herein was obligated under a contract of insurance with Thomas Mills, t/a Mills Motor Company, upon certain terms and condi-

tions, to insure Mills in his business for any bodily injury arising out of the operations of the business which Mills should become legally obligated to pay while the insurance contract was in force and effect.

The action was tried before the court, without a jury, upon stipulated facts and oral testimony given by the plaintiff and the defendant's claims supervisor from Charlotte, North Carolina. The court made detailed findings of fact and conclusions of law thereon and gave judgment for the plaintiff for $5,000, with interest at the rate of 6% from 11 September 1967, the costs of the former action and the costs of the present action. Defendant appealed, assigning error.

Don Davis for plaintiff appellee.

Boyle, Alexander & Hord by Robert C. Hord, Jr., for defendant appellant.

MALLARD, Chief Judge.

[1] This trial was by the court without a jury. Defendant has four assignments of error, but none of them is based on an exception duly noted in the record and numbered in accordance with Rule of Practice in the Court of Appeals No. 21. In the appeal entries it is stated that the defendant "in apt time objects and excepts to the Findings of Fact, Conclusions of Law and Judgment entered thereon," and this is the only place in the record that the defendant excepted. The defendant does not refer to this or any other exception in its assignments of error. An assignment of error must be based upon an exception duly noted; otherwise it is ineffectual. *Hunt v. Davis,* 248 N.C. 69, 102 S.E. 2d 405 (1958); *Campbell v. McNeil,* 15 N.C. App. 559, 190 S.E. 2d 383 (1972); *Bost v. Bank,* 1 N.C. App. 470, 162 S.E. 2d 158 (1968).

[2] Furthermore, defendant made a broadside exception in its "Appeal Entries" to the "Findings of Fact, Conclusions of Law and Judgment entered thereon." This broadside exception in the appeal entries does not bring up for review the findings of fact or the evidence on which they were based. *Sweet v. Martin,* 13 N.C. App. 495, 186 S.E. 2d 205 (1972). However, the appeal itself was sufficient to present the record proper for review and to raise the question whether error of law appears on the face of the record. *In re Appeal of Broadcasting Corp.,* 273 N.C. 571,

160 S.E. 2d 728 (1968); 1 Strong, N. C. Index 2d, Appeal and Error, § 28. A review which is limited to the face of the record proper presents the questions whether the facts found support the judgment and whether the judgment is regular in form, but it does not present for review any question as to the findings of fact or the sufficiency of the evidence to support the findings of fact. *Fishing Pier v. Town of Carolina Beach*, 274 N.C. 362, 163 S.E. 2d 363 (1968); 1 Strong, N. C. Index 2d, Appeal and Error, § 26.

We have reviewed the record proper and are of the opinion that the judgment in this case is regular in form, that the facts found by the court support the conclusions of law in the judgment, and that no prejudicial error appears therein.

No error.

Judges BROCK and BRITT concur.

HERBERT LOGAN TURNER I, PLAINTIFF v. FRANK J. WEBER, DEFENDANT

— AND —

HERBERT LOGAN TURNER II, ADDITIONAL DEFENDANT

No. 7228DC735

(Filed 22 November 1972)

1. **Ejectment § 8— action to recover possession of realty — failure to file defense bond — affidavits in lieu of bond**

In an action to recover possession of real property, contention that judgment should have been rendered for plaintiff because defendant failed to file the defense bond required by G.S. 1-111 is untenable where defendant filed answer on 28 January, plaintiff called the court's attention to defendant's failure to file the bond on 2 February, and defendant filed the affidavits permitted by G.S. 1-112 in lieu of bond on 7 February.

2. **Ejectment § 1; Landlord and Tenant § 3— estoppel of tenant to deny landlord's title — title allegedly obtained by fraud from tenant**

A tenant in possession is not estopped to deny his landlord's title when that title was allegedly obtained by fraud from the tenant in possession.

3. **Cancellation of Instruments § 2— signature by grantor who can read and write — showing of fraud**

The mere fact that a grantor who can read and write signs a deed does not preclude him from showing, as between the grantee and

himself, that he was induced to sign by fraud on the part of the grantee, or that he was deceived and thrown off guard by the grantee's false statements and assurances designedly made at the time and reasonably relied on by him.

APPEAL by plaintiff from *Winner, District Judge,* 3 April 1972 Session of District Court held in BUNCOMBE County.

Action in summary ejectment. The action was tried by the court without a jury.

Plaintiff's evidence tended to show that on or about 20 September 1971 a sale contract was executed wherein defendant Weber agreed to sell and plaintiff agreed to buy seven-tenths of one acre contained within a tract of 9.5 acres owned by defendant. Plaintiff testified that this land was to be conveyed to his son, defendant Turner II. This contract of sale called for a payment of $600.00 at the time of execution with the balance of $650.00 to be paid at the closing. On the same day, plaintiff made a loan of $600.00 to defendant Weber and required Weber to execute a deed of trust, identified as D-6 in the record, for the entire 9.5 acres in order to secure this note. The following day, on or about 21 September 1971, a paper writing purporting to be a sale contract, identified as P-A in the record on appeal, was executed wherein Weber agreed to sell and plaintiff agreed to buy the 9.5 acres owned by defendant, less the seven-tenths acre described in the sale contract dated 20 September 1971. This contract called for plaintiff to pay $2,000.00 into escrow, $6,000.00 at the closing and assume approximately $17,100.00 in existing mortgages on the land. Plaintiff's evidence tended to show that on 29 October 1971 defendant executed a deed, identified as Exhibit P-B, for the entire tract of 9.5 acres to plaintiff. Plaintiff then alleges that on 1 November 1971 defendant executed a deed to plaintiff for the seven-tenths of an acre which defendant had deeded as part of the tract of 9.5 acres on 29 October. Plaintiff testified that on 21 January 1972, he asked defendant to vacate the property on the grounds that the terms of the purported sales agreement called for defendant to vacate on or before 15 January 1972. Other terms of that same sales agreement call for defendant to make installment payments on the existing mortgages for the months of October, November and December 1971, inclusive, in lieu of rent. Plaintiff testified that he paid mortgage installments for January, February and March 1972, inclusive. This suit was instituted on 26 January 1972.

Defendant Weber's evidence tended to show that sometime in August 1971, defendant and plaintiff negotiated for the sale and purchase of seven-tenths of an acre of land, part of a tract of 9.5 acres owned by defendant. On or about 20 September 1971 defendant signed a sales contract, identified as D-I in the record on appeal, in which he agreed to sell seven-tenths of an acre to plaintiff for $1,250.00. At the time of this signing, defendant was presented with a stack of sheets of paper which plaintiff represented to be the original contract of sale and copies. Defendant read the top sheet and signed it and all sheets under it, relying upon the representation made by plaintiff.

Defendant also testified that he executed a deed of trust, identified as D-6, for the entire 9.5 acres in order to secure the sum of $600.00 (the amount of plaintiff's down payment made on the purchase of the seven-tenths acre tract). This security was required in the event defendant would be unable to obtain releases to deeds of trust held by other parties on the entire tract of 9.5 acres. Defendant testified that no other documents were executed on or about 20 September or 21 September 1971 and there was no agreement at any time to sell the tract of 9.5 acres to plaintiff. The $650.00 balance of the purchase price for the seven-tenths acre was paid by plaintiff within a month. Shortly thereafter, either at the end of October or the beginning of November 1971, defendant obtained a loan of $600.00 from plaintiff and executed what was represented by plaintiff to be a deed of trust on the entire 9.5 acres to secure the loan. Once again, plaintiff presented a stack of papers to defendant, representing them to be an original deed of trust and copies of that deed of trust. Defendant read the deed of trust which was the top sheet and, relying upon the representation of plaintiff, signed all copies in the stack. On or about 1 November 1971, defendant executed a deed to plaintiff's son for the seven-tenths acre of land as agreed in the sale contract dated 20 September. In January 1972, defendant tendered a cashier's check for $620.00 to plaintiff to repay the loan defendant believed to be secured by a deed of trust executed either in late October or early November 1971. Plaintiff refused to accept the check. Subsequently, defendant discovered that a deed purporting to convey defendant's 9.5 acres to plaintiff had been recorded and he sought legal counsel.

In a judgment entered 7 April 1972, the court made the following findings of fact, among others:

"3. That at the time of the signing of the agreement D-I, there were numerous carbon copies signed; that the defendant read the original but did not read the copies; that the copies were in a stack of sheets of paper and that the plaintiff represented to the defendant that all of the sheets of paper were copies of D-I; that the defendant relied upon this representation and signed all of the copies; that among the copies was Exhibit P-A, and that the defendant did not know the contents of Exhibit P-A when he signed it, having relied upon the plaintiff.

* * *

5. That the defendant never knew the contents of Exhibit P-A until sometime after the filing of this lawsuit.

6. That at the time of the signing of the said contract D-I, a deed of trust was signed by the defendant to secure the down payment made by the plaintiff for the seventenths (sic) of an acre, in case the defendant would be unable to obtain releases to certain deeds of trust on the whole property held by other parties; that the said deed of trust was introduced as Exhibit D-6, and all of the terms of the said deed of trust are hereby made a part of these findings of fact.

7. That sometime at the end of the month of October, 1971, or at the beginning of November, 1971, the defendant asked the plaintiff to loan him the sum of six hundred dollars ($600.00) ; that the plaintiff agreed to do this, requiring another deed of trust on the whole nine-and-a-half acre tract to secure the loan; that the defendant signed what was represented to him by the plaintiff as being another deed of trust, but what in actuality was the deed introduced as Exhibit P-B; that at the time of the signing of P-B, there was another sheet attached, which sheet looked like the front of a form deed of trust and looked like the deed of trust that the defendant had previously signed and which was introduced as D-6; that the plaintiff told the defendant that he was signing a deed of trust and that he was in a hurry; that the defendant relied upon the representations of the plaintiff and signed the instrument without reading it; that he did not know that he had deeded his whole property away until sometime in January, 1972.

* * *

9. That under the conditions of all of these transactions, a reasonably prudent man would not have read the copies attached to D-I before signing them, nor would a reasonably prudent man under the conditions at the time have read P-B before signing it. . . .

10. That the defendant has tendered to the plaintiff the sum of six hundred dollars ($600.00) plus interest to repay the loan of six hundred dollars ($600.00) above mentioned, but that the said tender was refused by the plaintiff.

* * *

14. That the defendant was damaged by his reliance upon the misrepresentations of the plaintiff, in that he has lost record title to the above mentioned nine-and-a-half acre tract of real estate."

The court concluded as a matter of law that defendant was not estopped from raising the defense of a fraudulent procurement of the property in question and that " . . . plaintiff made material misrepresentations of subsisting facts, with the knowledge of the falsity of the said misrepresentations and with a fraudulent intent that as to the signing of the deed marked Exhibit P-B and the contract marked Exhibit P-A, the defendant reasonably relied upon the plaintiff's representations and that he reasonably signed Exhibit P-B and P-A without reading them, due to the use of artifice by the plaintiff. . . . "

The court then ordered that plaintiff's action be dismissed, the sales contract and deed for the tract of 9.5 acres were declared null and void and defendant was ordered to pay $600.00 plus interest from the date of judgment to the plaintiff as repayment of the loan made in late October or early November.

S. Thomas Walton for plaintiff appellant.

Hendon & Carson by James Cary Rowe for defendant appellee.

VAUGHN, Judge.

[1] We first consider plaintiff's challenges to the overruling of his motions for summary judgment and judgment on the pleadings under Rule 12(c) as raised by his second, third and twenty-third assignments of error. Plaintiff contends that

defendant Weber should not have been allowed to plead because of an alleged failure to comply with the requirements of G.S. 1-111 and that Weber was estopped to plead fraud because of the relationship of landlord and tenant existing between plaintiff and Weber. G.S. 1-111 provides that in all actions for the recovery or possession of real property, the defendant, before being permitted to plead, must execute and file a security bond in an amount fixed by the court, but not less than $200.00. G.S. 1-112 provides that the undertaking prescribed in G.S. 1-111 is not necessary if an authorized attorney certifies in writing that he has examined defendant's case and is of the opinion that the plaintiff is not entitled to recover and if defendant files an affidavit stating he is unable to give and is not worth the amount of the undertaking. Here, defendant Weber filed answer on 28 January 1972, plaintiff called the court's attention to noncompliance with G.S. 1-111 on 2 February 1972 and the affidavits permitted by G.S. 1-112 were filed on 7 February 1972. There was no prejudicial error in this procedure. *Cooper v. Warlick,* 109 N.C. 672, 14 S.E. 106; *McMillan v. Baker,* 92 N.C. 111.

[2] The general rule denies a tenant in possession any right to challenge his landlord's title to the property. *King v. Murray,* 28 N.C. 62. Even if it could be assumed that the sales agreement and deed to the tract of 9.5 acres did create a relationship of landlord and tenant between plaintiff and defendant Weber, an exception to the general rule permits a tenant in possession to challenge his landlord's title when that title was allegedly obtained by fraud from the tenant in possession. *Lawrence v. Eller,* 169 N.C. 211, 85 S.E. 291; *Insurance Co. v. Totten,* 203 N.C. 431, 166 S.E. 316. The estoppel created by application of the general rule extends only to prohibit the denial of what has already been admitted, usually the original landlord's title. *Hargrove v. Cox,* 180 N.C. 360, 104 S.E. 757. Here, however, the title of plaintiff was never admitted by defendant Weber and the relationship of landlord and tenant, if it exisited at all, was created under conditions indicating the possible presence of fraud and misrepresentation. Plaintiff's second, third and twenty-third assignments of error are without merit.

In his fifth and sixth assignments of error respectively, plaintiff contends that it was prejudicial error to allow, over his general objection, the introduction of defendant's exhibit five, an unsigned paper writing purporting to authorize, among

other things, plaintiff to rent and redecorate the house on the land in question, and defendant's exhibit seven, a copy of a cashier's check in the amount of $620.00 payable to plaintiff. Defendant neither cites authority nor advances argument to support his contention. We hold that no prejudicial error appears from the admission of the exhibits.

[3] Plaintiff makes numerous assignments of error (numbered 7, 9, 10, 11, 12, 13, 18, 19, 20, 21, 22) which all speak to the evidentiary findings and conclusions as to fraudulent representations made by plaintiff and defendant's reliance on those representations to his detriment. Plaintiff correctly argues that the general rule requires a person who can do so to read a paper before signing it and holds that his failure to do so is negligence for which the law affords no remedy. However, just as firmly established in North Carolina is the exception which is that in no case can a person escape responsibility for representations on the ground that the other party was negligent in relying on them if, in addition to making the representations, he resorted to artifice which was reasonably calculated to induce the other party to forego making inquiry. *May v. Loomis,* 140 N.C. 350, 52 S.E. 728. More specifically, it has been held that the mere fact that a grantor who can read and write, as can defendant Weber, signs a deed does not necessarily conclude him from showing, as between himself and the grantee, that he was induced to sign by fraud on the part of the grantee, or that he was deceived and thrown off his guard by the grantee's false statements and assurances designedly made at the time and reasonably relied on by him. *Taylor v. Edmunds,* 176 N.C. 325, 97 S.E. 42. See also, *Cromwell v. Logan* and *Logan v. Mercantile Co.,* 196 N.C. 588, 146 S.E. 233.

All of plaintiff's assignments of error have been considered and are overruled. The court's findings of fact are supported by competent evidence. The findings support the judgment. In the trial we find no error.

No error.

Judges HEDRICK and GRAHAM concur.

STATE OF NORTH CAROLINA v. PAUL HIGGINS

No. 7226SC728

(Filed 22 November 1972)

1. **Criminal Law § 84; Searches and Seizures § 1— automobile removed to police station — warrantless search — probable cause**

Warrantless search of defendant's automobile after the automobile had been removed to the Law Enforcement Center following defendant's arrest for being an accessory to murder was lawful where the police had probable cause to believe that defendant and the automobile in question were connected with a murder and that the automobile or some article contained within it was subject to seizure in connection with the murder, and heroin found during the search was properly admitted in evidence in defendant's trial for possession of heroin.

2. **Narcotics § 1— possession of heroin — felony**

The possession of any quantity of heroin constitutes a felony under the provisions of the Controlled Substances Act.

APPEAL from *McLean, Judge,* 3 May 1972 Session of Superior Court held in MECKLENBURG County.

Defendant was convicted under an indictment charging him with a violation of the North Carolina Controlled Substances Act.

The State's evidence tended to show that on the afternoon of 3 January 1972, a uniformed police officer, Officer Christmas, was on duty alone in a marked police patrol car when he observed a passing brown Pinto automobile driven by defendant and containing two other people. The officer had been alerted to watch for such a car which was believed to have been used in a recent murder. Officer Christmas followed the Pinto in his patrol car and while keeping the same under observation, radioed the Pinto's tag number to police headquarters in order to verify identification of the tag. Having obtained a positive identification of the tag number and believing the defendant driver to fit the description of a suspect also wanted in connection with the murder, the officer radioed for assistance. The Pinto had, by this time, pulled into a gasoline service station and stopped. Officer Christmas stopped behind the Pinto, got out of the car and positioned himself so that he could look through the rear window of the Pinto. He then observed the defendant driver place a green bottle with a white cap between

the seat and the door on the passenger side of the front seats in the Pinto. As soon as additional police officers arrived at the scene, Officer Christmas drew his service revolver, approached the Pinto and had all three occupants of the car get out. Officer Ruckart, assigned to the City of Charlotte Police Department, Criminal Investigation Bureau, arrived on the scene, placed defendant under arrest for being an accessory to murder, searched him and then had defendant and the other two occupants of the car taken into custody. The brown Pinto automobile was removed to the Law Enforcement Center parking area where it was searched by Officer Christmas and another officer. On the floor of the Pinto they found a green bottle with a white cap containing 17 foil packets. Analysis of the contents of those packets revealed the presence of the heroin.

The defendant called one of the other occupants of the brown Pinto whose testimony tended to show that the defendant had not placed any green bottle with a white cap anywhere on the right-hand side of the automobile. The testimony also tended to show that the backs of the front seats of the car in question would allow someone standing behind the car to see only a small portion of anyone occupying the front seats and that the occupant of the rear seat was placed so as to further obstruct the view.

The jury found defendant guilty of the offense of possession of heroin. He was sentenced to imprisonment for a period not to exceed five years and was given credit against his sentence for time served awaiting trial.

Attorney General Robert Morgan by Henry E. Poole, Associate Attorney, for the State.

James J. Caldwell for defendant appellant.

VAUGHN, Judge.

[1] Defendant's first assignment of error challenges the admissibility of the green bottle and the 17 foil packets it contained on the grounds that they were discovered as the result of a warrantless search of an automobile at a time and place remote from the arrest of defendant. Defendant had not objected to earlier testimony that the State's Exhibit (the green bottle containing foil packages) contained heroin. Upon defendant's

objection, the court excused the jury, conducted a *voir dire* and, upon findings of fact which are supported by the evidence, concluded that the search was lawful and allowed the exhibit in evidence.

A warrantless search and seizure based upon a reasonable belief arising out of circumstances known by the seizing officers that an automobile contained articles which the officers are entitled to seize has been held to be valid. *Carroll v. United States,* 267 U.S. 132, 69 L.Ed. 543; *Brinegar v. United States,* 338 U.S. 160, 93 L.Ed. 1879. A warrantless search and seizure based upon probable cause has been held to be lawful though conducted at a time and place remote from the time and place of the original detention of the vehicle. *Chambers v. Maroney,* 399 U.S. 42, 26 L.Ed. 2d 419. In *Chambers,* the police had probable cause to believe that four men, carrying guns and the fruits of a robbery, had fled the scene of the crime in a car of a particular description. Based upon this probable cause, the police stopped a particular car, took the occupants into custody, removed the car to the police garage and searched it without a warrant, seizing certain incriminating evidence which was used to convict the occupants of the car. Discussing the choices of immediately conducting a warrantless search based upon probable cause at the scene and on the other hand seizing and holding a car before presenting the probable cause issue to a magistrate, the court concluded that, "Given probable cause to search, either course is reasonable under the Fourth Amendment."

In the present case, the record discloses that the police had probable cause, based upon the testimony of three witnesses given to Officer Ruckart, to believe that defendant and a brown Pinto automobile bearing the license number in question were connected with a murder committed on Christmas Day, 1971. A warrant for the arrest of defendant was outstanding. The officers had probable cause to believe that the brown Pinto, or some article contained within it, was subject to seizure in connection with the investigation of that murder. It has long been the rule that discovered evidence which is not related to the crime which created a basis for the search originally, is admissible. *Harris v. United States,* 331 U.S. 145, 91 L.Ed. 1399; *Abel v. United States,* 362 U.S. 217, 4 L.Ed. 2d 668, reh. den. 362 U.S. 984, 4 L.Ed. 2d 1019. We hold that the admission into evidence of the green bottle and the 17 foil packets containing

traces of heroin did not violate any rights of defendant and does not constitute prejudicial error.

[2] Defendant's argument that the amount of heroin seized is insufficient to support a conviction and that judgment of nonsuit should have been entered for that reason is without merit. The possession of any quantity of the drug heroin constitutes a felony under the provisions of the North Carolina Controlled Substances Act.

Defendant, through his court appointed counsel, has brought forward and argued other assignments of error. After due consideration, we hold that they fail to disclose prejudicial error.

No error.

Judges HEDRICK and GRAHAM concur.

L. DAVID BERRYHILL, JR. AND WIFE, BARBARA D. BERRYHILL; LEWIS D. BERRYHILL AND WIFE, MAE LILLIE M. BERRYHILL; JAMES D. INGOLD AND WIFE, DRUSILLA S. INGOLD v. OLEN E. MORGAN AND WIFE, BETTY M. MORGAN

No. 7226SC757

(Filed 22 November 1972)

Deeds § 20— prohibition of duplex for rental purposes — sufficiency of restrictive covenant

A subdivision restrictive covenant stating "No duplexes or apartment houses for rental property" prohibited the construction of a two-family duplex dwelling for rental purposes on property within the subdivision.

APPEAL by defendant from *Snepp, Judge,* 5 June 1972 Schedule "A" Jury Session of MECKLENBURG Superior Court.

Plaintiffs instituted this action to have defendants restrained and enjoined from constructing a duplex dwelling on a lot within a subdivision and renting the same to tenants.

Pertinent stipulations are summarized as follows:

Plaintiffs Berryhill are the owners of Lots 11, 12, 13, 14 and 15 of a subdivision known as the Lloyd Campbell property located in Mecklenburg County, a map of said property being

duly recorded in Mecklenburg County Registry in Map Book 6, at page 921; plaintiffs Ingold are the owners of Lot 10 and defendants are the owners of Lots 2 and 16 of said property.

The property shown on said map is subject to restrictive covenants duly recorded in Mecklenburg County Registry, said covenants being as follows:

"1. No residence erected on Lots Nos. 4, 5, 6, 7, 8, 9, 18, 19, 20, 21, 22 and 23 facing on Driftwood Drive shall have less than 1200 square feet of floor space and to be used for residential purposes only;

2. Residences built on all other lots shown on said map shall have not less than 1,000 square feet of floor space, and to be used for residential purposes only;

3. No residence shall be erected within 65 feet of the front property line on the lots facing on Driftwood Drive;

4. No trailer, basement, tent, shack, garage, barn or other outbuilding erected in the tract shall at any time be used as a residence temporarily or permanently, nor shall any structure of a temporary character be used as a residence;

5. All houses on the property shall be equipped with running water and sewage facilities;

6. No duplexes or apartment houses for rental property;

7. A right of way is reserved across the front of all lots in said development for water and sewage lines."

Defendants have obtained from the City of Charlotte a permit authorizing them to build a two-family duplex dwelling on Lot 16 as shown on said map; defendants intend to construct a two-family duplex dwelling on said lot and intend to rent the same to tenants for occupancy.

On proper motion, plaintiffs were granted a temporary restraining order which was continued until the hearing of the cause on its merits. The parties waived jury trial and following a hearing the court entered judgment in favor of plaintiffs. Defendants appealed.

Joseph L. Barrier for plaintiff appellees.

Ervin, Burroughs & Kornfeld by Winfred R. Ervin and John C. MacNeill, Jr., for defendant appellants.

BRITT, Judge.

In our opinion the disposition of this appeal depends on the answer to the question, do the restrictive covenants hereinabove set out forbid the construction of a two-family duplex dwelling on Lot 16 of the Lloyd Campbell property *and* the rental of said duplex dwelling to tenants for occupancy? We answer in the affirmative.

The broad principles governing construction of restrictive covenants in this jurisdiction appear to be well summarized by Sharp, Justice, in *Long v. Branham,* 271 N.C. 264, 268, 156 S.E. 2d 235, 238, 239 (1967) as follows:

> "In construing restrictive covenants, the fundamental rule is that the intention of the parties governs, and that their intention must be gathered from study and consideration of *all* the covenants contained in the instrument or instruments creating the restrictions. *Callaham v. Arenson,* 239 N.C. 619, 80 S.E. 2d 619. The rules of construction are fully set out in Annot., Construction and application of covenant restricting use of property to 'residential' or 'residential purposes,' 175 A.L.R. 1191, 1193 (1948), and they are succinctly stated in 20 Am. Jur., Id. § 187 as follows:
>
> > 'Covenants and agreements restricting the free use of property are strictly construed against limitations upon such use. Such restrictions will not be aided or extended by implication or enlarged by construction to affect lands not specifically described, or to grant rights to persons in whose favor it is not clearly shown such restrictions are to apply. Doubt will be resolved in favor of the unrestricted use of property, so that where the language of a restrictive covenant is capable of two constructions, the one that limits, rather than the one which extends it, should be adopted, and that construction should be embraced which least restricts the free use of the land.
> >
> > *'Such construction in favor of the unrestricted use, however, must be reasonable. The strict rule of construction as to restrictions should not be applied in such a way as to defeat the plain and obvious purposes of a restriction.'* " (Emphasis added.)

Needless to say, the form of the covenants under consideration would hardly win a contest for good draftsmanship. Nevertheless, when Covenant 6 is considered in context, it is reasonable to conclude that no duplex house or apartment house may be constructed on Lot 16 and rented to tenants for occupancy. Should we assume that in Covenant 6 "duplexes" is used as a noun and does not relate to "houses," two of the examples given in Webster's Third New International Dictionary, Unabridged, for "duplex" when used as a noun are (a) duplex apartment and (b) two-family house.

In the judgment appealed from the court found as a fact, among other things, (1) that the restrictive covenants constitute a general plan of development and bind and are applicable to all lots shown on the map of the Lloyd Campbell property, and (2) defendants intend to construct on Lot 16 a two-family duplex dwelling for rent. All of the findings of fact are fully supported by the evidence and stipulations. The court concluded as a matter of law, among other things, that defendants' property is subject to Covenant 6 and plaintiffs may enjoin defendants from erecting a duplex dwelling for rental on Lot 16. The conclusions of law are fully supported by the findings of fact. However, the court ordered that the defendants be restrained "from constructing a duplex structure on Lot 16 in said subdivision" and made no reference to use for rental purposes.

We think the court erred in the relief it granted in the judgment for the reason that the relief is not consistent with the findings of fact and conclusions of law. Consequently, the judgment appealed from is vacated and this cause is remanded for further proceedings not inconsistent with this opinion.

Judgment vacated and cause remanded.

Chief Judge MALLARD and Judge BROCK concur.

DWIGHT E. AVIS AND WIFE, MARGARET C. AVIS v. THE HARTFORD FIRE INSURANCE COMPANY, A CORPORATION

No. 7228DC797

(Filed 22 November 1972)

1. **Insurance § 143— fortuitous event defined**

A fortuitous event is an event dependent on chance; thus, fortuitous is synonymous with accident.

2. **Insurance § 143— "all risk" policy — fortuitous event**

An "all risk" policy obligates the insurer to pay for loss caused by a fortuitous and extraneous event, but does not obligate the insurer to pay for loss or damage likely to happen because of the nature and inherent qualities of the property insured.

3. **Insurance § 144— "all risk" insurance — fortuitous event — failure of wood to hold paint**

Loss occasioned when paint applied to paneling and woodwork in plaintiffs' home began to blister and peel and attempts to remove all the paint and to repaint areas where paint had been removed were unsuccessful because of qualities in the wood or in a finish on the wood, leaving the wood stained and mottled, *held* not a fortuitous event covered by a policy insuring plaintiffs' home against "all risks of physical loss."

APPEAL by defendant from *Winner, Judge,* 24 April 1972 Session of District Court held in BUNCOMBE County.

This is a civil action wherein plaintiffs, Dwight E. Avis and wife, Margaret C. Avis, seek to recover damages from defendant, The Hartford Fire Insurance Company, under the terms of a fire insurance policy issued by defendant, insuring plaintiffs' home against "all risks of physical loss." After a trial without a jury, the court made findings of fact which, except where quoted, are summarized as follows:

Plaintiffs purchased from the defendant a policy of insurance which insured their home against "all risks of physical loss." In October, 1965, R. A. Ingle was employed by plaintiffs "to paint certain woodwork in the 3 upstairs bedrooms in the dwelling and 2 baths." Approximately one month after the painting was completed, some of the paint had begun "to blister and peel." Attempts by R. A. Ingle in January, 1966, to remove the paint on the paneling by application of commercial paint solvents were unsuccessful. Attempts to repaint the areas where the paint had been removed were also unsuccessful. On 21 Jan-

uary 1966 plaintiffs notified defendant of the condition of the walls, and on 7 September 1966, "the defendant acting through its insurance adjuster informed the plaintiffs that the defendant would not pay the claim because there had not been an 'accident' within the coverage of the policy."

Based upon these findings of fact, the trial court concluded as a matter of law:

> "That the diminution in market value of the wood paneling, molding, baseboards, frames around windows and doors and closet doors in January of 1966, resulting from the fact that all of the paint on the wood paneling and woodwork herein could not be removed and that the areas from which paint had been removed could not be painted and from the staining and mottling of the said wood paneling and woodwork was a fortuitous event and happening occurring in January of 1966 without intentional or fraudulent acts on the part of the plaintiffs and is within the coverage of the 'all risks' provision of the policy upon which suit has been instituted, and that said loss and damage is within the terms and meaning of the policy provision quoted in Paragraph 2 of the findings of fact, and said loss and diminution in market value was not within the terms of any of the pleaded conditions, exclusions or exceptions to coverage under said policy."

From a judgment that plaintiffs recover of the defendant $1,625.92 with interest, defendant appealed.

Bennett, Kelly & Long, P.A., by Robert B. Long, Jr., for plaintiff appellees.

Williams, Morris and Golding by William C. Morris, Jr., for defendant appellant.

HEDRICK, Judge.

It is generally recognized that the liability of an insurer under an "all risk" policy is limited to losses resulting from a fortuitous event. Annot., 88 A.L.R. 2d 1124 (1963). Thus the critical question raised by this appeal is whether the loss in issue was occasioned by a fortuitous event.

[1, 2] A fortuitous event is an event dependent on chance. Restatement of Contracts § 291, comment *a* at 430 (1932). Thus,

fortuitous is synonymous with accident. *Kirkley v. Insurance Company,* 232 N.C. 292, 59 S.E. 2d 629 (1950). An "all risk" policy obligates the insurer to pay for loss caused by a fortuitous and extraneous event, but does not obligate the insurer to pay for loss or damage likely to happen because of the nature and inherent qualities of the property insured. Therefore, to recover under this policy of insurance, plaintiffs must establish not only that a loss occurred, but that it was fortuitous, i.e., that it resulted from a risk as opposed to being an ordinary and probable consequence of the inherent qualities of the surfaces to be painted. *Glassner v. Detroit Fire and Marine Insurance Company,* 23 Wis. 2d 532, 127 N.W. 2d 761 (1964).

[3] In the present case, the trial court's conclusion that the loss, "resulting from the fact that all of the paint on the wood paneling and woodwork herein could not be removed and that the areas from which paint had been removed could not be painted and from the staining and mottling of the said wood paneling and woodwork was a fortuitous event and happening occurring in January of 1966" is simply not supported by the evidence or the findings of fact.

Plaintiff, Margaret C. Avis, testified:

"Because of the finish to this wall, or to these walls, the paint wouldn't stay on, and the remover made it even worse."

"Nothing had been done to these walls other than a finish put on them, to my knowledge. There had been some kind of a finish put on them. We couldn't seem to get the paint to stick to that finish even though we applied it over and over."

"As to whether I relate the coming off of the paint to the finish that the walls had on them, well, it wouldn't let the paint stay on them."

Plaintiff, Dwight E. Avis, testified:

"As to whether I attributed this paint coming off to the finish that was on the paneling and woodwork, I think that was probably the reason. It was either in the wood or in the finish. Whether it was in the wood or in the finish, the fact remains that it just wouldn't hold paint."

Ernest Reed, a witness for plaintiff, testified:

"It is my opinion that these walls, woodwork, would simply not hold paint. That was my opinion because of the finish that they had on them. . . . This was simply a surface on which paint would not stick. It didn't make any difference what kind of paint it was, it wouldn't stick or stay on it."

Plaintiffs' evidence negates the possibility that the damage to plaintiffs' property was produced by a fortuitous event and conclusively establishes that the loss was the product of the inherent qualities of the property insured.

The judgment appealed from is

Reversed.

Judges VAUGHN and GRAHAM concur.

EDWARD BELL AND PAULINE W. BELL v. TRADERS AND MECHANICS INSURANCE COMPANY, INC.

No. 7229SC596

(Filed 22 November 1972)

1. **Insurance § 128; Rules of Civil Procedure § 8— waiver of limitation period in fire policy — sufficiency of pleading**

Plaintiff's reply alleging the affirmative defense of waiver of the 12-month limitation for instituting suit on a fire policy was sufficiently particular to place the court and defendant on notice of the matter intended to be proved as required by G.S. 1A-1, Rule 8(c).

2. **Insurance § 128; Principal and Agent § 4— waiver of limitation period in fire policy — statements and actions of local agent — failure to prove scope of authority**

In an action on a fire policy wherein the main issue was whether the one-year limitation for instituting suit on the policy had been waived, testimony by defendant's local agent tending to show that the agent had told plaintiff that the claim would be paid and that he had negotiated with plaintiff after the one-year period had expired was erroneously admitted where plaintiff failed to establish that the local agent was acting within the scope of his authority when he made the statement and negotiated with plaintiff.

APPEAL by defendant from *McLean, Judge,* 31 January 1972 Session of Superior Court held in POLK County.

Plaintiff instituted this action on 18 November 1970 to recover on a fire insurance policy issued by defendant, Traders and Mechanics Insurance Company, Inc. The policy, in the face amount of $6,000, covered a dwelling house of the plaintiff which was destroyed by fire on 11 or 12 December 1967. The parties have stipulated that the policy was in full force and effect at the time of the fire.

Plaintiff testified that he reported the fire loss to Robert Adams, manager of Polk Insurance Company, Inc., who had issued the defendant's policy in question. Defendant was informed of the loss by Adams and sent an adjuster, John B. King, to investigate. Plaintiff and King did not agree on the value of the loss, and no payment was made under the policy.

Under the provisions of the policy, no action for recovery on the policy shall be sustained "unless all the requirements of this policy shall have been complied with, and unless commenced within twelve months next after inception of the loss." Plaintiff did not institute an action within the period of one year from the time of loss, but alleged, however, that defendant waived this one year requirement by the statements or actions of its agents. Plaintiff alleged that statements or actions of Robert Adams and John B. King, the adjuster, constituted a waiver of the time limitation provision of the insurance contract. The question of waiver was submitted to the jury which found that the time limitation provision in question had been waived, and returned a verdict in the amount of the maximum coverage of the policy. Defendant appealed.

Hamrick & Bowen, by Fred D. Hamrick, Jr., and McFarland & Key, by William A. McFarland, for plaintiff.

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

BROCK, Judge.

[1] Defendant assigns as error the court's refusal of his motion to strike certain portions of the plaintiff's reply alleging waiver. Defendant contends plaintiff's reply does not specifically state the facts constituting waiver, and so should be struck as an insufficient defense under Rule 12(f) of the North Carolina

Rules of Civil Procedure. Rule 8(c) designates waiver as an affirmative defense. The language in Rule 8(a), dealing with general pleading, and that in Rule 8(c), dealing with pleading affirmative defenses, is largely identical: (such pleading shall contain) "a short and plain statement . . . sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved." Under our new Rules of Civil Procedure, the requirements for pleading an affirmative defense are no more stringent than those for pleading a cause of action. Plaintiff's reply in question was sufficiently particular to place the court and defendant on notice of the matter intended to be proved. This assignment of error is overruled.

[2] Defendant makes numerous assignments of error to the admission of evidence. Assignments of error Nos. 10-16 challenge the admissibility of the testimony of Robert Adams, manager of Polk Insurance Company, Inc., which was the local or producing agent for Traders and Mechanics Insurance Company, Inc., in the issuance of the fire insurance policy in question. The testimony, admitted over defendant's objections, was as follows:

"Q. What did you tell Mr. McFarland, if anything, with reference to whether or not the claim would be paid?

"A. I told Mr. McFarland that the claim would be paid; that it was a matter of how much money.

"Q. Now, was the claim still in your office and in negotiation as of the time you left there?

"A. We had sent to Mr. Black in Spartanburg the fire loss claim that was filed. Now, I don't know whether we had a copy of this in Mr. Bell's file or not.

"Q. Were you still talking with Mr. McFarland and Mr. Bell about this claim up until the time you left?

"A. Yes, Sir.

"Q. And that was about a year and a half to two years from this date?

"A. That's right."

This testimony tended to show that Adams had told plaintiff his claim would be paid, and that Adams had negotiated with

plaintiff at a time after the one-year-from-loss period for bringing suit had passed. Both of these statements affected the critical issue of this trial, i.e., whether defendant waived the time limitation provision of the insurance contract through the actions or statements of its agents.

It is a general principle that one who has dealt with an agent or who has availed himself of the act of an agent must, in order to charge the principal, prove the authority under which the agent acted; he has the burden of establishing the agent's authority to bind the principal by the act or contract in controversy. 3 Am. Jur. 2d, Agency, § 348, p. 705. "Thus, the person alleging the agency must prove not only the fact of its existence, but also its nature and extent." 3 Am. Jur. 2d, *supra; accord, Harvel's, Inc. v. Eggleston,* 268 N.C. 388, 150 S.E. 2d 786. Statements of the alleged agent are not competent against the principal as admissions against interest unless the fact of agency and the authority of the agent to bind the principal in the matter are shown by competent evidence. 6 Strong, N. C. Index 2d, Principal & Agent, § 4, p. 406.

Adams testified that he told plaintiff he had no authority to settle the claim. In light of this testimony, plaintiff could not rely on a presumption that Adams was acting within an implied or ostensible authority. It was incumbent on plaintiff to establish Adams' authority to bind the defendant. *See Horton v. Insurance Co.,* 9 N.C. App. 140, 175 S.E. 2d 725. Plaintiff did not meet this burden. The admission of this testimony was error prejudicial to the defendant.

New trial.

Chief Judge MALLARD and Judge BRITT concur.

ROBERT W. MIKEAL v. FIRST FEDERAL SAVINGS & LOAN ASSOCIATION, A BANKING INSTITUTION, AND LOU ELLEN W. PENNELL, ADMINISTRATRIX C.T.A. OF THE ESTATE OF RHODA JANE W. JONES, DECEASED

No. 7226SC748

(Filed 22 November 1972)

Evidence § 43— mental capacity to execute contract — opinion testimony — exclusion of general questions

In an action involving the mental capacity of decedent to execute a contract with plaintiff establishing a joint savings account with right of survivorship, the trial court properly sustained plaintiff's objections to general questions seeking to obtain opinion testimony as to decedent's physical and mental condition during a specific period of time since the questions did not relate to the mental capacity of decedent to know and understand the nature and effect of the contract in question.

APPEAL by defendant administratrix from *Snepp, Judge,* 29 May 1972 Schedule A Session of Superior Court held in MECKLENBURG County.

This is an action for declaratory judgment to determine the rights of plaintiff and the estate of Rhoda Jane Watson Jones to the proceeds of a savings account on deposit in defendant savings and loan association.

The defendant administratrix is the qualified and acting administratrix of the estate of Rhoda Jane Watson Jones (hereinafter referred to as Jane W. Jones), who died on 8 March 1971. It was stipulated by the parties that on 21 December 1965 plaintiff and Jane W. Jones executed a written agreement which established between themselves and the defendant savings and loan association a joint savings account with the right of survivorship; that the agreement and account is designated by defendant savings and loan association as No. 28290; that the amount of $6,377.84 was the initial deposit to said account by Jane W. Jones; and that plaintiff provided none of the consideration or did not contribute to said account. It was judicially admitted by the administratrix that the estate of Jane W. Jones contained sufficient assets, without consideration of the account here in controversy, to pay all claims, debts, and charges of administration.

Defendant administratrix alleges undue influence upon Jane W. Jones by plaintiff, and mental incapacity of Jane W.

Jones to execute the contract for the joint account with right of survivorship.

Plaintiff offered the judicial admissions and the stipulations and rested. Defendant offered the testimony of several witnesses in an effort to show mental incapacity. At the close of defendants' evidence, upon plaintiff's motion, the trial judge directed a verdict for the plaintiff upon the issue of the mental capacity of Jane W. Jones.

Lane & Helms, by Thomas G. Lane, Jr., for the plaintiff.

J. C. Sedberry and Don Davis for the administratrix.

BROCK, Judge.

All of the facts necessary to the establishment of a *prima facie* case for plaintiff were either judicially admitted or formally stipulated. The fact of the execution by plaintiff and Jane W. Jones of a contract which established the account in question as a joint savings account with the right of survivorship; and the fact that the assets of the estate of Jane W. Jones were sufficient, without consideration of the savings account in question, to pay all debts, claims, and charges of administration, entitled plaintiff, nothing else appearing, to a judgment declaring him to be entitled to the proceeds of the savings account in question. The questions of undue influence and of the mental incapacity of Jane W. Jones to execute the contract were raised by the administratrix. These were the only issues which remained to be resolved, and the burden of proof was upon the administratrix.

Defendant administratrix offered several witnesses and proposed to obtain opinion testimony from them. Objections to the questions were sustained in each instance and defendant administratrix assigns these rulings as errors. These assignments of error are without merit.

"Anyone who has observed another, or conversed with him, or had dealings with him, and a reasonable opportunity, based thereon, of forming an opinion, satisfactory to himself, as to the mental condition of such person, is permitted to give his opinion in evidence upon the issue of mental capacity, although the witness be not a psychiatrist or expert in mental disorders." *In re Brown,* 203 N.C. 347, 166 S.E. 72. *See also, Moore v. Insurance Co.,* 266 N.C. 440, 146 S.E. 2d 492; Stansbury, N. C.

Evidence 2d, § 127. However, this rule presupposes an inquiry or question relating to mental capacity to know and understand the nature and effect of the kind of transaction involved in the litigation.

The following is generally typical of the questions to which objections were sustained:

> "Q. Well, Mrs. Pennell, will you describe to His Honor and the jury the physical and mental condition of your sister, Mrs. Jones, from September 14, 1965 to December 21, 1965?"

The vice of such a general question is fully exemplified in the answer to the question which was allowed in the absence of the jury. We will not reproduce here the dissertation delivered by the witnesses. Suffice to say, much of it was not relevant to the case, much of it was clearly hearsay, and none of it bore directly upon the mental capacity of decedent to know and understand the nature and effect of the contract she signed with plaintiff to establish a joint savings account with right of survivorship. The objections to the questions were properly sustained.

Defendant did not undertake to offer evidence of undue influence, therefore no issue concerning this was before the court. Having failed in her effort to offer competent evidence of mental incapacity, she failed to offer sufficient evidence to justify submission of that issue to the jury. Therefore, a directed verdict for plaintiff was properly entered.

Affirmed.

Chief Judge MALLARD and Judge BRITT concur.

STATE OF NORTH CAROLINA v. WILLIAM CLAUDE DOUGLAS

No. 7226SC627

(Filed 22 November 1972)

1. Assault and Battery § 15— self-defense — jury instructions proper

The trial court's instruction in a felonious assault trial on defendant's right to act in self-defense was clear, fair and submitted the case to the jury upon applicable principles of law.

2. **Assault and Battery § 15— accidental shooting — jury instructions required without request**

Where defendant's entire defense in a felonious assault case was his contention that the shot which hit his victim was accidentally fired when she accidentally hit the pistol, defendant was entitled to an instruction with respect to an accidental shooting without a special request therefor.

APPEAL by defendant from *Hasty, Judge,* 31 January 1972 Session of Superior Court held in MECKLENBURG County.

Defendant was charged in separate bills of indictment with two felonious assaults: (1) in case number 71CR65216 with an assault on Howard Pettice with a deadly weapon with intent to kill, inflicting serious injury, and (2) in case number 70CR79662 with an assault on Marie Pettice with a deadly weapon with intent to kill, inflicting serious injury.

The evidence for the State tended to show as follows: That Mr. Howard Pettice and wife, Marie Pettice, with their son, Dana Pettice, and Marie Pettice's mother, Frances Hairston, gathered at the home of Marie Pettice's brother in Charlotte on December 25, 1970; that Marie Pettice had once been married to the defendant, but had been divorced for many years; that the defendant came to the house that morning; that the group talked and some members danced and drank; that the defendant left about 3:15 p.m. and returned about 4:15; that, again, the atmosphere was jovial for a time; that later Howard Pettice noticed that the defendant had become quiet and that "things are not going right." (R p 7); that Howard Pettice spoke with his wife in the bedroom and suggested that they should leave; that he then went outside, followed after a few minutes by Marie Pettice; that, upon hearing a commotion within, he returned to the house; that upon entering he spoke a few words to the defendant, whereupon the defendant produced a pistol and shot him twice, at a range of six feet; that Marie Pettice then reentered the house and was shot twice by the defendant; that the defendant was not assaulted prior to the shootings; that both Howard and Marie Pettice sustained serious injuries.

The evidence for the defendant tended to show as follows: That the defendant had been a long-time friend of Marie Pettice's brother and had been a frequent guest in his home; that the defendant arrived there on Christmas morning, 1970, about 10:30; that he left and returned later in the afternoon for the

purpose of loaning money to the wife of Marie Pettice's brother; that he sat down in the living room and that, shortly, Howard Pettice, his son and Marie Pettice's mother came through the living room from the back of the house and left by the front door; that Marie Pettice then confronted the defendant in the living room and some unpleasant conversation took place; that she then left through the front door; that Howard Pettice then reentered the living room from outside, struck the defendant in his face and picked him up from his chair; that the defendant was considerably smaller than Howard Pettice, and that the defendant was afraid of Howard Pettice; that the defendant then shot Howard Pettice with his pistol and seeing that the shot had no apparent effect, shot him again; that Marie Pettice came back into the house and in trying to assist her husband she ran into defendant's hand accidently causing the pistol to fire again; that the defendant then left and later turned himself in to the police; that the defendant is a diabetic; that he frequently carries large sums of cash in connection with his business, and was doing so on the day of the shootings; that the shooting of Howard Pettice was in self-defense, and the shooting of Marie Pettice was an accident.

The jury returned a verdict of guilty in each case. In case number 71CR65216 (assault on Howard Pettice), defendant was sentenced to a term of five years imprisonment. In case number 70CR79662 (assault on Marie Pettice), defendant was sentenced to a term of five years imprisonment, to run concurrently with the sentence in case number 71CR65216.

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

Wardlaw, Knox, Caudle & Knox, by John S. Freeman, and Henry E. Fisher, for the defendant.

BROCK, Judge.

Case number 71CR65216 (assault on Howard Pettice).

[1] Defendant assigns as error the charge of the court respecting defendant's right to act in self-defense. We think the charge is clear and fair, and, when read in context, submitted the case to the jury upon applicable principles of law. This assignment of error is overruled.

Case number 70CR79662 (assault on Marie Pettice).

[2] Defendant assigns as error the failure of the court to instruct the jury upon the law applicable to his defense of an accidental shooting. This assignment of error is sustained. Defendant's entire defense in this case was his contention that the shot which hit Marie Pettice was accidentally fired when she accidentally hit the pistol after the scuffle with Howard Pettice had concluded. This was a substantial feature of defendant's defense and he was entitled to an instruction thereon without special request. 3 Strong, N. C. Index 2nd, Criminal Law, § 113, p. 10.

In case number 71CR65216 (assault on Howard Pettice): No error.

In case number 70CR79662 (assault on Marie Pettice): New trial.

Chief Judge MALLARD and Judge BRITT concur.

BEUNA LINEBERRY v. CAROLINA GOLF & COUNTRY CLUB, INC., A NORTH CAROLINA CORPORATION, AND GARFIELD WASHINGTON, A MINOR, THROUGH HIS GUARDIAN AD LITEM, JEFFERSON H. BRUTON

No. 7226SC663

(Filed 22 November 1972)

Appeal and Error § 57; Games and Exhibitions § 2— golf course injury — findings of fact with respect to negligence — conclusiveness on appeal

Where the trial court in a personal injury action made findings of fact that plaintiff was injured by a golf ball hit by defendant caddy while she was playing on defendant corporation's golf course, that defendant corporation had no knowledge that defendant caddy was hitting golf balls onto the fairways, that defendant caddy was not an employee or agent of defendant corporation and that defendant corporation was guilty of no negligent act or omission, the court on appeal was bound by such findings since they were supported by competent evidence.

ON writ of *certiorari* to review the trial before *Snepp, Judge,* 17 April 1972 Session of Superior Court held in MECKLENBURG County.

Plaintiff, Beuna Lineberry, instituted this action to recover damages for injuries allegedly suffered by her when she was struck by a golf ball driven by defendant Garfield Washington while she was playing golf on the course owned by defendant Carolina Country Club (Country Club). In support of this claim, plaintiff introduced evidence tending to show the following:

On the morning of 9 June 1966 plaintiff was a member of a threesome playing golf at defendant Country Club. While on the number two fairway plaintiff was struck on the left hip by a golf ball driven by the defendant, Garfield Washington, then age 13. Defendant Washington and other caddies had been given permission by the caddy master, John Henry Withers, "to play with clubs around the caddy house," and on the morning of 9 June 1966 "all the caddies were down there hitting balls across the fairway." Walter Eugene Reynolds, the golf pro at defendant Country Club, testified that:

> "The Caddy Master was responsible for keeping the boys quiet, training them, and seeing that they conducted themselves in an orderly manner when they were at the caddy house. . . . The caddies were not permitted to keep golf clubs over there and they were not permitted to hit golf balls at any time."

Prior to this occasion, Reynolds "had never had any reports that golf caddies had hit balls out on to the course." Caddies were employees of the golfer and not of the Country Club and received no compensation unless they caddied. There was no requirement that caddies report to work at a particular time; caddies could come and go at will.

At the conclusion of plaintiff's evidence, defendant Country Club moved for involuntary dismissal and the court, pursuant to the provisions of Rule 41(b) of the North Carolina Rules of Civil Procedure, made the following pertinent findings and conclusions:

> "On June 9, 1966, the plaintiff was a member of a threesome playing golf on a golf course owned and operated by the corporate defendant. She was on number two fairway of the course, which parallels number one fairway.
>
> At the same time the defendant Washington was in or near the caddy house which was located adjacent to

number one fairway. He was there to seek employment by players as a caddy.

* * *

As the plaintiff was on number two fairway, the defendant Washington hit a golf ball across number one fairway and onto number two fairway. At that time he knew that persons were on number two fairway and his view of the area in which the plaintiff was standing was obscured by trees. The ball driven by Washington struck the plaintiff, and his negligence in driving the ball proximately caused injury to the plaintiff.

* * *

There is no evidence that the corporate defendant had any knowledge that the defendant Washington or other caddies had on any prior occasion hit golf balls into the fairways, or that Washington was about to do so on this occasion.

Washington received no salary or wages from the corporate defendant and had no assigned or required hours of work, but appeared to seek employment as a caddy at such times as he desired.

* * *

The defendant Washington was not on this occasion, an agent or employee of the corporate defendant acting pursuant to the terms of his employment or within the scope thereof.

The plaintiff's evidence fails to show any negligent act or omission upon the part of the corporate defendant, and the corporate defendant is not liable for injuries sustained by the plaintiff."

Based on its findings and conclusions, the court entered judgment dismissing plaintiff's claim as to defendant Country Club. The plaintiff appealed.

Edwards and Millsaps by Joe T. Millsaps for plaintiff appellant.

Fairley, Hamrick, Monteith & Cobb by S. Dean Hamrick for defendant appellee.

HEDRICK, Judge.

We allow plaintiff's petition for writ of certiorari so we may review the case on its merits.

The plaintiff's several assignments of error present the question of whether the evidence supports the trial judge's findings of fact and whether the facts found support the conclusions of law. In *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), Judge Parker, writing for this court, stated:

> "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." *Wells v. Insurance Co.,* 10 N.C. App. 584, 179 S.E. 2d 806 (1971); *Rogers v. City of Asheville,* 14 N.C. App. 514, 188 S.E. 2d 656 (1972).

In the present case Judge Snepp made findings determinative of the issues raised by the pleadings and the evidence. Such findings are supported by competent evidence in the record and are conclusive on appeal even though there might be evidence to sustain findings to the contrary. *Bryant v. Kelly, supra.* The facts found support the conclusions of law which in turn support the judgment.

In the trial below we find

No error.

Judges VAUGHN and GRAHAM concur.

JESSIE S. PELAEZ v. OSWALD PELAEZ v. CARLOS F. PELAEZ, SR., AND CARLOS F. PELAEZ, JR.

No. 7228SC729

(Filed 22 November 1972)

Deeds §§ 8, 9— recital of consideration — presumption of correctness — refusal to declare conveyances as deeds of gift proper

A recital of consideration in two deeds conveying land to defendant Oswald Pelaez by plaintiff Jessie Pelaez and defendant Carlos Pelaez is presumed to be correct; hence, the trial court properly granted defendants' motions for directed verdict in an action by plaintiff to have the deeds declared to be deeds of gift and therefore null and void because they were not recorded within two years from their making.

APPEAL by plaintiff from *Anglin, Judge,* 22 May 1972 Session of Superior Court held in BUNCOMBE County.

This is a civil action wherein plaintiff, Jessie S. Pelaez (now Surrency), seeks to have two deeds of conveyance (exhibits P-4 and P-5) declared to be deeds of gift and therefore null and void because they were not recorded within two years from their making as required by G.S. 47-26. The following facts are uncontroverted:

The plaintiff is the divorced wife of the additional defendant, Carlos F. Pelaez, Jr. The original defendant, Oswald Pelaez, is the brother of Carlos F. Pelaez, Jr. The additional defendant, Carlos F. Pelaez, Sr., is the father of Oswald and Carlos (Jr.) Pelaez. On 24 October 1964, Carlos F. Pelaez, Sr., conveyed the real property in question to the plaintiff and her husband, Carlos F. Pelaez, Jr., by warranty deeds recorded in Deed Book 911, page 643, and in Deed Book 912, page 15, in the office of the Register of Deeds of Buncombe County. On 11 November 1964, the plaintiff and her husband, Carlos F. Pelaez, Jr., executed and delivered two deeds (exhibits P-4 and P-5) conveying the same property to Oswald Pelaez. Exhibits P-4 and P-5 were recorded on 3 September 1970 in Deed Book 1025, pages 23 and 25, in the office of the Register of Deeds of Buncombe County. The parties stipulated that the one issue for trial was whether exhibits P-4 and P-5 were deeds of gift. At the close of plaintiff's evidence the court allowed the defendants' motions for directed verdict.

From a judgment directing a verdict for the defendants, plaintiff appealed.

Cecil C. Jackson, Jr., for plaintiff appellant.

Bennett, Kelly & Long, P.A., by E. Glenn Kelly for defendant appellee, Oswald Pelaez, and Peter L. Roda for defendant appellees Carlos F. Pelaez, Sr., and Carlos F. Pelaez, Jr.

HEDRICK, Judge.

The question presented on this appeal is whether plaintiff's evidence was sufficient to carry the case to the jury on the issue of whether exhibits P-4 and P-5 were deeds of gift.

At the trial plaintiff offered evidence tending to show that after the date of execution and delivery of exhibits P-4 and P-5 she and her husband, Carlos F. Pelaez, Jr., were divorced on 14 February 1971. Plaintiff testified:

> "With reference to P-4, the Deed containing a description of three tracts, I did not receive anything, money or anything of value, upon execution of that deed. I did not discharge, as a result of execution of that deed, any debt or anything.
>
> With reference to P-5, I did not receive any consideration or discharge any debt as a result of the execution of that deed."
>
> "I am telling this jury that my father-in-law gave these properties to me and Carlos, Jr., my then husband, and that they were ours absolutely without any strings attached. He gave them to us before he married. He gave them to us; and there wasn't no inheritance tax to be. I didn't give anything to Oswald, nor voluntarily turn around and give them to Oswald less than a month later. I am saying that they were not gifts to Oswald, they were deeds to us. My signature is on the two deeds, but I have not, knowingly, given anything to Oswald."

Exhibits P-4 and P-5 each contain the following recital:

> "WITNESSETH: That the Grantors, for and in consideration of the sum of Ten Dollars, and other good and valuable considerations to them in hand paid by the Grantees, the receipt whereof is hereby acknowledged, have

given, granted, bargained, sold and conveyed, and by these presents do give, grant, bargain, sell, convey and confirm unto the Grantees, their heirs and/or successors and assigns . . . . "

In *Speller v. Speller,* 273 N.C. 340, 159 S.E. 2d 894 (1968) it is stated:

"Ordinarily, the consideration recited in a deed is presumed to be correct. *Hinson v. Morgan,* 225 N.C. 740, 36 S.E. 2d 266. The question of consideration, however, under certain circumstances may be inquired into by the court. *Smith v. Smith,* 249 N.C. 669, 107 S.E. 2d 530; *Conner v. Ridley,* 248 N.C. 714, 104 S.E. 2d 845."

In *Randle v. Grady,* 224 N.C. 651, 32 S.E. 2d 20 (1944), Justice Winborne writing for the North Carolina Supreme Court said, "[D]ecisions of this Court are uniform in holding that in the purchase of land the recital acknowledging receipt of consideration contained in a deed therefor is *prima facie* evidence of that fact and is presumed to be correct."

Plaintiff has offered no evidence to overcome the presumption that the consideration recited in exhibits P-4 and P-5 is correct. Her own testimony tends to show that the deeds were not deeds of gift.

In view of our holding that the trial judge correctly allowed the defendants' motions for a directed verdict, it is not necessary that we discuss plaintiff's other assignments of error.

The judgment appealed from is

Affirmed.

Judges VAUGHN and GRAHAM concur.

STATE OF NORTH CAROLINA v. JAMES LEWIS ROBERTS AND THOMAS EDWARD TILLMAN

No. 7225SC581

(Filed 22 November 1972)

1. **Criminal Law § 21; Indictment and Warrant § 1— denial of preliminary hearing — no error**

The trial court in an armed robbery case did not commit error in denying defendants' motion to quash the bill of indictment returned against them on the grounds that they had been denied a preliminary hearing.

2. **Criminal Law § 113— two defendants — jury instructions as to guilt of each — no error**

The trial court's charge, considered as a whole, clearly and properly instructed the jury that under the evidence in the case they could find one or both of the defendants guilty or not guilty.

APPEAL by defendants from *Grist, Judge,* 9 February 1972 Session of Superior Court held in CATAWBA County for the trial of criminal cases.

Defendants were arrested on 23 December 1971 on warrants charging them with armed robbery. The warrants were returnable before the District Court in Hickory on 28 January 1972. On 10 January 1972 defendants, who were adjudged to be indigents, were assigned counsel. At the January 1972 Session of Superior Court held in Catawba County, true bills of indictment, proper in form, were returned against each of the defendants charging them with the felony of armed robbery. These bills of indictment were returned prior to 28 January 1972. On 28 January 1972 the district court judge found that the Grand Jury had already returned a true bill of indictment against each defendant charging him with the crime of armed robbery as contained in the warrants and held that, therefore, the defendants were not entitled to a preliminary hearing. At the 9 February 1972 Session of Superior Court held in Catawba County, the defendants pleaded not guilty and were found guilty of the lesser included offense of common-law robbery. From the judgment of imprisonment imposed, the defendants appealed, assigning error.

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

James M. Gaither, Jr., for James Lewis Roberts, defendant appellant.

E. Fielding Clark, II, for Thomas Edward Tillman, defendant appellant.

MALLARD, Chief Judge.

[1] The defendants' first assignment of error is that the court erred in refusing to grant their motion to quash the indictment on the grounds that they were denied a preliminary hearing after a date had been designated for such hearing.

The purpose of a preliminary hearing is to effect a release for one who is held in violation of his rights. *State v. Davis,* 253 N.C. 86, 116 S.E. 2d 365 (1960), *cert. denied,* 365 U.S. 855, 5 L.Ed. 2d 819, 81 S.Ct. 816. Inasmuch as the Grand Jury had already returned a true bill of indictment against each defendant on the same charge of armed robbery as contained in the warrants, there was nothing for the district judge to determine on 28 January 1972 at a hearing on the warrants. This court held in the case of *State v. Pitts,* 10 N.C. App. 355, 178 S.E. 2d 632 (1971), *cert. denied,* 278 N.C. 301, that:

> "A preliminary hearing is not an essential prerequisite to the finding of a bill of indictment. *State v. Hartsell,* 272 N.C. 710, 158 S.E. 2d 785 (1968). A defendant who is tried on a bill of indictment, as this defendant was, is not entitled to a preliminary hearing on the bill of indictment as a matter of right. 4 Strong, N. C. Index 2d, Indictment and Warrant, § 1, p. 335. * * * "

See also, *Gasque v. State,* 271 N.C. 323, 156 S.E. 2d 740 (1967), *cert. denied,* 390 U.S. 1030, 20 L.Ed. 2d 288, 88 S.Ct. 1423. The district judge was correct in ruling on the question of bond for the defendants and in declining to conduct a preliminary hearing. The superior court judge did not commit error in denying the motion of the defendants to quash the bill of indictment on the grounds that they had been denied a preliminary hearing.

[2] In their only other assignment of error, the defendants contend that the trial judge did not make it clear to the

jury that one of the defendants could be found guilty and the other not guilty. This contention is without merit. When the charge is read and considered as a whole, we think that the judge clearly and properly instructed the jury that under the evidence in this case they could find one or both of the defendants guilty or not guilty.

In the trial we find no prejudicial error.

No error.

Judges BROCK and BRITT concur.

STATE OF NORTH CAROLINA v. JOE HERMAN MARTIN

No. 7226SC562

(Filed 22 November 1972)

1. **Constitutional Law § 34; Criminal Law § 26— mistrial — plea of former jeopardy**

An order of mistrial entered upon motion of the defendant in an assault case did not support defendant's plea of former jeopardy in a subsequent trial for the same offense.

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

The imposition of a greater sentence after a conviction on a misdemeanor charge of assault by a jury in the superior court, upon appeal from a district court, did not violate defendant's constitutional rights.

APPEAL by defendant from *Friday, Judge,* 3 January 1972 Session of Superior Court held in MECKLENBURG County.

Defendant was charged in case No. 71-Cr-31432 in a warrant, proper in form, with the misdemeanor of assault with a deadly weapon and in case No. 71-Cr-31431 in a bill of indictment, proper in form, with the felony of assault with a deadly weapon with intent to kill, inflicting serious injuries, not resulting in death.

In case No. 71-Cr-31432, after his conviction in district court and the imposition of a six-months prison sentence, the defendant appealed to the superior court.

In superior court both of these cases were consolidated for trial without objection.

At the 8 November 1971 Session of Superior Court for the trial of criminal cases held in Mecklenburg County, the defendant was tried before a jury. After the jury had deliberated for approximately six hours, the defendant's motion for a mistrial was allowed and the court withdrew a juror and declared a mistrial.

At the 3 January 1972 Session of Superior Court held in Mecklenburg County for the trial of criminal cases, the defendant was again tried on both cases and was found guilty as charged in case No. 71-Cr-31432 and a prison sentence of two years was imposed, with a recommendation that the defendant be permitted to work under the Work Release Program. In case No. 71-Cr-31431, the defendant was found guilty of the felony of assault with a deadly weapon inflicting serious injury and a sentence was imposed of not less than four nor more than five years to begin at the expiration of the sentence imposed in case No. 71-Cr-31432. The execution of this latter sentence was suspended and the defendant was placed on probation for a period of five years.

The defendant appealed to the Court of Appeals, assigning error.

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

Chambers, Stein, Ferguson & Lanning by James E. Ferguson II and Karl Adkins for defendant appellant.

MALLARD, Chief Judge.

[1] The defendant's first assignment of error is that he was subjected to double jeopardy, in violation of his constitutional rights, for that he was retried on charges that he had been previously tried upon, at which former trial the jury had been unable to agree upon a verdict. This assignment of error is overruled. When the mistrial was ordered, the defendant not only made no objection but made the motion for the mistrial. The rule is that an order of mistrial entered upon motion of the defendant or with the defendant's consent will not support

a plea of former jeopardy. *State v. Crocker,* 239 N.C. 446, 80 S.E. 2d 243 (1954). In *State v. Battle,* 279 N.C. 484, 183 S.E. 2d 641 (1971), Justice Sharp said:

> "However, the general rule is that an order of mistrial in a criminal case will not support a plea of former jeopardy. * * *
>
> When the jurors declare their inability to agree, it must be left to the trial judge, in the exercise of his judicial discretion, to decide whether he will then declare a mistrial or require them to deliberate further. * * * "

[2] Defendant's second assignment of error is that his constitutional rights were violated by the imposition in superior court of a greater sentence on the misdemeanor charge than that which he received in the district court. The district court had jurisdiction of the misdemeanor charge. G.S. 7A-272. Upon appeal to superior court, trial is *de novo.* It is not an appeal on the record. G.S. 7A-271(b). The imposition of a greater sentence after a conviction by a jury in the superior court, upon appeal from a district court, does not violate a defendant's constitutional rights. *Colten v. Kentucky,* 407 U.S. 104, 32 L.Ed. 2d 584, 92 S.Ct. 1953 (1972); *State v. Speights,* 280 N.C. 137, 185 S.E. 2d 152 (1971); *State v. Spencer,* 276 N.C. 535, 173 S.E. 2d 765 (1970); *State v. Sparrow,* 276 N.C. 499, 173 S.E. 2d 897 (1970); *State v. Coffey,* 14 N.C. App. 642, 188 S.E. 2d 550 (1972), *cert. denied,* 281 N.C. 624.

Defendant has five other assignments of error relating to the charge of the court, the admission and exclusion of evidence, cross-examination of State's witnesses by the defendant, and the propounding of certain questions by the State. We have examined all of these assignments of error and are of the opinion that prejudicial error does not appear.

No error.

Judges BROCK and BRITT concur.

HATTIE M. BRYANT v. SHIRLEEN WYKE WINKLER

No. 7225SC802

(Filed 22 November 1972)

1. **Automobiles § 72— sudden emergency — refusal to give instructions proper**

Defendant's conduct in failing to bring her automobile under control as she proceeded onto a narrow bridge where two cars were meeting in front of her contributed to whatever emergency arose from the sudden stop by the vehicle in her lane of travel; therefore, the trial court properly refused to instruct the jury on the doctrine of sudden emergency.

2. **Damages § 15— damages for permanent injury — sufficiency of evidence to support award**

The trial court properly allowed the jury to assess damages for permanent injury where there was evidence tending to show some permanent injury to plaintiff's spine and expected disability therefrom.

ON *certiorari* to review judgment of *Grist, Judge,* 27 March 1972 Session of Superior Court held in CALDWELL County.

Civil action to recover for personal injuries allegedly sustained by plaintiff while a passenger in an automobile operated by her husband, Grayson Bryant.

Plaintiff's evidence tends to show that before entering upon a bridge located on a rural paved road near Granite Falls, Bryant stopped his automobile so that a vehicle he was meeting could clear the bridge. The bridge was not wide enough for two cars to meet on it and pass. While Bryant was stopped at the bridge, defendant drove her automobile into the rear of the Bryant automobile, knocking it forward about 80 feet and causing plaintiff to sustain a whiplash type injury to her neck.

Defendant testified that she was familiar with the bridge and knew the practice was for all motorists to stop at either end of the bridge for oncoming traffic. "Everybody in the community did that." As defendant proceeded toward the bridge on the date of the accident, she saw a vehicle approaching on the other side, and she also saw the Bryant car stop in front of her about a car length from the edge of the bridge. Defendant stated that she applied her brakes but let up on them when she observed the Bryant automobile move forward as if it were going to proceed across the bridge. The Bryant

automobile then stopped suddenly, and defendant was unable to bring her automobile under control and avoid striking the Bryant car from the rear.

The jury answered the issue of negligence in plaintiff's favor and awarded damages in the sum of $7,000.00. Defendant appeals from judgment entered upon the verdict.

No brief filed for plaintiff.

Townsend and Todd by J. R. Todd, Jr., for defendant appellant.

GRAHAM, Judge.

[1] Defendant assigns as error the denial of her request for jury instructions on the doctrine of sudden emergency. She says that she was confronted with a sudden emergency when the Bryant car stopped after having started from a stopped position as if it would proceed across the bridge.

We agree with the trial court that the doctrine of sudden emergency is not applicable here. The doctrine is not available to a party who contributes to the creation of the emergency in whole or in part. 6 Strong, N. C. Index 2d, Negligence, § 4, p. 9. Defendant's conduct in failing to bring her automobile under control as she proceeded onto a narrow bridge where two cars were meeting in front of her contributed to whatever emergency arose from the sudden stop by the Bryant vehicle.

[2] Defendant's remaining assignment of error is to the court's instruction to the jury that they might assess damages for permanent injury. She contends that there was no evidence on which to base this instruction.

It is elementary that there can be no recovery for a permanent injury unless there is some evidence tending to establish one with reasonable certainty. *Gillikin v. Burbage,* 263 N.C. 317, 139 S.E. 2d 753; *Short v. Chapman,* 261 N.C. 674, 136 S.E. 2d 40; *Johnson v. Brown,* 11 N.C. App. 323, 181 S.E. 2d 321, *cert. denied,* 279 N.C. 349. While the testimony of plaintiff's physician on the question of permanent injury was far from explicit, we are of the opinion that it was sufficient to permit the element of permanency to be considered by the jury. He testified as a medical expert and described the physical injuries suffered by plaintiff in the accident. His testimony,

when considered in the light most favorable to plaintiff, would permit the jury to find that plaintiff suffered a whiplash injury that consisted of a disarrangement or separation and stretching of the inner fascia and ligaments about the spine. Fibrous or scar tissue can be expected to form in the healing process and remain during the remainder of plaintiff's life. This scar tissue or fibrous tissue is abnormal and constitutes some disability.

No error.

Judges VAUGHN and HEDRICK concur.

SHIRLEY T. RAMSEY v. ROBERT EUGENE RAMSEY AND BYRD E. BRITTAIN

No. 7226SC654

(Filed 22 November 1972)

Automobiles § 50; Negligence § 29— automobile collision — personal injury — sufficiency of evidence to withstand nonsuit

The trial court properly denied defendant's motion to dismiss a personal injury action against him where the evidence tended to show that plaintiff was injured when defendant's car in which she was a passenger and the car of her defendant husband collided as a result of the negligence of the two drivers in operating their vehicles at speeds greater than were reasonable and prudent under the circumstances, failing to keep their vehicles under proper control and failing to reduce their speed in order to avoid colliding with each other's vehicle.

APPEAL by defendant Brittain from *Chess, Special Judge,* 10 April 1972 Schedule "D" Session of Superior Court held in MECKLENBURG County.

Personal injury action tried by the court without a jury. The court concluded from extensive findings of fact that plaintiff's injuries were proximately caused by the joint and concurring negligence of defendants in driving their vehicles at a speed greater than was reasonable and prudent under conditions existing, failing to keep their vehicles under proper control and failing to reduce their speed in order to avoid colliding with each other's vehicle. Damages in the sum of $8,000.00 were awarded plaintiff. Defendant Brittain appeals.

Richard A. Cohan for plaintiff appellee.

Hedrick, McKnight, Parham, Helms, Warley & Kellam by Thomas A. McNeely for defendant appellant Byrd E. Brittain.

GRAHAM, Judge.

The only question of substance raised by this appeal is whether the trial judge erred in denying appellant's motion to dismiss made at the close of plaintiff's evidence and renewed at the close of all the evidence. We hold that he did not.

Appellant's motion to dismiss, made pursuant to G.S. 1A-1, Rule 41(b), challenged the sufficiency of the evidence to establish plaintiff's right to relief, and in passing on the motion the trial judge was guided by the same principles expressed under our former procedure with respect to the sufficiency of the evidence to withstand the motion of nonsuit. *Presson v. Presson,* 12 N.C. App. 109, 182 S.E. 2d 614; *Wells v. Insurance Co.,* 10 N.C. App. 584, 179 S.E. 2d 806.

The evidence, when considered in the light most favorable to plaintiff, tends to show the following: On 17 August 1968 plaintiff was living separate and apart from her husband, defendant Ramsey. She was dating defendant Brittain on that evening and riding as a passenger in his automobile. Defendant Ramsey drove from a grill parking lot behind Brittain and passed him. Brittain then drove around Ramsey and proceeded to take a detour "so he wouldn't follow us." Brittain eventually drove onto Interstate Highway # 85 and proceeded south. Ramsey followed, drove around Brittain, and slowed to around 35 to 40 miles an hour. Brittain passed Ramsey again and then drove in the outside lane of the two southbound lanes. Ramsey pulled up alongside Brittain in the inside lane, and both defendants proceeded to drive side by side at speeds of 65 to 70 miles per hour for about a mile and a half, at which point the fronts of the vehicles collided, causing Brittain's automobile to strike the guardrail and injure plaintiff. While driving alongside Ramsey, Brittain would look at him and then look back at the road.

Appellant makes no contention that plaintiff was contributorily negligent, nor does he contend that he was frightened by Ramsey or had any other reason to drive alongside of him at

a high rate of speed for a mile and a half. His position is that by failing to show which lane the vehicles were in at the time of the collision, plaintiff failed to show that any negligence on appellant's part was a proximate cause of her injury. We do not agree. The immature and perilous conduct of both men in the operation of their automobiles invited the consequences that followed. As stated in *Groome v. Davis,* 215 N.C. 510, 514, 2 S.E. 2d 771, 773, "there is more involved in speed than the mere chance of being at a particular spot at a given instant. The event may not be left in the lap of the gods, when it should have been kept in the hands of the driver." While there is no allegation or contention by plaintiff that the men were engaged in speed competition, as that term is used in the statutes, we are nevertheless of the opinion that their conduct amounted to a joint tort in which each must be responsible for the acts of the other. Consequently, the fact Brittain's automobile may have been in its proper lane when the vehicles collided is immaterial. See *Boykin v. Bennett,* 253 N.C. 725, 118 S.E. 2d 12, and authorities collected there.

No error.

Judges BROCK and VAUGHN concur.

STATE OF NORTH CAROLINA v. LEROY ROLLINS (ROLINS)

No. 7227SC739

(Filed 22 November 1972)

Criminal Law § 66— pretrial identification at poolroom — no right to counsel — in-court identification — independent origin

In-court identification of defendant as the perpetrator of a robbery was not rendered inadmissible by a pretrial identification of defendant at a poolroom at a time when he was unrepresented by counsel where defendant was not entitled to counsel at the pretrial identification because he was not in custody and no charges relating to the robbery had been made against him, and the in-court identification was based solely upon the witness' observation of defendant at the time of the robbery.

APPEAL by defendant from *Fountain, Judge,* 10 April 1972 Session of Superior Court held in GASTON County.

Defendant was tried upon his plea of not guilty to a charge of feloniously taking $1,711.19 from the person of Roger Beaver with the use of a .22 caliber pistol.

The State's evidence tended to show that on 20 December 1971, Roger Beaver and his wife drove to Citizens National Bank on Main Street in Gastonia to make a bank deposit for the wife's employer. Mrs. Beaver remained in the car while Mr. Beaver walked over to the night depository. He had the key in the depository when a man tapped him on the shoulder, turned him around and grabbed the bag containing the deposit of about $1,800.00. Beaver resisted at first but surrendered the bag after the man pulled a gun and pointed it toward him. The man then fled on foot, passing the car in which Mrs. Beaver was sitting. Mrs. Beaver pointed defendant out in court as the man whom she observed commit the robbery. Neill Barnes testified that he was waiting behind Beaver at the night depository to make a deposit and saw defendant pull a pistol on Beaver and take the money bag from him.

Defendant took the stand and contended that at the time the robbery occurred, he was working at a poolroom a short distance from the bank. Other witnesses supported his alibi.

The jury returned a verdict of guilty, and defendant appeals from judgment entered on the verdict imposing an active prison sentence.

Attorney General Morgan by Associate Attorney Kramer for the State.

Ralph C. Gingles, Jr., for defendant appellant.

GRAHAM, Judge.

Defendant's only assignment of error is to the overruling of his objection to the in-court identification testimony by Neill Barnes. This assignment of error is overruled.

A *voir dire* examination was conducted before the witness was permitted to identify defendant in court. Barnes testified on *voir dire* that several days after the robbery he went with police officers to a poolroom in Gastonia. They asked him to look around to see if he recognized anyone. After looking over 15 or 20 people inside the poolroom, Barnes pointed defendant out to officers as the man who committed the robbery. The

officers did not tell Barnes who their suspect was nor did they assist him in any way in making the identification. Defendant contends this procedure was illegal for the reason that he had no opportunity to have counsel present at the time. This contention is without merit. Defendant was not in custody at the time, and no charges relating to the robbery had been made against him. Consequently, his out-of-court identification by Barnes did not occur during a time when he was entitled, as a matter of constitutional right, to counsel. *Kirby v. Illinois,* 406 U.S. 682, 92 S.Ct. 1877, 32 L.Ed. 2d 411 (1972); *State v. Reaves,* 15 N.C. App. 476, 190 S.E. 2d 358. Moreover, the trial court found from evidence elicited on *voir dire* that Barnes' in-court identification of defendant was based solely upon his observation of defendant at the time of the alleged robbery. This finding is supported by the evidence.

We find that defendant had a fair trial free from prejudicial error.

No error.

Judges HEDRICK and VAUGHN concur.

GEORGE E. SMITH, JR. v. DOROTHY PATRICIA SMITH RHODES

No. 7228DC718

(Filed 22 November 1972)

Infants § 9— custody proceeding — private examination of child without consent of parties — error

While the trial judge may question a child in open court in a custody proceeding, he cannot do so privately except by consent of the parties; therefore, the trial court erred in its finding that the children involved in this custody proceeding desired to live with their mother, the defendant, where such finding was based on a private examination of one of the children conducted over plaintiff father's objection and out of the presence of plaintiff and his counsel.

APPEAL by plaintiff from *Winner, District Judge,* 17 July 1972 Session of District Court held in BUNCOMBE County.

Judgment was entered in this cause on 4 June 1970 granting plaintiff an absolute divorce from defendant and awarding

to plaintiff the custody of two minor children born of the marriage of the parties. Defendant was allowed privileges of visitation. The parties and their attorneys consented to the provisions in the judgment relating to custody and visitation. On 15 September 1970 defendant filed a motion seeking to have the judgment modified and full and complete custody of the children awarded to her. In an order of 11 November 1970 the court found that defendant had failed to show sufficient change of conditions to require a modification of custody and continued custody in plaintiff. On 26 April 1971 defendant again moved for full custody of the children. This motion resulted in a consent judgment, entered 7 June 1971, in which plaintiff was permitted to retain the general custody and defendant was permitted more liberal visitation privileges. On 9 May 1972 defendant filed a third motion seeking full custody.

At the conclusion of a hearing on the last motion filed, the court entered an order finding, among other things, that both parties are fit and proper persons to have custody of their children but that the best interests of the children will be served by granting their general custody to defendant and rights of visitation to plaintiff. Custody was awarded defendant in accordance with this finding and plaintiff appeals.

Riddle and Shackelford by Robert E. Riddle for plaintiff appellant.

Robert S. Swain by Joel B. Stevenson for defendant appellee.

GRAHAM, Judge.

One of the findings of fact relied upon by the trial court to support a change in custody is "[t]hat the two minor children . . . now desire to live and reside with their mother, the defendant, and to visit with their father, the plaintiff, during vacation times." There is no evidence in the record to support this finding. Apparently it is based on information obtained during a private conversation which the trial judge had with one of the children, over plaintiff's objection, and out of the presence of plaintiff and his counsel. Plaintiff's first assignment of error encompasses exceptions to the court's private examination of the child and to the finding of fact apparently arising therefrom. The assignment of error must be sustained.

All parties in a court proceeding have a constitutional right to be present at all of its stages so that they may hear the evidence and have an opportunity to refute it. Consequently, while the trial judge may question a child in open court in a custody proceeding, he cannot do so privately except by the consent of the parties. *Raper v. Berrier,* 246 N.C. 193, 97 S.E. 2d 782. In accord: *Shepherd v. Shepherd,* 273 N.C. 71, 159 S.E. 2d 357; *Horton v. Horton,* 12 N.C. App. 526, 183 S.E. 2d 794, *cert. denied,* 279 N.C. 727; *Cook v. Cook,* 5 N.C. App. 652, 169 S.E. 2d 29.

The judgment is vacated and this cause is remanded for rehearing.

Error and remanded.

Judges VAUGHN and HEDRICK concur.

STATE OF NORTH CAROLINA v. LORENZA HARRELL

No. 721SC787

(Filed 22 November 1972)

1. **Criminal Law § 162— objection to evidence first made on appeal**

Defendant's objection to the admission of breathalyzer test results comes too late when made for the first time on appeal.

2. **Constitutional Law § 32— failure of counsel to object to admission of evidence — denial of new trial proper**

Failure of defendant's counsel to object at trial to the admission of breathalyzer test results does not entitle defendant in a drunken driving case to a new trial.

APPEAL by defendant from *Tillery, Judge,* 27 June 1972 Criminal Session of Superior Court held in PERQUIMANS County.

Defendant was convicted in the District Court of Perquimans County of the offense of driving a motor vehicle upon a public highway while under the influence of intoxicating liquor. He appealed to Superior Court where he was again convicted.

Evidence offered in Superior Court by the State tends to show the following: On 17 January 1972 at about 11:00 p.m.,

Highway Patrolman C. T. Thomas observed a Plymouth automobile being operated by defendant on Highway 17 near Hertford. The automobile had taxi license plates and was proceeding in a "zig-zag manner" at a speed of approximately 45 miles per hour in a 60 mile per hour speed zone. Thomas had defendant pull over after observing him cross over the center line of the highway two or three times. Defendant was unsteady on his feet and had an odor of some intoxicant about his person. After defendant was unable to successfully perform various sobriety tests which he voluntarily attempted, Thomas placed him under arrest, advised him of his constitutional rights, and took him to the Elizabeth City Patrol Station where he was given additional tests, including a breathalyzer test. Defendant was "wobbling or swaying" during agility tests, and he was generally unable to perform them successfully. His speech was somewhat mumbled. The breathalyzer results, which were admitted in evidence without objection, showed a reading of .10. The arresting officer and the breathalyzer operator testified that, based upon their observation of defendant and independent of the breathalyzer results, they were of the opinion defendant was under the influence of some intoxicating beverage.

Defendant testified in his own behalf that on the evening he was arrested he had consumed only a portion of one tall can of Colt 45 beer. He stated that the beer did not affect him in any way.

Attorney General Morgan by Associate Attorney Witcover for the State.

John H. Harmon for defendant appellant.

GRAHAM, Judge.

[1] Defendant's first assignment of error is directed to the admission of the results of the breathalyzer test. No objection to the admission of this evidence was made at trial and no exception to its admission appears in the record. Even if the evidence were inadmissible, which is not conceded, defendant's objection comes too late. *State v. Davis,* 8 N.C. App. 589, 174 S.E. 2d 865.

[2] Defendant contends in the alternative that the failure of his privately employed counsel to object to the evidence in question shows that he had ineffective counsel and entitles him

to a new trial. This argument has no merit. A mere error in judgment or tactical blunder by counsel is not grounds for a new trial. Moreover, the failure of counsel to object in this instance could very well have been a deliberate choice of trial strategy, especially since the results of the breathalyzer test tended to show a lesser degree of intoxication than did the testimony of the officers.

The evidence was plenary to support the verdict of the jury, and the record affirmatively shows that defendant's counsel ably represented him at trial. We find that defendant had a fair trial free from prejudicial error.

No error.

Judges VAUGHN and HEDRICK concur.

DUKE POWER COMPANY v. WALTER JAMES HOGAN AND WIFE, MARIE HOGAN

No. 7225SC702

(Filed 22 November 1972)

Injunctions § 14— permanent injunction — hearing on show cause order for temporary injunction

The trial court erred in permanently restraining defendants from interfering with a power company's entry on their land to survey its right-of-way upon a hearing had on the return of a show cause order seeking a temporary injunction, particularly since the judgment was entered over defendants' objection when no answer had been filed and defendants had only two days notice.

APPEAL by defendants from *Grist, Judge,* June 1972 Session, Superior Court, CATAWBA County.

On 2 June 1972, plaintiff commenced an action seeking to have defendants "permanently enjoined from interfering, threatening to interfere, or in any other manner or by any other means preventing the employees, officers and servants of plaintiff from entering upon its (sic) land and performing and accomplishing its requisite surveys for the purposes stated above." The complaint alleged that defendants had forbidden plaintiff to enter on their lands for the purpose of determining

by survey the exact location of the right-of-way required by it over their lands. Plaintiff also prayed for the issuance of a temporary injunction.

On 5 June 1972, Judge Grist signed an order requiring defendants to appear on 14 June 1972 and show cause why a temporary restraining order, as prayed for by plaintiff, should not be granted. This order, a copy of the complaint, and a copy of affidavit filed by plaintiff, were served on defendants on 12 June 1972. Defendants filed two affidavits on 14 June 1972, but did not answer the complaint.

On 15 June 1972, Judge Grist entered a permanent restraining order permitting plaintiff to go upon the land and survey its line indicated on an attached aerial photograph and ordering defendants not to interfere in any manner.

From the entry of this judgment defendants appealed.

Townsend and Todd, by J. R. Todd, Jr., for plaintiff appellee.

Wilson and Palmer, by Hugh M. Wilson, for defendant appellants.

MORRIS, Judge.

Appellants contend that a final and permanent restraining order has been entered against them without their having sufficient notice, without their having filed answer, and without their having had opportunity to present evidence on the merits of the case. We are of the opinion that their position is well taken.

The record shows that they received the only notice of this action on 12 June 1972, when the summons, complaint, bond, two affidavits, and the show cause order were served on them. The show cause order required them to appear on 14 June and show cause why a temporary restraining order should not issue. They appeared as directed and presented two affidavits which, they argue, were necessarily hastily prepared.

On 15 June 1972, an order was entered which by its language is not a *temporary* restraining order but a permanent restraining order and a final order in the action.

G.S. 40-3 gives plaintiff the right to go upon defendants' lands to make a survey of the route over which it proposes to put its lines. This defendants concede. Nevertheless, we are of the opinion that the court erred in entering a final order permanently restraining defendants upon a hearing had on the return of a show cause order seeking a temporary injunction; particularly where, as here, the judgment was entered over defendants' objection when no answer had been filed and defendants had only two days notice.

The judgment of the trial court is, therefore, reversed and the cause remanded for further proceedings.

Reversed.

Judges CAMPBELL and PARKER concur.

STATE OF NORTH CAROLINA v. JOHNNY WALLACE

No. 7229SC754

(Filed 22 November 1972)

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

Assignments of error not supported by exceptions previously noted are ineffective.

2. **Criminal Law § 161— assignments of error to charge and to failure to charge**

An assignment of error to the charge should set forth the portion of the charge to which defendant objects, and an assignment of error based on the failure to charge should set forth the charge defendant contends should have been given.

APPEAL by defendant from *Falls, Judge,* 12 June 1972 Session of MCDOWELL County Superior Court.

Defendant was charged in a warrant and tried in District Court for operating a motor vehicle on a public road while his operator's license was in a state of revocation. He was found guilty and appealed to Superior Court.

In the trial in Superior Court evidence for the State tended to show that two officers observed defendant driving an automobile containing one passenger on a rural road on 17 Septem-

ber 1971. After meeting and passing defendant's automobile, the deputies turned their own vehicle around and proceeded back up the road where they found defendant's automobile abandoned. A "Master Check" from the North Carolina Department of Motor Vehicles revealed that defendant had his license suspended on 1 April 1971 and was entitled to return of his license on 4 January 1973.

Defense witness Watkins testified that he was driving the automobile at the time it was observed by the deputies and it was he who abandoned the vehicle after seeing the deputies turn around because of the fact that he did not have an operator's license and that the defendant was not with him. Defendant Wallace testified that he had loaned his vehicle to Watkins and another that same day.

The jury found defendant guilty and from a judgment imposing an active sentence of 18 months, defendant appealed.

Attorney General Morgan, by Associate Attorney Witcover, for the State.

George R. Morrow for defendant appellant.

MORRIS, Judge.

Defendant has failed to set forth any exceptions in the record, thereby failing to comply with the mandate of Rule 21, Rules of Practice in the Court of Appeals of North Carolina.

[1] Likewise, defendant's four assignments of error are defective in that there are no exceptions grouped and numbered as required by Rule 19(c), Rules of Practice in the Court of Appeals of North Carolina. "An assignment of error which is not supported by an exception previously noted in the case on appeal presents no question of law for this Court to decide." *State v. Fox,* 277 N.C. 1, 21, 175 S.E. 2d 561 (1970). "The Rules of Practice in the Court of Appeals are mandatory and not directory." *State v. Thigpen,* 10 N.C. App. 88, 91, 178 S.E. 2d 6 (1970).

[2] Furthermore, defendant's assignments of error Nos. 1 and 2 relating to portions of the judge's charge are defective in that they fail to set forth within the assignment of error the portions of the judge's charge which are the subject of the assignment of error. Also defendant's assignment of error

contending that the judge failed properly to instruct and define "operator of a motor vehicle" is equally defective in that it fails to set forth the charge defendant argues should have been given. *State v. Wilson,* 263 N.C. 533, 139 S.E. 2d 736 (1965).

The State has made a timely motion to dismiss the appeal assigning as grounds therefor the failures to comply with our rules discussed above. The motion is well taken, and the appeal is dismissed.

We have, nevertheless, carefully examined the record and have considered the errors defendant attempts to bring before us. We find no prejudicial error.

Appeal dismissed.

Judges CAMPBELL and PARKER concur.

STATE OF NORTH CAROLINA v. THOMAS D. WYATT

No. 7224SC616

(Filed 22 November 1972)

1. **Criminal Law § 146— appeal from guilty plea**

Where defendant pled guilty to charges of felonious escape, third offense, and felonious breaking and entering and larceny, his appeal presented only the question of whether error appeared on the face of the record proper.

2. **Criminal Law § 23— voluntariness of guilty plea — sufficiency of findings**

Where the record supported the trial court's findings that defendant entered his pleas of guilty voluntarily and with full knowledge of his rights and of the possible consequences of his pleas, the acceptance of the pleas will not be disturbed on appeal.

APPEAL by defendant from *Hasty, Judge,* 27 March 1972 Session of Superior Court, held in WATAUGA County.

By bill of indictment proper in form defendant was charged in case No. 72Cr479 with felonious escape, being defendant's third escape. By a second bill of indictment also proper in form defendant was charged in case No. 72Cr389 with (1) felonious

breaking and entering and (2) felonious larceny after such breaking and entering. Upon arraignment on the charges in the two cases, defendant, through court-appointed counsel, tendered pleas of guilty to misdemeanor escape and to felonious breaking and entering and larceny. Whereupon defendant was questioned in open court by the presiding judge concerning his understanding of the consequences of his pleas of guilty and concerning his voluntary assent thereto, and defendant signed and swore to a written "transcript of plea" which contained his answers to the judge's questions. The judge then signed an order adjudicating that defendant's pleas of guilty had been freely, understandingly and voluntarily made, without undue influence, compulsion or duress, and without promise of leniency. In case No. 72Cr389, in which defendant had pleaded guilty to felonious breaking and entering and larceny, judgment was entered sentencing defendant to prison as a committed youthful offender for a term not to exceed three years, this sentence to commence at the expiration of sentences previously imposed and which defendant was then serving. In case No. 72Cr479, in which defendant had pleaded guilty to misdemeanor escape, judgment was entered sentencing defendant to prison as a youthful offender for a period not to exceed twelve months, this sentence to commence at the expiration of the sentence imposed in case No. 72Cr389.

Defendant appealed, and at his request the court appointed new counsel to represent him in the appeal.

Attorney General Robert Morgan by Associate Attorney Ralf F. Haskell for the State.

C. Banks Finger for defendant appellant.

PARKER, Judge.

[1] Since defendant pled guilty this appeal presents only the question whether error appears on the face of the record proper. *State v. Roberts,* 279 N.C. 500, 183 S.E. 2d 647. None does. The court was properly organized; the bills of indictment were in all respects regular; before accepting defendant's pleas the trial judge examined him and found that his pleas were freely, understandingly and voluntarily made; defendant's signed transcript of plea supports these findings; and the sentences imposed were within statutory limits. The requirement of *Boykin v. Alabama,* 395 U.S. 238, 23 L.Ed. 2d 274, 89 S.Ct. 1709,

that the record affirmatively show that the guilty pleas were entered voluntarily and understandingly was adequately met. Nothing in the record supports defendant's present contention that he did not understand that he was pleading guilty to any felonies but thought he was pleading guilty only to misdemeanors. On the contrary, his signed transcript of plea discloses that he understood that upon his pleas of guilty he could be imprisoned for as long as twenty-one years.

[2] Where, as here, the record supports the trial court's findings that defendant entered his pleas of guilty voluntarily and with full knowledge of his rights and of the possible consequences of his pleas, the acceptance of the pleas will not be disturbed on appeal. *State v. Jones,* 278 N.C. 259, 179 S.E. 2d 433.

No error.

Judges CAMPBELL and MORRIS concur.

GEORGE FAULKNER HARRINGTON v. JANE PRITCHETT HARRINGTON

No. 7226DC775

(Filed 22 November 1972)

1. **Divorce and Alimony § 24— custody order — sufficiency of findings and evidence**

   Order awarding custody of two children of the parties to the mother with visitation privileges to the father was supported by sufficient findings of fact based on competent evidence.

2. **Divorce and Alimony § 24— modification of custody order — change of conditions — change of residence**

   A finding that the mother "is now residing in Mecklenburg County, North Carolina" is not a finding of a substantial change of circumstances that will support the modification of a child custody order. G.S. 50-13.7.

APPEAL by plaintiff from *Belk, District Judge,* 27 March 1972 Session of MECKLENBURG District Court.

This is an action for custody of children brought by plaintiff husband against defendant wife.

In his complaint filed 28 February 1972 plaintiff in pertinent part alleges: Plaintiff and defendant were married to each other on 29 November 1963. Three children were born to the marriage, namely, Leslie Jane, age 8, Bruce, age 7, and Amy, age 4. On 29 June 1971 defendant abandoned plaintiff by leaving their home in Charlotte and taking the children to New York where she began living with another man. The custody of Bruce has been previously granted to plaintiff under an order of the Mecklenburg District Court. Defendant is an unfit person to have custody of the children.

In her answer, defendant admitted the marriage and that custody of Bruce had been awarded to plaintiff. She denied that plaintiff is Leslie Jane's natural father but alleged that plaintiff had adopted her. Defendant pleaded a counterclaim in which she set forth her contentions as to the parties' marital troubles; she further alleged that she had returned to Charlotte to live and that the best interest of all three children would be promoted by awarding their custody to her. She asked for custody of the three children and that plaintiff be required to contribute to their support.

Following a hearing the court entered an order finding, among other things, that both plaintiff and defendant "are fit and proper persons to have the care and custody" of the children but their best interest and welfare would be promoted by awarding their custody to defendant. The order awarded custody of all three children to defendant, with visitation privileges to plaintiff, and required that plaintiff, beginning in June 1972, pay $300.00 per month as support for the benefit of the three children.

Plaintiff appealed from the order.

Edwards and Millsaps by Joe T. Millsaps for plaintiff appellant.

Farris, Mallard & Underwood by E. Lynwood Mallard for defendant appellee.

BRITT, Judge.

[1] We hold that the part of the order awarding custody of Leslie Jane and Amy to defendant with visitation privileges to plaintiff is supported by sufficient findings of fact based on competent evidence. Since the trial judge has the opportunity

to see the parties in person and to hear the witnesses, it is mandatory that the trial judge be given wide discretion in making a determination as to custody, and that determination will not be upset on appeal absent a clear showing of abuse of discretion. *In re Custody of Stancil,* 10 N.C. App. 545, 179 S.E. 2d 844 (1971). No abuse of discretion is made to appear here.

[2] As to that part of the order awarding custody of Bruce to defendant, we hold that the court erred. The pleadings and the evidence established, and the court found as a fact, that Bruce's custody was awarded to plaintiff by an order of Mecklenburg District Court dated 26 August 1971. To modify or vacate an order of a court of this State providing for the custody of a minor child, there must be a showing of changed circumstances, G.S. 50-13.7, and the change of circumstances must be substantial. *Rothman v. Rothman,* 6 N.C. App. 401, 170 S.E. 2d 140 (1969). The only finding of change of circumstances as to Bruce was that "defendant is now residing in Mecklenburg County, North Carolina." We hold that this was not a *substantial* change of circumstances.

It would appear that any proceedings to determine Bruce's custody should be by motion in the cause in which his custody was previously awarded to plaintiff. G.S. 50-13.7.

Obviously, the $300.00 per month plaintiff is required by the order to pay for support of the children is based on the assumption he would be contributing to the support of three children. In view of our ruling as to Bruce, that part of the order providing for $300.00 monthly payments is vacated and the cause is remanded for further proceedings on that question.

As to custody of Leslie Jane and Amy, the order is affirmed.

As to custody of Bruce, the order is vacated.

As to amount of child support, the order is vacated and cause remanded.

Chief Judge MALLARD and Judge BROCK concur.

STATE OF NORTH CAROLINA v. WAYNE JOSEPH HILL

No. 7226SC584

(Filed 22 November 1972)

1. **Criminal Law § 102— jury argument of solicitor — reference to absence of defense witnesses — no error**

The trial court did not err in a prosecution for housebreaking and larceny in allowing the solicitor in his argument to the jury to state that it was "mighty convenient" for the defendant that two witnesses who allegedly would have helped him establish an alibi were not present.

2. **Criminal Law § 86— impeachment of defendant — inquiry about previous crimes proper**

It was proper for the solicitor to ask defendant for the purpose of impeachment if he had been convicted of stealing an automobile where the question was based on information and asked in good faith.

APPEAL by defendant from *Ervin, Judge,* 17 January 1972 Conflict Session, MECKLENBURG Superior Court.

By indictment proper in form, defendant was charged with (1) housebreaking, (2) larceny, and (3) receiving. Defendant's motion for dismissal of the receiving count was allowed but the jury found defendant guilty of the other two charges. From judgment sentencing him to the custody of the Commissioner of Corrections for supervision and treatment as a youthful offender for a term of not less than six years, defendant appealed.

Attorney General Robert Morgan by James E. Magner, Jr., Assistant Attorney General, for the State.

Don Davis for defendant appellant.

BRITT, Judge.

[1] In the first assignment of error brought forward and argued in his brief, defendant contends that the court erred in allowing the solicitor in his argument to the jury to state that it was "mighty convenient" for the defendant that two possible witnesses were not present. Defendant indicated at trial that the two witnesses would have helped him establish an alibi but one of them was out of the State serving in the Air Force and the whereabouts of the other was unknown.

In 2 Strong, N.C. Index 2d, Criminal Law, § 102, p. 642, we find: "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. It is only in extreme cases of abuse of the privilege of counsel, and when the trial court does not intervene or correct an impropriety, that a new trial may be allowed."

We hold that under the facts in this case, the trial judge did not abuse his discretion in allowing the argument complained of and the assignment of error is overruled.

[2] In the second assignment of error brought forward in his brief, defendant contends that the solicitor committed prejudicial error when in cross-examining defendant accused defendant of having been convicted of stealing an automobile when there was no "good faith" basis for such accusation.

Defendant having voluntarily become a witness for himself, it was proper for the solicitor to ask him the question complained of for the purpose of impeachment, provided the question was based on information and asked in good faith. *State v. Heard,* 262 N.C. 599, 138 S.E. 2d 243 (1964); *State v. Sheffield,* 251 N.C. 309, 111 S.E. 2d 195 (1959). The record reveals that the solicitor's question was based on information which the solicitor had and that the question was asked in good faith. The assignment of error is overruled.

We have duly considered the other assignments of error argued in defendant's brief but finding them without merit, they are overruled.

No error.

Chief Judge MALLARD and Judge BROCK concur.

STATE OF NORTH CAROLINA v. RANDY ABSHER

No. 7224SC615

(Filed 22 November 1972)

1. **Criminal Law § 146— appeal from guilty plea**

Where defendant pled guilty to charges of felonious escape and felonious breaking and entering and larceny, his appeal presented only the question of whether error appeared on the face of the record proper.

2. **Criminal Law § 23— voluntariness of guilty plea — sufficiency of findings**

Where the record supported the trial court's findings that defendant entered his plea of guilty freely, understandingly and voluntarily, the acceptance of the plea will not be disturbed on appeal.

APPEAL by defendant from *Hasty, Judge,* 27 March 1972 Session of Superior Court, WATAUGA County.

By bill of indictment, proper in form, defendant was charged with felonious escape in case No. 72CR481. In case No. 72CR388 he was charged, by indictment also proper in form, with felonious breaking and entering and with felonious larceny after breaking and entering. Defendant was represented by court-appointed counsel and entered a plea of guilty to felonious breaking and entering and misdemeanor escape. The record reveals that defendant was questioned in open court with respect to whether he understood that he was charged with felonious breaking and entering and misdemeanor larceny, whether the charges had been explained to him, and whether his pleas were voluntarily, freely and understandingly entered. His replies were in the affirmative. He signed a "transcript of plea," and the court entered its adjudication that the pleas of guilty were entered freely, understandingly and voluntarily and without undue influence, compulsion or duress and without promise of leniency.

In case No. 72CR388, judgment was entered sentencing defendant to prison as a committed youthful offender for a term not to exceed three years, to begin at the expiration of sentences defendant was then serving. In case No. 72CR481, judgment was entered sentencing defendant to prison as a committed youthful offender for a term not to exceed 12 months, to begin at the expiration of the sentence imposed in case No. 72CR388.

Defendant appealed, and is represented on appeal by court-appointed counsel appointed for the purpose of perfecting defendant's appeal and not the same counsel who represented defendant at trial.

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

C. Banks Finger for defendant appellant.

MORRIS, Judge.

The defendant failed to file his brief within the time prescribed and the State has, in apt time, filed motion to dismiss. We choose to discuss the matter on its merits, however, and the motion is denied.

[1] Defendant's guilty plea results in our having before us only the question of whether error appears on the face of the record proper. *State v. Roberts,* 279 N.C. 500, 183 S.E. 2d 647 (1971). The bills of indictment are in all respects regular, the court was properly organized, and the sentences imposed are within the statutory limits. The record clearly reveals that, before accepting his pleas, the court examined defendant fully and found that he had entered his pleas freely, voluntarily, and understandingly. His written and signed transcript of plea fully supports the court's finding and controverts his present contention that he thought he was pleading guilty only to misdemeanors and not a felony. This is defendant's only contention on appeal.

[2] Where, as here, there is plenary evidence to support the trial judge's findings that defendant freely, understandingly, and voluntarily entered his plea of guilty, the acceptance of the plea will not be disturbed. *State v. Jackson,* 279 N.C. 503, 183 S.E. 2d 550 (1971).

No error.

Judges CAMPBELL and PARKER concur.

STATE OF NORTH CAROLINA v. FAISON HICKS

No. 727SC736

(Filed 22 November 1972)

1. **Criminal Law § 51— expert testimony — failure to make finding of expertise — no error**

Though the trial court did not enter a finding in the record that a witness was an expert and qualified to give his opinion, there was no error in allowing the witness to testify for the State that in his opinion the vegetable matter defendant was charged with selling was marijuana since there was evidence that the witness was an expert and since defendant made no objection to the testimony at the time it was given.

2. **Criminal Law § 112— failure to charge on reasonable doubt — no error**

The trial court did not commit reversible error in failing to define the term "reasonable doubt" in a prosecution for the felonious sale of marijuana.

APPEAL by defendant from *Fountain, Judge,* 27 March 1972 Session of Superior Court held in NASH County.

Defendant was tried under a bill of indictment, proper in form, charging him with feloniously selling "a quantity of narcotic drugs to wit: marijuana in excess of one gram. . . . " The jury found defendant guilty as charged and judgment imposing an active prison sentence was entered. After being processed into the prison system, defendant wrote letters to the solicitor and clerk of court expressing a desire to appeal. These letters were treated as a notice of appeal.

Defendant's appeal was perfected by privately retained counsel who did not appear for him at the trial.

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

Biggs, Meadows & Batts by Charles B. Winberry for defendant appellant.

GRAHAM, Judge.

[1] Defendant's first contention is that the court erred in permitting a forensic chemist to testify for the State that in his opinion the vegetable matter defendant was charged with selling was marijuana. The basis of this contention is the trial court's

failure to enter a finding in the record that the witness was an expert and qualified to express an opinion. There was plenary evidence tending to show that the witness was an expert in the field of chemistry and that he possessed appropriate qualifications to give his opinion that the substance in question was marijuana. He testified that his opinion was based on a microscopic visual examination of the substance and two separate tests which he performed. Defendant did not object to any of the witness's testimony; nor did he request the court to enter findings as to the qualification of the witness as an expert. Under these circumstances, it was not necessary that the trial judge enter findings in the record relating to the witness's qualifications before allowing him to express his opinion. *State v. Perry,* 275 N.C. 565, 169 S.E. 2d 839; *State v. Johnson,* 13 N.C. App. 323, 185 S.E. 2d 423; Stansbury, N. C. Evidence 2d, § 133.

[2] Defendant's remaining contention is that the court committed error in failing to define the term "reasonable doubt." It is well settled in this jurisdiction that the failure of a trial judge to define the term "reasonable doubt," absent a request that he do so, is not reversible error. *State v. Potts,* 266 N.C. 117, 145 S.E. 2d 307; *State v. Browder,* 252 N.C. 35, 112 S.E. 2d 728; *State v. Lee,* 248 N.C. 327, 103 S.E. 2d 295.

Defendant's counsel candidly concedes that the law presently prevailing in this jurisdiction does not support either of his contentions. We have examined his forceful argument that new rules should be formulated. Even if this Court had the authority to do so, which it does not, we would not be inclined to disturb the well established principles applicable to the contentions raised on this appeal.

No error.

Judges VAUGHN and HEDRICK concur.

STATE OF NORTH CAROLINA v. SAMMIE LEE BYNUM

No. 7226SC652

(Filed 22 November 1972)

1. **Criminal Law § 66— in-court identification — voir dire examination — failure to make finding — identification proper**

The trial court did not err in allowing an eyewitness to testify without first making findings of fact where the evidence on *voir dire* was uncontradicted and tended to show that the witness's identification of defendant at trial was based upon her observations of defendant during the course of the robberies.

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

Where the State presented its evidence, including two witnesses who identified defendant as the perpetrator of the crimes charged, and defendant presented only his uncorroborated testimony that he was out of the State at the time the robberies were committed, the evidence was sufficient to overrule defendant's motions for nonsuit and directed verdict.

APPEAL by defendant from *Chess, Judge,* 17 April 1972 Session of Superior Court held in MECKLENBURG County.

Defendant was convicted on two bills of indictment charging robbery with firearms. Judgment was entered imposing a seven-to-ten-year prison sentence in each case, to be served concurrently.

Attorney General Robert Morgan by Thomas B. Wood, Assistant Attorney General, for the State.

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

VAUGHN, Judge.

[1] Defendant assigns as error that the court, without "findings of fact," allowed one of the eyewitnesses to the robberies to testify that she saw defendant participate in the crimes. The witness testified that she saw defendant behind the counter of the store where the robberies occurred. Defendant objected, moved to strike and requested a *voir dire.* The jury was excused and the witness was examined as to her opportunity to observe defendant. She testified that she had ample opportunity to observe defendant throughout the robberies, made it a point to study the features of his face and was of the further opinion that she had sold defendant a pack of cigarettes the day prior

to the robberies. Defendant offered no evidence on *voir dire*. The court, without making specific findings of fact, overruled defendant's motion to strike and ordered the jury returned to the courtroom wherein the witness then proceeded to testify as to defendant's conduct during the course of the robberies. The uncontradicted evidence tended to show that the witness's identification of defendant at trial was based upon her observations of defendant during the courses of the robberies. Neither at trial nor on appeal did defendant contend otherwise. Under these circumstances no prejudicial error appears from the failure of the court to make "findings of fact" after the *voir dire*.

[2] After the State presented its evidence, including that of another witness who identified defendant as a participant in the robberies, defendant took the stand in his own behalf. He testified that at the time the robberies were alleged to have taken place he was in Alexandria, Virginia, having been an escapee from the North Carolina Department of Correction from 3 December 1971 until arrested by an officer of the Charlotte Police Department on 26 December 1971. No other witnesses testified for the defendant.

Defendant assigns as error the denial of his motions for nonsuit and directed verdict. Evidence of defendant's guilt was adequate for submission to a jury and convincingly supports the verdict rendered in a trial which we hold to have been free of prejudicial error.

No error.

Judges HEDRICK and GRAHAM concur.

STATE OF NORTH CAROLINA v. JOHN LEWIS MURRARY

No. 7228SC738

(Filed 22 November 1972)

1. **Robbery § 4— armed robbery — sufficiency of evidence**

State's evidence, including the identification of defendant by two eyewitnesses, was sufficient to be submitted to the jury in an armed robbery prosecution.

2. **Criminal Law § 127— motion in arrest of judgment — denial**

Defendant's motion in arrest of judgment in an armed robbery

case was properly denied where the indictment sufficiently charges the offense of armed robbery and no defect appears on the face of the record.

3. Indictment and Warrant § 10— name of the accused — doctrine of idem sonans

Doctrine of *idem sonans* is applicable where the indictment, judgment and commitment refer to defendant as "John Louis Murray" and the caption of the case in the record on appeal names defendant as "John Lewis Murrary."

APPEAL by defendant from *Anglin, Judge,* May 1972 Criminal Session of Superior Court held in BUNCOMBE County.

Defendant was tried on his plea of not guilty to an indictment charging him with armed robbery. The State presented the testimony of two eyewitnesses who positively identified defendant as the person who committed the robbery charged in the bill of indictment. Defendant testified that at the time the robbery was alleged to have been committed he was on a plane traveling to New York and presented witnesses to corroborate his alibi. The jury found defendant guilty of armed robbery, and from judgment imposing prison sentence, defendant appealed.

Attorney General Robert Morgan by Assistant Attorney General Howard P. Satisky for the State.

Robert L. Harrell for defendant appellant.

PARKER, Judge.

[1] Defendant's first assignment of error is directed to denial of his motion for nonsuit. There was ample evidence to require submission of the case to the jury and there is no merit in defendant's first assignment of error.

[2] Defendant's second assignment of error is directed to denial of his motion in arrest of judgment. "A motion in arrest of judgment is one made after verdict and to prevent entry of judgment, and is based upon the insufficiency of the indictment or some other fatal defect appearing on the face of the record." *State v. McCollum,* 216 N.C. 737, 6 S.E. 2d 503. The indictment in the present case is sufficient to charge the offense of armed robbery, and no defect appears on the face of the record before us. Accordingly, defendant's second assignment of error is also without merit.

[3] We note that the indictment as well as the judgment and commitment refer to the defendant as "John Louis Murray," while the caption of the case in the record on appeal names defendant as "John Lewis Murrary." While defendant has made no point concerning this, in view of his motion in arrest of judgment we deem it proper to advert to this fact, and we hold that the doctrine of *idem sonans* is applicable. *State v. Culbertson,* 6 N.C. App. 327, 170 S.E. 2d 125.

We have carefully reviewed the entire record and find

No error.

Judges CAMPBELL and MORRIS concur.

STATE OF NORTH CAROLINA v. RUSSELL T. ADAMS

No. 7226SC760

(Filed 22 November 1972)

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

Though the record on appeal was not docketed in apt time, the court on appeal reviewed the record and found it to be without prejudicial error.

APPEAL by defendant from *McLean, Judge,* 17 April 1972 Schedule C Criminal Session of Superior Court held in MECKLENBURG County.

Defendant was tried on his plea of not guilty to a bill of indictment charging him with uttering a forged check drawn on the account of Acrow Carolina, Inc., payable to defendant in the amount of $152.30. The State offered evidence to show that shortly after defendant visited the office of Acrow Carolina, Inc., on or about 15 December 1970 it was discovered that ten printed blank checks were missing, that the check described in the indictment was one of these, that the purported signature of the company official thereon was forged, and that on 16 December 1970 defendant endorsed and cashed the check at a convenience store. Defendant took the stand, admitted he had endorsed and cashed the check, but testified that it had been given him by a passenger who had ridden in defendant's taxicab and who represented to defendant that he was authorized to sign

checks on the company's account. The jury found defendant guilty as charged in the bill of indictment, and from judgment imposing a sentence upon the verdict, defendant appealed.

Attorney General Robert Morgan by Assistant Attorneys General Claude W. Harris and James E. Magner for the State.

T. O. Stennett for defendant appellant.

PARKER, Judge.

The judgment appealed from was dated 19 April 1972. The record on appeal was docketed in this Court on 7 September 1972, which was more than ninety days after the date of the judgment appealed from. No order of the trial tribunal extending the time for docketing 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. Simpson,* 14 N.C. App. 456, 188 S.E. 2d 535; *State v. Cook,* 11 N.C. App. 439, 181 S.E. 2d 172.

Nevertheless, we have carefully reviewed the record and prejudicial error sufficient to warrant a new trial is not shown. The only assignment of error noted in the record, that the trial court erred in allowing the solicitor too great latitude in cross-examining defendant as to his prior criminal record, we find without merit. *State v. Weaver,* 3 N.C. App. 439, 165 S.E. 2d 15, *cert. denied,* 275 N.C. 263.

Appeal dismissed.

Judges CAMPBELL and MORRIS concur.

STATE OF NORTH CAROLINA v. TYRONE SPRINGS

No. 7226SC711

(Filed 22 November 1972)

Robbery § 4— armed robbery — sufficiency of evidence to withstand nonsuit

There was sufficient evidence to overrule defendant's motion for nonsuit in a robbery case where the evidence tended to show that defendant and two others entered a clothing store, that defendant

held a gun on the assistant manager of the store while an accomplice informed him that "this is a hold up" and that defendant and his accomplices took clothing from the store and money from the assistant manager and the cash register.

APPEAL by defendant from *McLean, Judge,* 17 April 1972 Session of Superior Court held in MECKLENBURG County.

Defendant Tyrone Springs was tried on a bill of indictment, proper in form, charging him with the armed robbery of Jeffrey R. Gresko on 9 February 1972.

Upon the defendant's plea of not guilty, the State offered evidence tending to show that the defendant, with two other men, entered the "Pants East" clothing store on North Tryon Street in the City of Charlotte at about 8:30 p.m. on 9 February 1972. At that time, Jeffrey R. Gresko, the assistant manager, and Rebecca Padgett, a clerk, were in the store alone. The defendant was wearing a green jacket with a hood pulled over his head. One of the men was wearing a red ski mask. The smallest of the three men asked the assistant manager to show him some pants. While the defendant was standing behind Gresko, pointing a gun at him, the smallest of the three men pulled out a gun, aimed it at Gresko, and stated "This is a hold-up." Gresko and Miss Padgett were then taken to the back of the store, bound and gagged and made to lie on the floor. After taking $42.00 from Gresko's wallet, $240.00 from the cash register, 126 pairs of pants and 100 knit tops, the three men left the store.

The defendant offered evidence tending to establish an alibi.

The defendant was found guilty of armed robbery. From a judgment imposing a prison sentence of twenty-five years, defendant appealed.

Attorney General Robert Morgan and Associate Attorney Ann Reed for the State.

Frank H. Walker for defendant appellant.

HEDRICK, Judge.

The defendant assigns as error the denial of his timely motions for judgment as of nonsuit. There was ample evidence to require submission of this case to the jury and to support the verdict.

Assignments of error one, two and four relate to the admission and exclusion of testimony. We have carefully examined each exception upon which these assignments of error are based and find them to be without merit.

The defendant's trial in the Superior Court was free from prejudicial error.

No error.

Judges VAUGHN and GRAHAM concur.

STATE OF NORTH CAROLINA v. CHARLES SHEPHERD

No. 7224SC617

(Filed 22 November 1972)

Criminal Law § 23— voluntariness of guilty plea

Where the record shows that defendant was aware of the consequences of his guilty plea and knew that he could be sentenced to imprisonment for up to 21 years, his plea was knowingly, voluntarily and understandingly made.

APPEAL by defendant from *Hasty, Judge,* 27 March 1972 Session of WATAUGA County Superior Court.

By bill of indictment proper in form defendant was charged in Case No. 72CR480 with felonious escape, being defendant's second escape. By a second bill of indictment also proper in form defendant was charged in Case No. 72CR387 with felonious breaking and entering and larceny. Upon arraignment on the charges in the two cases, defendant, through court-appointed counsel, tendered pleas of guilty to misdemeanor escape and to felonious breaking and entering and larceny. Whereupon defendant was questioned in open court by the presiding judge concerning his understanding of the consequences of his pleas of guilty and concerning his voluntary assent thereto, and defendant signed and swore to a written "transcript of plea" which contained his answers to the judge's questions. The judge then signed an order adjudicating that defendant's pleas of guilty had been freely, understandingly and voluntarily made, without undue influence, compulsion or

duress, and without promise of leniency. In Case No. 72CR387, in which defendant had pleaded guilty to felonious breaking and entering and larceny, judgment was entered sentencing defendant to prison as a committed youthful offender for a term not to exceed three years, this sentence to commence at the expiration of the sentences previously imposed, which the defendant was then serving, and not to run concurrently therewith. In Case No. 72CR480, in which defendant had pleaded guilty to misdemeanor escape, judgment was entered sentencing defendant to prison as a youthful offender for a period not to exceed twelve months, this sentence to commence at the expiration of the sentence imposed in Case No. 72CR387, not to run concurrently therewith, and not to run concurrently with the sentences the defendant was then serving.

Defendant appealed, and at his request the court appointed new counsel to represent him in the appeal.

Attorney General Robert Morgan by Associate Attorney Ralf F. Haskell for the State.

Finger & Greene by C. Banks Finger for defendant appellant.

CAMPBELL, Judge.

This is a companion case to *State v. Wyatt* also filed this date. Here, as in *Wyatt,* the record affirmatively shows that the defendant's plea was knowingly, voluntarily, and understandingly made. *Boykin v. Alabama,* 395 U.S. 238, 23 L.Ed. 2d 274, 89 S.Ct. 1709 (1969). Where the defendant is fully aware of the consequences of his guilty plea such as the waiver of his right to trial by jury and the right to confront his accusers, and specifically that he could be sentenced to imprisonment for as much as twenty-one years, there is no merit to the contention that he did not understand that he was pleading guilty to any felonies but thought he was pleading guilty only to misdemeanors.

No error.

Judges MORRIS and PARKER concur.

STATE OF NORTH CAROLINA v. EDDIE WALLACE

No. 7226SC683

(Filed 22 November 1972)

Criminal Law § 161— failure to assign error on appeal — review of record proper

Where defendant presented no assignments of error, the appeal itself constituted an exception to the judgment; however, no error appeared on the face of the record proper.

APPEAL by defendant from *Friday, Judge,* 8 May 1972 Session of MECKLENBURG Superior Court.

Defendant was charged in two bills of indictment with the offense of uttering forged checks, a felony prohibited by G.S. 14-120. The bills were consolidated for trial; defendant pleaded not guilty; the jury returned a verdict of guilty of both counts. Defendant was sentenced to imprisonment for a period of not less than three nor more than five years.

On this appeal defendant has presented no assignments of error.

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

Nelson M. Casstevens, Jr., for defendant appellant.

CAMPBELL, Judge.

The defendant having presented no assignments of error, the appeal itself is an exception to the judgment, *State v. Ayscue,* 240 N.C. 196, 81 S.E. 2d 403 (1954); defendant's exception to the judgment presents the face of the record for review, which review is ordinarily limited to the question of whether error of law appears on the face of the record and whether the judgment is regular in form, *State v. Kirby,* 276 N.C. 123, 171 S.E. 2d 416 (1970); when no error appears on the face of the record proper, and the judgment is within the statutory limitations prescribed and is predicated upon a verdict sufficient to support it, the judgment must be affirmed, *State v. Darnell,* 266 N.C. 640, 146 S.E. 2d 800 (1966), and *State v. Sloan,* 238 N.C. 672, 78 S.E. 2d 738 (1953).

There is no error within the record proper. Defendant was sentenced to a maximum imprisonment of five years, well within the ten years authorized by G.S. 14-120.

No error.

Judges MORRIS and PARKER concur.

ASHBY R. ROTH, VINCENT P. ROTH AND ASHBY D. ROTH, MINORS BY THEIR GUARDIAN AD LITEM ASHBY R. ROTH v. PATRICIA A. PARSONS

No. 7226SC609

(Filed 22 November 1972)

Parent and Child § 4— alienation of affection of parent — no right of action

Minor children may not maintain an action for the alienation of the affection of their father.

APPEAL by plaintiffs Vincent P. Roth and Ashby D. Roth from *McLean, Judge,* at the Regular 22 May 1972 Civil "C" Session of MECKLENBURG Superior Court.

In this action, commenced on 14 March 1972, plaintiff Ashby R. Roth seeks to recover for (1) alienation of affection of her husband by defendant and (2) criminal conversation by defendant with her husband. In a third cause of action the minor plaintiffs seek to recover for the alienation of affection of their father by defendant.

As to the third cause of action defendant moved for judgment on the pleadings pursuant to G.S. 1A-1, Rule 12, or, in the alternative, for summary judgment pursuant to G.S. 1A-1, Rule 56. Following a hearing the court sustained defendant's motion and from judgment dismissing their action, the minor plaintiffs appealed.

Richard A. Cohan for plaintiff appellant.

Wade and Carmichael by R. C. Carmichael, Jr., for defendant appellee.

BRITT, Judge.

We hold that the court properly dismissed the third cause of action. Although appellants attempt to distinguish their case from *Henson v. Thomas,* 231 N.C. 173, 56 S.E. 2d 432 (1949), we think the legal principles in the cases are the same and that the majority opinion in *Henson* is controlling here. For that reason, the judgment appealed from is

Affirmed.

Chief Judge MALLARD and Judge BROCK concur.

STATE OF NORTH CAROLINA v. WILLIE JAMES WALLACE ALIAS WILLIE BRYANT

No. 7228SC629

(Filed 22 November 1972)

1. **Criminal Law § 161— exception to judgment — review of face of record**

Assignment of error based on an exception to entry of the judgment presents only the question of whether error appears on the face of the record.

2. **Criminal Law § 23— plea of guilty — no error on face of record**

No error appears on the face of the record in an appeal from judgment imposed upon defendant's plea of guilty of voluntary manslaughter.

ON *certiorari* to review judgment of *Thornburg, Judge,* at the 27 March 1972 Session of BUNCOMBE Superior Court.

In a bill of indictment returned at the 8 October 1969 Session of Buncombe Superior Court, defendant was charged with first-degree murder. He appeared with his court appointed attorney at the 27 March 1972 session of the court and tendered a plea of guilty of voluntary manslaughter. After due inquiry the trial court adjudged that the plea was freely, understandingly, and voluntarily made, without undue influence, compulsion or duress, and without any promise of leniency, and accepted the tendered plea. From judgment sentencing him to prison for 15 years, with credit to be given for time spent in jail and the State Hospital between 28 September 1969 and 27 March 1972, defendant appealed.

Attorney General Robert Morgan by Lester V. Chalmers, Jr., Assistant Attorney General, for the State.

Ruben J. Dailey for defendant appellant.

BRITT, Judge.

[1] Defendant's sole assignment of error is based on his exception to the entry of the judgment, therefore, the only question presented is whether error appears on the face of the record. *State v. Martin,* 10 N.C. App. 181, 178 S.E. 2d 32 (1970).

[2] A careful review of the record reveals no error. The bill of indictment is proper in form; the defendant's plea of guilty to a less degree of the offense charged in the indictment against him is authorized by statute; *State v. Woody,* 271 N.C. 544, 157 S.E. 2d 108 (1967); defendant was represented by an experienced attorney; the court, following a careful inquiry, determined that defendant's guilty plea was freely, understandingly, and voluntarily entered; and the sentence imposed is well within the limits provided by statute; G.S. 14-18.

The judgment appealed from is

Affirmed.

Chief Judge MALLARD and Judge BROCK concur.

JAMES ARTHUR PRINGLE, JR. v. DANA FREEMAN PRINGLE

No. 7226DC761

(Filed 22 November 1972)

Appeal and Error § 62— stipulation that order contains reversible error — new trial

Appellant is entitled to a new trial where it was stipulated that the order appealed from contains reversible error.

APPEAL by defendant from *Arbuckle, District Judge,* 10 April 1972 Session of District Court held in MECKLENBURG County.

Olive, Howard & Downer by Leon Olive for plaintiff appellee.

Ruff, Perry, Bond, Cobb, Wade & McNair by Hamlin L. Wade for defendant appellant.

MALLARD, Chief Judge.

On 26 October 1972, the date this cause was calendared for oral argument in this court, the parties, through their respective counsel, filed a written stipulation which contains among other things the following:

"1. The Order entered by the Honorable Howard B. Arbuckle, Jr., on April 20, 1972, in the above matter contains errors which subject it to being reversible on appeal."

Inasmuch as the order dated 20 April 1972, in which reversible error was stipulated, was the order appealed from, the appellant is entitled to a new trial.

New trial.

Judges BROCK and BRITT concur.

IN THE MATTER OF: DOW BONDING COMPANY, ERNEST DOW, RAY SMITH, GENE EDISON AND FREDDIE M. (FLIP) DOW

No. 7227DC790

(Filed 22 November 1972)

Arrest and Bail § 11— order forbidding appellants to execute bail bonds — absence of notice and hearing

Order entered by the chief district court judge *sua sponte* forbidding appellants from executing bail bonds, without notice to appellants and without their having the opportunity to appear and be heard, is void.

ON *certiorari* from an order of *Bulwinkle, Chief District Judge,* entered at the 19 April 1972 Session of District Court held in GASTON County.

On 19 April 1972, the Chief District Judge of the 27th Judicial District entered an order which, among other things, expressly forbade the execution of bail bonds by petitioners to

secure the appearance of anyone in the district courts of the 27th Judicial District or to secure the compliance by any person with any order of a district court of that district.

Attorney General Robert Morgan by John M. Silverstein, Associate Attorney for the State.

Hollowell, Stott & Hollowell; Frank P. Cooke and Steve B. Dolley, Jr., by Grady B. Stott for petitioner appellants.

VAUGHN, Judge.

The judge issued the order *sua sponte* without due notice to petitioners or appropriate opportunity to appear and be heard. The order is void. *State v. Parish,* 254 N.C. 301, 118 S.E. 2d 786; *In re Wilson,* 13 N.C. App. 151, 185 S.E. 2d 323. The order is vacated.

Vacated.

Judges HEDRICK and GRAHAM concur.

STATE OF NORTH CAROLINA v. CAROLYN STEVEY PROCTOR

No. 727SC814

(Filed 22 November 1972)

Criminal Law § 25— plea of nolo contendere — showing of voluntariness in record

The record affirmatively shows that defendant's plea of *nolo contendere* to the crime of feloniously receiving stolen property was voluntarily and understandingly entered.

APPEAL by defendant from *Martin (Perry), Judge,* 7 August 1972 Session of Superior Court held in EDGECOMBE County.

Defendant, represented by counsel, entered a plea of *nolo contendere* to the crime of feloniously receiving stolen property. Judgment was entered imposing an active prison sentence.

Attorney General Robert Morgan by H. A. Cole, Jr., Assistant Attorney General for the State.

Taylor, Brinson & Aycock by William W. Aycock, Jr. for defendant appellant.

VAUGHN, Judge.

No exceptions were entered at the trial before Judge Martin. Several days after the entry of judgment, defendant expressed a desire to appeal. Counsel for defendant, with appropriate candor, concedes that he is unable to discover or assign error but states that defendant now contends that the plea was not voluntarily and understandingly entered. The record contains the transcript of defendant's plea and the court's adjudication thereon. It clearly and affirmatively appears that the plea was voluntarily and understandingly entered. The court's adjudication thereon is supported by the evidence developed in open court and is affirmed. *State v. Ford,* 281 N.C. 62, 187 S.E. 2d 741.

No error.

Judges HEDRICK and GRAHAM concur.

TOMMY I. ARAKAS v. CECIL McMAHAN AND GERALD SMITH, D/B/A WHITE MONUMENT WORKS, AND DORIS S. McMAHAN

No. 7228SC733

(Filed 22 November 1972)

APPEAL from *Thornburg, Judge,* 24 April 1972 Civil Session of Superior Court held in BUNCOMBE County.

Action to recover damages for injuries and property damage sustained as a result of a collision between plaintiff's motorcycle and defendant's automobile driven by defendant McMahan.

The evidence tended to show the collision took place on the four lane Hendersonville Road north of its intersection with All Souls Crescent and Vanderbilt Road. Plaintiff's vehicle was traveling north on Hendersonville Road and passed this intersection in the outside or right-hand lane. Defendant's vehicle, traveling in the same direction, passed through the intersection in the inside or left-hand lane of the two lanes designated for northbound traffic. Plaintiff, traveling ahead of defendant's vehicle, turned his motorcycle from a direct line of travel to the left towards the inside northbound lane. It was during this

maneuver that the impact occurred. The jury answered issues of negligence and contributory negligence in the affirmative. Judgment was entered denying recovery.

Uzzell and Dumont by Harry Dumont for plaintiff appellant.

Williams, Morris and Golding by James N. Golding for defendant appellees.

VAUGHN, Judge.

All of plaintiff's assignments of error have been carefully considered. The evidence was conflicting. The jury has resolved the issues in a trial which we believe to have been free of prejudicial error.

No error.

Judges HEDRICK and GRAHAM concur.

STATE OF NORTH CAROLINA v. TOMMY HOYT WHITE

No. 7229SC582

(Filed 22 November 1972)

APPEAL by defendant from *Falls, Judge,* 8 May 1972 Session of Superior Court held in RUTHERFORD County.

Defendant was charged with felonious escape in violation of G.S. 148-45, having already been once convicted of escape. Represented by court-appointed counsel, defendant pleaded guilty to a violation of this statute. The court entered judgment that defendant be imprisoned for 9 months. Defendant appealed.

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

Robert G. Summey for defendant appellant.

BROCK, Judge.

Defendant's counsel asks that this Court review the record and determine if any error exists. We have carefully reviewed

the record and find that the bill of indictment was in proper form; that the guilty plea was freely, understandingly, and voluntarily made; and that the sentence imposed was within the statutory limits. We find the record free from prejudicial error. The judgment of the Superior Court is

Affirmed.

Chief Judge MALLARD and Judge BRITT concur.

STATE OF NORTH CAROLINA v. JAMES CLARENCE HUFFMAN

No. 7226SC632

(Filed 22 November 1972)

APPEAL by defendant from *McLean, Judge,* 4 April 1972 Schedule "C" Criminal Session, MECKLENBURG Superior Court.

By indictment proper in form defendant was charged with (1) felonious store breaking and (2) felonious larceny. A jury found defendant guilty as charged. From judgment imposing two 10 years prison sentences, sentence in the larceny count to begin at the expiration of sentence in the store breaking count, defendant appealed.

Attorney General Robert Morgan by Henry T. Rosser, Assistant Attorney General, for the State.

John Guerrant Walker for defendant appellant.

BRITT, Judge.

Although defendant's brief does not comply with the rules of this court, we have carefully reviewed the record on appeal, with particular reference to the questions raised in the brief, but find no prejudicial error. We hold that defendant received a fair trial and the sentences imposed are within the limits provided by applicable statutes. G.S. 14-54; G.S. 14-72; G.S. 14-2.

No error.

Chief Judge MALLARD and Judge BROCK concur.

STATE OF NORTH CAROLINA v. HOMER MACK GUFFEY

No. 7229SC602

(Filed 22 November 1972)

APPEAL by defendant from *Falls, Judge,* 10 May 1972 Session of Superior Court held in RUTHERFORD County.

Attorney General Robert Morgan and Associate Attorney E. Thomas Maddox, Jr., for the State.

James H. Burwell, Jr., for defendant appellant.

HEDRICK, Judge.

The record affirmatively shows that the defendant, represented by counsel, freely, understandingly and voluntarily pleaded guilty to a warrant, proper in form, which charged him with violating G.S. 20-28(a) by operating a motor vehicle while his driver's license was indefinitely suspended.

The judgment imposing a prison sentence of eighteen months is within the limits prescribed for a violation of the statute.

In the defendant's trial in the Superior Court we find

No error.

Judges VAUGHN and GRAHAM concur.

MERCHANTS DISTRIBUTORS, INC. v. JOHN N. HUTCHINSON, INDIVIDUALLY, AND JOHN N. HUTCHINSON, ADMINISTRATOR OF THE ESTATE OF MARK S. HUTCHINSON, DECEASED

— AND —

RONNIE WAYNE LEWIS v. JOHN N. HUTCHINSON, INDIVIDUALLY, AND JOHN N. HUTCHINSON, ADMINISTRATOR OF THE ESTATE OF MARK S. HUTCHINSON, DECEASED

No. 7225SC571

(Filed 20 December 1972)

1. **Executors and Administrators § 3— wrongful death action — appointment of ancillary administrator**

In North Carolina, an administrator appointed by the court of another state may not maintain an action for wrongful death occurring in North Carolina; however, the clerk of the superior court in the county in which personal service may be had upon the alleged tortfeasor has authority to appoint an acillary administrator to sue for wrongful death, notwithstanding that deceased was a nonresident.

2. **Death §§ 3, 4— wrongful death action — Tennessee administrator — statute of limitations not tolled**

The commencement of a wrongful death action by a foreign administrator in North Carolina will not operate to bar the running of the applicable two-year statute of limitations, such action being a nullity and subject to dismissal; therefore, a counterclaim for wrongful death instituted by a Tennessee administrator in North Carolina and more than two years from date of death of the deceased was properly dismissed under G.S. 1A-1, Rule 12(b)(6).

3. **Death §§ 3, 4; Executors and Administrators § 3— counterclaim barred by statute of limitations — amendment of answer properly refused**

The trial court properly refused to allow defendant to amend his answer to assert a counterclaim which had been barred by the statute of limitations since the proposed counterclaim for wrongful death was signed and filed by attorneys acting on behalf of a foreign administrator at a time when there was a duly appointed ancillary administrator in North Carolina and after the Tennessee administrator had failed in his effort to have the federal court take jurisdiction. 1A-1, Rule 15(c).

4. **Appeal and Error § 50; Trial § 33— negligence action — instruction on "victim" — no error**

Though the Court of Appeals does not approve of the use of the word "victim" by the trial judge in his charge to the jury in a negligence action, use of the word in this particular action was not an impermissible expression of opinion by the trial judge and did not amount to prejudicial error.

5. Appeal and Error § 50; Negligence § 40; Trial § 33— negligence action —instruction on foreseeability — no error

In a negligence action the trial court's charge, when construed as a whole, adequately stated the law as to foreseeability, and a reference to the requirement of "due regard for the rights of our fellowmen" did not constitute error.

6. Negligence § 27— deposition excluded as irrelevant — no error

Portion of a deposition having to do with pep pills in the possession of the deceased driver was irrelevant and too remote to be considered on the issue of deceased's negligence and was properly excluded.

APPEAL by John N. Hutchinson, Administrator (defendant), and Ronnie Wayne Lewis and Merchants Distributors, Inc. (plaintiffs), from *Grist, Judge*, 4 January 1972 Session of Superior Court held in CATAWBA County.

The collision giving rise to these two actions, which were consolidated for trial, occurred on U. S. Highway No. 64, approximately four miles east of Statesville, Iredell County, North Carolina, about 5:15 a.m. on 2 June 1969. Plaintiff Lewis, in the course of his employment, was driving a tractor-trailer vehicle owned by the plaintiff corporation in an easterly direction on Highway No. 64. Deceased, Mark S. Hutchinson, a 17-year-old minor domiciled in Tennessee, was driving a 1965 Dodge truck on the bed of which deceased and two passengers, Timothy Wilson and Arthur Larry Arnold, were transporting a "Supercuda" racing car west along Highway No. 64. At the point of the collision, Highway No. 64 was a two-laned paved highway, 22 feet wide with yellow dividing lines marking its center. The collision between the Dodge truck and the tractor-trailer truck occurred near the crest of a hill, and Mark S. Hutchinson died as a result thereof. Plaintiffs' evidence tended to show that deceased was negligent in that he drove the 1965 Dodge truck across the center yellow line into the path of the corporate plaintiff's truck. Defendant's evidence tended to show that plaintiff Lewis was negligent in that he drove the corporate plaintiff's truck across the center yellow line into the path of the deceased's Dodge truck.

On 9 September 1969, plaintiff Lewis and plaintiff Merchants Distributors, Inc., commenced these actions by filing complaints against John N. Hutchinson, the registered owner of the 1965 Dodge truck. Mr. Hutchinson (the father of the deceased, Mark S. Hutchinson) was a citizen and resident of

Tennessee at the time of this action. After answers were duly filed on 1 December 1969 by the defendant, John N. Hutchinson, to the original complaints, plaintiffs filed amended complaints on 28 January 1971 and joined John N. Hutchinson, the Tennessee administrator of the estate of Mark S. Hutchinson, as a party defendant to the actions. Alias summonses were issued on 5 February 1971 and served on 10 February 1971 on John N. Hutchinson, individually and as administrator of the estate of Mark S. Hutchinson. John N. Hutchinson had been appointed administrator of the estate of Mark S. Hutchinson, deceased, on 2 December 1969 by the Clerk of Probate Court, Shelby County, Tennessee.

On 4 March 1971, John Hutchinson, Tennessee administrator, filed an action in the Federal District Court, Western District, North Carolina, against both plaintiffs herein, asking for damages for the wrongful death of Mark S. Hutchinson. On 26 March 1971, plaintiffs herein, defendants in the Federal court, filed answers to the complaint of John Hutchinson, in Federal District Court, and also moved to dismiss the action commenced in that court on the grounds that there was a prior pending action in the state court and also that no administrator had been appointed in North Carolina.

On 29 April 1971 in Superior Court, Catawba County, defendant John Hutchinson, individually and as administrator, filed answer to the amended complaint of the plaintiffs Lewis and Merchants Distributors, Inc., denied negligence or agency, alleged contributory negligence of Lewis, asserted that plaintiffs failed to state a claim upon which relief could be granted but did not state a counterclaim for wrongful death.

On 11 October 1971, the action of John Hutchinson, administrator, against these plaintiffs in the Federal District Court was dismissed on the ground that a foreign administrator may not recover on a cause of action for wrongful death arising in North Carolina in a North Carolina court.

On 20 October 1971, which was more than two years after 2 June 1969, Harold J. Bender, a resident of Iredell County, North Carolina, was appointed by the Clerk of Superior Court of Iredell County ancillary administrator for the estate of Mark S. Hutchinson, deceased. Thereafter on 30 November 1971, an order was entered in Superior Court, Catawba County, allowing John N. Hutchinson, the Tennessee administrator, to

amend his answer and assert a counterclaim for wrongful death against both plaintiffs without prejudice to the plaintiffs' right to assert the statute of limitations as a plea in bar to the claim, but the order failed to contain any provision ordering the ancillary administrator joined as a party claimant to the counterclaim for wrongful death.

Thereafter on 4 January 1972, and after a hearing and findings of fact on the plea in bar, Judge Grist entered an order (dated and filed 12 January 1972) dismissing the counterclaim of the defendant John N. Hutchinson, the Tennessee administrator. Defendant John N. Hutchinson, individually and as the Tennessee administrator, excepted and appealed on 12 January 1972 from the order of admissal, assigning error.

On 7 January 1972 (after the hearing on the plea in bar but before the date of the order therein), trial was had upon the issue of the negligence of the deceased, Mark Hutchinson, and the jury answered that issue "No" and returned a verdict for defendant, individually and as administrator. On 7 January 1972, judgment was entered on the verdict that plaintiffs have and recover nothing of the defendants, and on 7 January 1972, plaintiffs appealed, assigning error.

Smathers, Ferrell & Farthing by Edwin G. Farthing and James C. Smathers for plaintiff appellants-appellees.

Frank & Lassiter by Jay F. Frank for defendant appellant, and Perry C. Henson and Daniel W. Donahue for defendant appellee.

MALLARD, Chief Judge.

APPEAL OF DEFENDANT ADMINISTRATOR

Defendant John N. Hutchinson, administrator of the estate of Mark S. Hutchinson in Tennessee, assigns as error the dismissal of his counterclaim at the hearing on plaintiffs' motion to dismiss, pursuant to G.S. 1A-1, Rule 12(b)(6).

[1] In North Carolina, an administrator appointed by the court of another state may not maintain an action for wrongful death occurring in North Carolina. *Monfils v. Hazlewood,* 218 N.C. 215, 10 S.E. 2d 673 (1940), *cert. denied,* 312 U.S. 684; *Hall v. R. R.,* 146 N.C. 345, 59 S.E. 879 (1907). However, the clerk of the superior court in the county in which personal

service may be had upon the alleged tortfeasor has authority to appoint an ancillary administrator to sue for wrongful death, notwithstanding that deceased was a nonresident. 3 Strong, N. C. Index 2d, Executors and Administrators, § 3.

[2] Therefore, the commencement of a wrongful death action by a foreign administrator in North Carolina will not operate to bar the running of the applicable two-year statute of limitations set forth in G.S. 1-53, such action being a nullity and subject to dismissal. *Graves v. Welborn,* 260 N.C. 688, 133 S.E. 2d 761, 3 A.L.R. 3d 1225 (1963); *Bennett v. R. R.,* 159 N.C. 345, 74 S.E. 883 (1911); *Reid v. Smith,* 5 N.C. App. 646, 169 S.E. 2d 14 (1969).

> "The right of action for wrongful death is purely statutory. It may be brought only 'by the executor, administrator, or collector of the decedent.' G.S. 28-173. * * * If an action for wrongful death is instituted by one other than the personal representative of a decedent, duly appointed in this State, it should be dismissed. * * * " *Graves v. Welborn, supra. Compare McNamara v. Kerr-McGee Chemical Corp.,* 328 F. Supp. 1058 (E.D.N.C. 1971); Annot., 3 A.L.R. 3d 1234 (1965).

An action may be dismissed for failure to state a claim upon which relief may be granted. G.S. 1A-1, Rule 12(b)(6). The defendant administrator was not duly appointed in this state. As of the time of this appeal, no ancillary administrator had been properly joined in this action, although there had been one appointed in North Carolina. The collision sued upon occurred on 2 June 1969. The date of death of Mark S. Hutchinson is not specifically alleged in the pleadings. However, one of the defendant's witnesses testified that he went to the scene of the collision and that Mark S. Hutchinson did not have any pulse. Moreover, in the copy of the counterclaim which was attached to the Tennessee administrator's motion to amend, it is alleged that Mark was 16 years of age at the time of his death and John N. Hutchinson (the father) testified that Mark was born on July 1, 1952. Therefore, if he did not die immediately, he died before his seventeenth birthday which would have been on 1 July 1969. In plaintiff appellant's statement of case on appeal, it is stated that he was "killed in the collision"; therefore, we assume that Mark S. Hutchinson died on 2 June 1969, or at least before his seventeenth birthday.

In the counterclaim attached to the motion filed 3 November 1971 by John N. Hutchinson, the Tennessee administrator of the estate of Mark S. Hutchinson, it was alleged that Harold J. Bender, the ancillary administrator, should be made a party to the action and that this allegation be considered as a motion for that purpose. This allegation was apparently not treated as such a motion because no order appears in this record directing that the ancillary administrator be made a party to this action.

The asserted counterclaim by the Tennessee administrator was not filed until 30 November 1971, which was after the ancillary administrator for the estate of Mark S. Hutchinson had been appointed in North Carolina and more than two years from the date of death of Mark S. Hutchinson, deceased. We hold that the defendant, Tennessee administrator, may not maintain this wrongful death action in North Carolina. Under the circumstances of this case, the dimissal of the counterclaim of the Tennessee administrator for the wrongful death of the decedent pursuant to G.S. 1A-1, Rule 12(b)(6) was proper. See *Young v. Marshburn,* 10 N.C. App. 729, 180 S.E. 2d 43 (1971), *cert. denied,* 278 N.C. 703; *Monfils v. Hazlewood, supra,* and G.S. 1-53.

[3] Defendant, the Tennessee administrator, contends that Judge Grist erred in failing to allow him to amend his answer pursuant to G.S. 1A-1, Rule 15(c) in order to assert a counterclaim for wrongful death which would relate back to defeat the bar of the statute of limitations. We do not agree. Assuming, but not deciding, that Rule 15(c) would permit the amendment of an answer to assert a counterclaim which has been barred by the statute of limitations [*compare Stoner v. Terranella,* 372 F. 2d 89 (6th Cir. 1967); *Butler v. Poffinberger,* 13 F.R. Serv. 2d 221, 49 F.R.D. 8 (1970)], nonetheless, we are of the opinion that Rule 15(c) is not applicable on the facts in this case because the proposed counterclaim for wrongful death was signed and filed by attorneys acting on behalf of a foreign administrator at a time when there was a duly appointed ancillary administrator in North Carolina, and after the Tennessee administrator had failed in his effort to have the Federal District Court take jurisdiction. The Tennessee administrator, instead of filing his counterclaim in the state court, instituted the action for wrongful death in the Federal District Court on 4 March 1971 which was after he was made a party defendant in this action and after summons in this action was served on him

on 10 February 1971. The findings of fact by Judge Grist are supported by the evidence and indicate that the defendant, the Tennessee administrator, failed in his counterclaim to state a claim upon which relief could be granted in North Carolina, failed to show oversight, inadvertence, excusable neglect, or that justice required the requested amendment, and the judge properly concluded as a matter of law that the counterclaim must be dismissed. See G.S. 1A-1, Rule 13(f). The order of Judge Grist dismissing the counterclaim of the defendant administrator is affirmed.

APPEAL OF PLAINTIFFS MERCHANTS DISTRIBUTORS, INC. AND RONNIE WAYNE LEWIS

Plaintiffs set forth fifteen assignments of error in the record on appeal but have brought forward and argued in their brief only three. The remaining twelve assignments of error are deemed abandoned. Rule 28 of the Rules of Practice in the Court of Appeals.

[4] Plaintiffs' assignments of error numbered 8 and 9 are directed to the charge of the court to the jury. While reviewing the evidence in the case, the judge stated that the evidence tended to show that defendant administrator " . . . appears in this case having been brought in as an individual as well as the administrator of the estate of Mark S. Hutchinson, his son who I think everyone would agree was the victim in the automobile and lost his life in it." The plaintiffs contend that the trial judge's use of the word "victim" in the charge was an expression of opinion prejudicial to their cause and violative of G.S. 1A-1, Rule 51(a).

In support of their contention, plaintiffs cite *People v. Williams*, 17 Cal. 142 (1860). In that opinion the use of the word "victim" in the charge to the jury at the trial of a homicide was criticized by the appellate court.

In North Carolina, whether prejudice resulted from the trial judge's remarks is to be determined from the circumstances under which the remarks were made and the probable meaning of the language of the judge to the jury. *State v. Byrd*, 10 N.C. App. 56, 177 S.E. 2d 738 (1970). We do not approve of the use of the word "victim" by the trial judge, but on the facts of this case, we are of the opinion that the use of the word "victim" was not an impermissible expression of opinion by the

trial judge and did not amount to prejudicial error. In so doing, we note that in the context in which the word "victim" was used, it was obvious both to counsel for the plaintiffs and to the jury that the court was referring solely to the fact that Mark S. Hutchinson was the only person who was killed in the collision. Moreover, one of the definitions of the word "victim" in Webster's Third New International Dictionary (1968) is "someone who suffers death, loss, or injury in an undertaking of his own." Plaintiffs' assignment of error numbered 8 is overruled. See also, *Barger v. State,* 235 Md. 556, 202 A. 2d 344, 9 A.L.R. 3d 926 (1964).

[5] The plaintiffs also contend that the court erred in defining foreseeability in its instructions to the jury on proximate cause. We disagree. The court in its charge stated:

> "The law is made for all of us and it recognizes that we all have our frailities (sic) and therefore, it does not require that we will be able to foresee what is going to happen, but it does require that we so conduct ourselves that we have due regard for the rights of our fellowmen and that we foresee what might reasonably be foreseen, although it does not require what is known as prevision.
>
> The law only requires reasonable foresight and where the injury complained of is not reasonably foreseeable in the exercise of due care, the party whose conduct is under investigation is not answerable therefor. And I instruct you that reasonable care is that degree of care which a reasonably prudent person would exercise under like circumstances when charged with a like duty. Foreseeable damage is a requisite of proximate cause and proximate cause is a requisite for actionable negligence and actionable negligence is a requisite for recovery for any damage negligently inflicted. A proximate cause is also a cause from which a person of ordinary prudence could have reasonably foreseen that such a result or some similar injurious result was probable under the facts as they existed."

Plaintiffs argue that the judge committed error in using the foregoing words "due regard for the rights of our fellowmen." We reject this argument and hold that the court's charge, when construed as a whole, adequately stated the law as to foreseeability. A charge must be construed contextually, and isolated

portions of it will not be held prejudicial when the charge as a whole is correct. *State v. McWilliams,* 277 N.C. 680, 178 S.E. 2d 476 (1971). Plaintiffs' assignment of error numbered 9 is overruled.

[6] Plaintiffs assign as error the action of the trial court in excluding from the evidence a portion of a deposition given by Arthur Larry Arnold who was a passenger in the 1965 Dodge truck at the time of the collision at issue. The portion of the deposition excluded reads as follows:

"Q. All right. Had he taken any kind of pep pill or anything to keep him awake?

A. I don't know.

Q. Did you customarily carry such in the truck?

A. Yes, we did.

Q. What did you carry?

A. They were pep pills, to stay awake pills.

Q. Were they the kind you can go to the corner drug store and buy or the kind that you slip around the corner and buy?

A. I really don't know.

Q. Who got them?

A. Mark got them for us.

Q. All right, and when you were taking these long trips, sometimes, you would take them, is that correct?

A. If it was necessary to take them, yes.

Q. All right, to keep you awake?

A. Yes, Sir."

Plaintiffs contend that the excluded portion of the deposition is relevant as bearing upon the issue of negligence. We do not agree. Although evidence concerning a person's physical condition which may cause that person to act in a given manner may be competent upon the issue of negligence [*Rick v. Murphy,* 251 N.C. 162, 110 S.E. 2d 815 (1959)], the proffered evidence in the case at bar does not raise even a conjectural inference that the deceased was under the influence of any drug at the

time of the collision, or at any other time, or that deceased's physical condition was anything other than normal at the time of the accident. We reject plaintiffs' contention that the excluded evidence establishes a habit or custom on the part of deceased. The portion of the deposition offered was irrelevant and too remote to be considered upon the issue of negligence in this case and was properly excluded. See *State v. Stone,* 240 N.C. 606, 83 S.E. 2d 543 (1954). Plaintiffs' assignment of error numbered 3 is overruled.

We think the trial in the superior court was free from prejudicial error. In the appeal of plaintiffs and in the appeal of defendants, we find no error.

No error.

Judges BROCK and BRITT concur.

FLORENCE T. FONVILLE, ADMINISTRATRIX OF ESTATE OF DR. J. S. NATHANIEL TROSS, DECEASED v. ARSON G. DIXON

No. 7227SC678

(Filed 20 December 1972)

Automobiles § 88— unreasonably slow speed — sufficiency of evidence to submit contributory negligence issue to jury

The trial court properly charged the jury on G.S. 20-141(h) (unreasonably slow speed) and properly submitted the issue of plaintiff's contributory negligence to the jury where the evidence tended to show that plaintiff was operating his vehicle at a speed of approximately 25 mph on Interstate Highway 85 on a rainy day when he was hit from behind by defendant's vehicle which was being operated at approximately 50 mph.

APPEAL by plaintiff from *Jackson, Judge,* 15 May 1972 Civil Session of GASTON County Superior Court.

Dr. Tross was injured in a collision between his automobile and that of the defendant Dixon, and filed this civil action for recovery of damages. Dr. Tross died, not as a result of the accident, after the filing of the complaint; and his daughter, plaintiff Florence T. Fonville, as his Administratrix, was made party plaintiff to the action.

The accident complained of occurred at 1:45 p.m. on 17 January 1970. Dr. Tross was driving a 1961 Chrysler automobile in a southerly direction along Interstate Highway 85 in Gaston County at a slow speed. Defendant's vehicle collided with the rear end of plaintiff's vehicle.

On the day of the collision it was raining and the highway was wet. Interstate Highway 85 at this point had a maximum posted speed limit of 65 miles per hour, and a minimum posted speed limit of 45 miles per hour. It was divided with two lanes for southbound traffic.

Plaintiff's evidence, as preserved in a deposition, tends to show that he intended to go into Charlotte, North Carolina, missed the proper turn, and ended up heading south on Interstate 85 toward Gastonia. Just as plaintiff headed onto a bridge his car "bucked a little," as plaintiff testified that it tended to do when running out of gas. Plaintiff feared that the car was running out of gas. Although the engine never quit running, he stopped the car on the bridge, and turned off the engine. He "had a conversation with this lady about two-thirds across the bridge," but then got back into his car, started the engine, and began driving off. Plaintiff said he did not see any vehicles to the rear of his car when he started again, and admitted that he did not look into his rear view mirror or turn around in the car to look behind him. He estimated that the car must have traveled about 20 or 25 car lengths from where it was stopped to the point of impact.

Defendant testified as witness for the plaintiff, that he was traveling south on Interstate 85 toward Gastonia following a tractor-trailer. He was in the right lane, and going about 50 miles per hour because of the weather conditions. Defendant first saw the Tross vehicle when the trailer truck he was following turned into the left-hand passing lane. Defendant estimated that when he first saw plaintiff's car he was about 125 to 150 feet from the plaintiff. Defendant testified, "The biggest part of the Tross car was in the right-hand lane when I first saw him. There was one wheel, the best I could see was over—he was into an angle in it when I first saw him. The truck I was following moved out and was getting in the second lane before I ever saw it, the vehicle of Dr. Tross. The truck was going into the left lane moving out from in front of me into the left lane. I thought the Tross vehicle was coming to a complete

stop when I first saw him. I couldn't say how fast he was moving. It was very slow. I couldn't estimate his speed."

When defendant first saw the plaintiff's car he applied his brakes and attempted to switch into the left lane to pass; however, as he turned, he heard the sound of truck air brakes in the left lane beside him, and turned back into the right lane. There not being enough room to change lanes, and no room to stop, defendant hit the rear of plaintiff's automobile.

In addition to his own testimony defendant offered testimony of the investigating State Highway Patrol officer, who testified that plaintiff said he was going about 25 miles per hour, that a truck had come up behind him, and that he changed lanes, from the left to the right lane, to move out of the truck's way.

The officer further testified, "I asked him why he was driving so slow. He said he didn't drive very fast, and his car wasn't the best."

Issues were submitted to the jury on the defendant's negligence, plaintiff's contributory negligence, plaintiff's damages, and defendant's damages.

The jury found that defendant had been negligent and that plaintiff also had been negligent, and the damage issues were not answered.

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

Hollowell, Stott & Hollowell by L. B. Hollowell, Jr., for defendant appellee.

CAMPBELL, Judge.

Appellant's brief contains thirteen questions involved on the appeal, comprising two pages of the index of the brief and four pages of the brief. Appellant's attention is directed to Rule 27½ of the Court of Appeals Rules of Practice, which provides that the first page of the appellant's brief shall be used for a *succinct statement* of the questions involved on the appeal, which statement should not ordinarily exceed fifteen lines, *and should never exceed one page.* The rules of this Court are mandatory, not advisory.

Appellant's arguments 1, 3, and 4 concern alleged error in the trial court's failure to direct a verdict against the defendant on his counterclaim for damages, failure to set aside the verdict and grant a new trial, and error in entering the judgment.

Appellant's arguments 2 and 12 allege error in the court's submission of an issue on plaintiff's contributory negligence, and in charging the jury on G.S. 20-141(h), (unreasonably slow speed).

Appellant's arguments 5 and 6 concern alleged error in the exclusion of testimony to the effect of plaintiff's injuries.

Appellant's argument number 11 asserts error in the trial court's instruction concerning plaintiff's damages.

Appellant's argument number 13 asserts that the trial court failed properly to explain the law arising upon the evidence in the case.

Appellant's arguments 7, 8, 9 and 10 assert error in exclusion of testimony as to defendant's negligence and error in the trial court's instruction as to the defendant's negligence. Since the issue of defendant's negligence was answered in appellant's favor, these latter arguments have no merit on appeal. *Wooten v. Cagle,* 268 N.C. 366, 150 S.E. 2d 738 (1966) (error in the exclusion or admission of evidence); *Brown v. Griffin,* 263 N.C. 61, 138 S.E. 2d 823 (1964) (error in the charge).

Plaintiff appellant vigorously argued, however, that under no view of the evidence in this case could it be found that he was contributorily negligent; specifically, that the evidence did not support an instruction that if the jury should find plaintiff was driving at an unreasonably slow speed, which slow speed was a proximate cause of plaintiff's injury, it should find against the plaintiff. Plaintiff's argument is untenable.

G.S. 20-141(b1) provides:

> "Except as otherwise provided in this Chapter, and except while towing another vehicle, and except when an advisory safe speed sign indicates a slower speed, it shall be unlawful to operate a passenger vehicle . . . upon the

interstate and primary highway system at less than the following speeds:

* * * *

(2) Forty-five (45) miles per hour in any speed zone of sixty (60) miles per hour or greater.

* * * *

In all civil actions, violations of this subsection relating to minimum speeds shall not constitute negligence per se."

G.S. 20-141(h) provides:

"No person shall operate a motor vehicle on the highway at such a slow speed as to impede the normal and reasonable movement of traffic except when reduced speed is necessary for safe operation because of mechanical failure or in compliance with law; . . . "

Generally, and without regard for the moment to the above statutes, the law provides that when a motorist operates his vehicle on the public highway where others are apt to be, his rights are relative. *Williams v. Henderson,* 230 N.C. 707, 55 S.E. 2d 462 (1949). The relative duties automobile drivers owe one another when they are traveling along a highway in the same direction are governed ordinarily by the circumstances in each case. *Racine v. Boege,* 6 N.C. App. 341, 169 S.E. 2d 913 (1969).

In the absence of anything which would alert him to danger, the law does not require a motorist to anticipate specific acts of negligence on the part of another, but he is entitled to assume and to act on the assumption that others will exercise due care for their own safety. *Simmons v. Rogers,* 247 N.C. 340, 100 S.E. 2d 849 (1957).

In the instant case, we are not concerned with the negligence of the defendant. He was negligent, and the jury so found. We are concerned with whether there was sufficient evidence of negligence on the part of Dr. Tross to go to the jury. To answer this we are required to take the evidence most favorable to the defendant. We think the evidence is sufficient to warrant submission of an issue of plaintiff's contributory negligence, and to withstand a motion for directed verdict on defendant's counterclaim under the authority of *McClellan v. Cox,* 258

N.C. 97, 128 S.E. 2d 10 (1962). In *McClellan* it was held that a motorist, who was proceeding in the right-hand lane, was liable for injuries sustained in an accident which occurred when he cut across to the passing lane without giving a signal and began slowing down in front of the plaintiff, who was proceeding in the passing lane, and whose automobile struck the rear of the other automobile.

Specifically with reference to G.S. 20-141(h), there are no North Carolina cases reported which have held the plaintiff contributorily negligent for traveling at an excessively slow speed, but many cases can be found from other jurisdictions to support this result. See Annot., 66 A.L.R. 2d 1194 (1959).

It has been held in construing statutes identical to G.S. 20-141(h) that the purpose of such statutes is rooted in recognition that the slow driver may be the cause of fatal highway accidents as well as the fast driver. *Hageman v. Townsend,* 144 Mont. 510, 398 P. 2d 612 (1965); *Bentzler v. Braun,* 34 Wis. 2d 362, 149 N.W. 2d 626 (1967).

Where the evidence tends to show that the plaintiff or defendant was traveling at a slow speed, a jury question is presented whether under the circumstances the speed was so slow as to impede reasonable movement of traffic, and whether there was justification for the slow speed. *Griffin v. Illinois Bell Telephone Company,* 34 Ill. App. 2d 87, 180 N.E. 2d 228 (1962); *Netterville v. Crawford,* 233 Miss. 562, 103 So. 2d 1 (1958).

In *Jacobsen v. Hala,* 255 Iowa 918, 125 N.W. 2d 500 (1963), the plaintiff sued for damages for personal injury when defendants' automobile collided with the rear end of plaintiff's automobile. Plaintiff's estimated speed was about 10 miles per hour; it had snowed the night before the accident; plaintiff testified that she was proceeding slowly up a gradual hill. Defendant testified that plaintiff was backing down the hill in his lane. This evidence was held to support an instruction on the slow speed statute, and to support a jury finding that plaintiff was contributorily negligent.

It was held in *Quint v. Porietis,* 107 N.H. 463, 225 A. 2d 179 (1966), where the plaintiff sued for wrongful death, that whether the decedent's car was motionless or traveling slowly on the high-speed, limited-access highway, such facts were sufficient to go to the jury on the issue of contributory negligence. The court remarked that a vehicle being operated at a

subnormal speed may very well create a hazard upon the highway designed and customarily used to carry fast-moving traffic. A case to the same effect is *Angell v. Hester,* 186 Kan. 43, 348 P. 2d 1050 (1960).

The very result to be anticipated from traveling ten to twenty miles per hour on a freeway designed for high-speed driving is that a fast car will collide with a slow car. The defendant's driving into the plaintiff, in *Seaton v. Spence,* 215 Cal. App. 2d 761, 30 Cal. Rptr. 510 (1963), was a foreseeable intervening cause, from which plaintiff must assume contributory responsibility. The question of whether plaintiff's slow driving upon a much traveled main highway constituted negligence which contributed proximately to the accident is a question for the jury.

Fairbanks v. Travelers Insurance Company, 232 So. 2d 323, *cert. denied,* 255 La. 1097, 234 So. 2d 194 (1970), was a case of first impression in Louisiana on a statute similar to G.S. 20-141(h). The court observed that adoption of the statute is legislative recognition of the fact that it is just as inherently dangerous for a vehicle to move at an unreasonably slow speed on the highway as it is to travel at an excessive speed. Either of these facts can be a contributing cause to an accident. The court further held, "Whether or not the speed in a particular case is slow enough to be in violation of the regulatory statute, and whether it is a legal or proximate cause of an accident, must necessarily be determined in relation to all of the facts and circumstances existing in that particular case. This would properly be a question to be decided by the trial judge or jury, and if there is sufficient evidence to support their finding, appellate courts should not substitute their own conclusions for that of the jury." *Fairbanks v. Travelers Insurance Company,* 232 So. 2d 323, 328.

And in *Hooten v. DeJarnatt,* 237 Ark. 792, 376 S.W. 2d 272 (1964), the plaintiff was properly held contributorily negligent in a suit for damages sustained when defendant's automobile collided with the rear of plaintiff's tractor, where plaintiff was traveling about fourteen miles per hour on a heavily traveled highway, and the defendant, who was traveling 50 miles per hour, first saw the plaintiff when he was too close to stop, but could not pass due to oncoming traffic in the other lane. It should be noted that the North Carolina Statute exempts farm tractors.

Common experience of those who drive on today's heavily trafficked roads dictates a recognition of the fact that those who drive at excessively slow speeds do create hazards upon the highways, particularly a highway which is part of the Federal Interstate Highway System.

We have considered all other assignments of error and can find no prejudicial error in the record of this trial. The proper issues were submitted to the jury under proper instruction. Since the jury found the plaintiff to have been contributorily negligent, it did not consider the damages issue.

No error.

Judges MORRIS and PARKER concur.

FOREST BEACHBOARD, PLAINTIFF v. SOUTHERN RAILWAY COMPANY, DEFENDANT AND THIRD-PARTY PLAINTIFF-APPELLEE v. U. S. PLYWOOD-CHAMPION PAPERS, INC., THIRD-PARTY DEFENDANT-APPELLANT

No. 7228SC56

(Filed 20 December 1972)

1. **Corporations § 11— contract executed prior to corporate existence — ratification by corporation**

By accepting the benefits of a contract executed by its president prior to its corporate existence, a corporation became bound to perform the obligations incident to such a contract.

2. **Corporations § 25— liability of corporation for contract of predecessor**

A contract entered in 1905 between a railroad and a fiber company is binding upon the third-party defendant where the fiber company in 1936 conveyed all of its assets to its parent corporation in complete cancellation or redemption of all of its outstanding shares, the surviving parent corporation entered a written agreement with the railroad in which it expressly agreed that it would be bound by the 1905 contract, a supplemental agreement executed by the parent corporation and the railroad in 1959 expressly recognized the 1905 contract as continuing in effect, and the parent corporation changed its name in 1961 and merged with another corporation in 1967 to become the corporate entity which appears in the present action as the third-party defendant.

3. **Indemnity § 2— indemnity against "all damage" — injuries to persons and property**

A covenant to indemnify a railroad against "any and all damage" resulting from the negligence of a corporation includes injuries to persons as well as injuries to property.

4. **Indemnity § 2— indemnity against negligence of corporation — concurring negligence**

A corporation's covenant to indemnify a railroad against "any and all damage resulting from the negligence" of the corporation obligates the corporation to indemnify the railroad not only when the damage is caused by the sole negligence of the corporation, but also when it results from the negligence of both the railroad and the corporation.

5. **Indemnity § 2— indemnity clause protecting railroad — validity — public policy**

An indemnity provision protecting a railroad from the consequences of its own negligence was not void as against public policy where it was in no way connected with the railroad's public service but was included in a contract in which the railroad obligated itself to perform acts and render services in connection with a corporation's privately owned tracks.

6. **Indemnity § 3— action to enforce indemnity clause — allegations and proof of performance by plaintiff unnecessary**

In a railroad's third-party action against a paper company to recover under an indemnity provision in a contract, the railroad was not required to allege and prove full performance of the contract on its part where the contract contained no express or implied condition precedent to make the indemnity clause therein operative, it being incumbent upon the paper company to allege and prove any asserted failure of performance by the railroad which would relieve it of its indemnity obligation.

7. **Indemnity § 3; Master and Servant § 40— injury to railroad employee — railroad's action on indemnity contract — contributory negligence of employee not in issue**

In a railroad's third-party action against a paper company to recover under an indemnity agreement an amount recovered by plaintiff railroad employee in an F.E.L.A. action against the railroad, the trial court properly refused to submit to the jury an issue as to plaintiff employee's contributory negligence since the contributory negligence of plaintiff, if any existed, was not a defense to the railroad's contract action against the paper company to enforce the indemnity agreement.

8. **Contracts § 26; Indemnity § 3— indemnity contract — prior negotiations**

In an action to enforce an indemnity contract, the trial court properly excluded a written "Memorandum of Understanding" used as a basis for the formal contract, since it is clear that the formal indemnity contract was intended by the parties to supersede all prior agreements.

9. **Indemnity § 3; Trial § 11— jury argument — legal effect of indemnity contract**

In an action to enforce an indemnity contract, the trial court properly refused to permit defendant's counsel to argue to the jury the legal effect of the indemnity contract between the parties.

Beachboard v. Railway Co.

APPEAL by third-party defendant from *Ervin, Judge,* 10 May 1971 Session of Superior Court held in BUNCOMBE County.

Plaintiff, an employee of Southern Railway Company (Southern), instituted this action on 13 December 1968 against Southern under the Federal Employers' Liability Act to recover damages for personal injuries sustained by him on 28 January 1967 when he was hit by a railway car, the wheels of which ran over and amputated both of his legs, while he was engaged in performance of his duties at the railroad yard owned by U. S. Plywood-Champion Papers, Inc. (Champion) in Haywood County, N. C. Plaintiff alleged that the yard was an unsafe place to work, that even though his employer knew or should have known this it had negligently ordered him to work there, and that Southern's negligence in this and in other specifically alleged respects proximately caused his injuries. Southern answered and denied negligence on its part, alleged that plaintiff's injuries were solely the result of the active negligence of Champion, and filed third-party complaint against Champion in which Southern sought to be indemnified by Champion for any amount which plaintiff might recover of Southern in this action. Southern alleged that it was entitled to be so indemnified by virtue of the provisions of former G.S. 1B-8 and by reason of a written contract dated 8 November 1905 entered into between Southern and Champion Fibre Company (Fibre Company), a predecessor of Champion. Southern alleged that by subsequent conveyances, agreements, and corporate mergers, Champion, the present third-party defendant, had succeeded to all of the rights, duties and obligations of Fibre Company under said contract. A copy of this contract, under which the industrial tracks and private railroad yard of Champion were constructed, was attached to Southern's third-party complaint against Champion, and contains the following provisions which were expressly pleaded by Southern:

> "AND the FIBRE COMPANY hereby covenants and agrees in consideration of the advantage to be by it derived from the operation of said tracks:
>
> "3. That it will pay unto the Southern Company, in cash, upon bills rendered therefor by the Southern Company, from time to time hereafter, as the said tracks are completed, whatever sum may be the entire actual cost to the Southern Company of the cross and switch ties, rails, fastenings and other track materials which may be neces-

sary for the construction of said tracks so far as they extend off the present right of way of the Southern Company; whereupon the said cross and switch ties, rails, fastenings and other track materials so paid for by the Fibre Company shall become and remain the property and under the control of the Fibre Company.

* * * * *

"5. That it will indemnify and save harmless the Southern Company against any and all damage resulting from the negligence of the Fibre Company, its servants and employees; . . . ."

Southern alleged that it had advised Champion Papers, Inc., predecessor of third-party defendant, of the institution of the present action and made demand upon it to assume complete responsibility therefor, but that third-party defendant and its predecessors had refused to comply with said indemnity agreement and had declined to assume responsibility for defense of plaintiff's claim.

Champion answered Southern's third-party complaint, admitted that Southern had called upon it to defend and that it had refused to defend against plaintiff's claim against Southern, and filed a cross action to recover from Southern $97,500.00 which Champion had previously paid plaintiff in exchange for plaintiff's covenant not to sue Champion.

The court ordered the issues arising between plaintiff and Southern severed for trial from the issues arising between Southern and Champion. Upon trial of the issues between plaintiff and Southern, held at the 29 March 1971 session of Superior Court in Buncombe County, the jury returned verdict that plaintiff was injured through the negligence of Southern as alleged in the complaint and awarded plaintiff damages in the sum of $1,000,000.00. Southern moved to set the verdict aside. By agreement of counsel the court reserved ruling on this motion until after trial of the issues between Southern and Champion. The case came on for trial upon the issues between Southern and Champion at the 10 May 1971 session of Superior Court held in Buncombe County. During the course of trial of these issues, all parties joined in a consent judgment dated 11 May 1971 under which it was adjudged that plaintiff should recover of Southern $347,500.00 in full satisfaction of all of his claims, said amount to be credited with $97,500.00 theretofore

paid plaintiff by Champion, thereby reducing the amount of the judgment to $250,000.00. Southern and Champion agreed, without prejudice to their rights as against each other, to advance payment to plaintiff of this $250,000.00, Champion advancing $137,500.00 and Southern advancing $112,500.00, the parties agreeing that in event it should be determined that Southern is not entitled to indemnity from Champion, it would repay $137,500.00 to Champion, and in event it be determined that Southern is entitled to complete indemnity from Champion, it should recover $112,500.00 from Champion. This judgment further stipulated that Champion's right to recover from Southern $97,500.00 on account of the payment theretofore made by Champion to plaintiff should be determined according to law and not according to the outcome of Southern's claim for indemnity, it being Southern's position that Champion was not entitled to recover said amount from Southern under any circumstances and it being Champion's position that it was entitled to recover said amount.

Upon trial of the issues between Southern and Champion, the evidence indicated that plaintiff was injured under the following circumstances:

On 28 January 1967 plaintiff went as a member of a Southern train crew to Champion's railroad yard which services its large industrial plant at Canton, N. C., for the purpose of removing empty railroad cars therefrom. This yard is located on Champion's property, is enclosed by a wire fence which has a gate at the eastern end, and contains six railroad tracks, numbered 9 through 14 inclusive. Two of these, #13 and #14, had been designated interchange tracks, #14 being used for placement thereon of empty woodrack cars by Champion's own yard crew and #13 for placement thereon of Champion's miscellaneous cars. At approximately the same time each day Southern sent one of its locomotives and crews to the Champion yard for the purpose of "pulling" or "dragging" it of empty woodrack and miscellaneous cars. On 28 January 1967 the crew of which plaintiff was a member entered Champion's yard at the customary time, traveling on a Southern locomotive through the gate at the eastern end of the yard. They entered the yard on track 9, which was the lead track which connected the yard with Southern's main line track running from Asheville to Murphy. They proceeded to track 14 and dragged all of the empty woodrack cars therefrom and placed these on the

main line track preparatory to having them hauled back to Asheville. They then entered on track 13 from the east and coupled up with empty cars thereon and "stretched" them, meaning to pull out the slack between the cars. After doing this, and while Southern's engine and the cars to which it was attached were standing still, plaintiff noticed two cars on track 13 to which the train had failed to couple. These were sitting 10 to 12 feet from the cars to which Southern's engine was attached, and plaintiff noticed there were no cars to the west of these two cars. Plaintiff proceeded to open the knuckles on these two cars preparatory to coupling with them. At this time a crew of Champion employees was operating a switch engine some distance away on the west end of the yard. This crew shoved five cars onto track 13, causing them to roll freely in an easterly direction on the track until they collided with the two cars on which plaintiff was engaged in opening the knuckles. Plaintiff was dragged beneath these cars, the wheels of which ran over and severed his legs. There was evidence that Champion's crew made no investigation prior to shoving the five cars onto track 13 to ascertain whether any of Southern's employees were working thereon and that they gave no signal from Champion's locomotive prior to making that movement. Other evidence will be referred to in the opinion.

The jury answered the issue submitted to it as follows:

> "Was the plaintiff, Forest Beachboard, injured through the negligence of U. S. Plywood-Champion Papers, Inc., as alleged in the Third-Party Complaint?
>
> Answer: Yes."

On this verdict the court entered judgment holding as a matter of law that, under the contract dated 8 November 1905 and related contract documents, Southern was entitled to full indemnity from Champion for the $112,500.00 which had been advanced by Southern to plaintiff pursuant to the consent judgment of 11 May 1971. From judgment that Southern recover $112,500.00 from Champion and that Champion recover nothing from Southern on its cross actions, Champion appealed.

W. T. Joyner; and Bennett, Kelly & Long by Harold K. Bennett for Southern Railway Company, Third-Party Plaintiff-Appellee.

Uzzell & DuMont by Harry DuMont for U. S. Plywood-Champion Papers, Inc., Third-Party Defendant-Appellant.

PARKER, Judge.

Appellant assigns error to the denial of its motions to dismiss Southern's third-party complaint for failure to state a claim upon which relief can be granted, for judgment on the pleadings, for summary judgment, and for directed verdict, all of which were predicated, at least in part, on appellant's contention that the contract of 8 November 1905 was not binding upon it and, if considered so, when correctly interpreted did not, and when lawfully enforced could not, impose upon appellant the obligation to indemnify Southern under the circumstances of this case. We first consider appellant's contention that the contract, whatever its correct interpretation and legal enforceability as an indemnity contract, was in any event not binding upon it.

[1, 2] The contract of 8 November 1905 was on its face expressed to be between Southern, on the one part, and Champion Fibre Company, an Ohio corporation, on the other. The name of the Fibre Company was signed to this contract by its president, Peter G. Thomson. It appears from the record and exhibits before us that at the date of this contract the Fibre Company was not yet in existence and that it was not actually incorporated until 3 January 1906, when it became incorporated under the laws of Ohio. Its corporate charter lists Peter G. Thomson as one of the original incorporators. While no formal ratification of the agreement has been shown, the record does indicate that after the Fibre Company came into corporate existence it acted under the contract and for many years accepted its benefits, and it is the general rule under such circumstances that by accepting the benefits the company becomes bound to perform the obligations incident to such a contract. 18 Am. Jur. 2d, Corporations, § 122, p. 664. However that may be, the record before us further indicates that the following transactions occurred: By instrument dated 12 October 1936 the Fibre Company conveyed all of its assets to its parent corporation, The Champion Paper & Fibre Company, also an Ohio corporation, in complete cancellation or redemption of all of Fibre Company's outstanding shares. The surviving parent corporation, The Champion Paper & Fibre Company, by written agreement dated 24 September 1937 executed by it and by Southern, expressly agreed with Southern that it would be bound by the contract of 8 November 1905, to which reference was expressly made, "to the same extent and with like effect

as if the said The Champion Paper & Fibre Company . . . had originally made and executed" said agreement. By "Supplemental Agreement" dated 28 July 1959, also executed by Southern and by The Champion Paper & Fibre Company, certain changes and extensions in the location of the industrial tracks serving Champion's plant were provided for, and by this Supplemental Agreement the contract of 8 November 1905 was again expressly recognized as continuing in effect. It also appears that The Champion Paper & Fibre Company, after changing its corporate name in 1961 to Champion Papers, Inc., merged with U. S. Plywood Corporation in 1967 to become the corporate entity which appears in the present action as the third-party defendant, and which for convenience is in this opinion referred to simply as "Champion." We hold that by virtue of the foregoing transactions, Champion became bound by the contract of 8 November 1905 and became obligated to perform the duties which were therein imposed on the Fibre Company.

[3] We next consider appellant's contention that the 8 November 1905 contract, properly interpreted in accordance with appellant's views, does not obligate it to indemnify Southern for the amount for which Southern became liable to plaintiff on account of his personal injuries in this case. In this connection appellant argues that the word "damage" as used in the covenant contained in paragraph 5 of the contract, under which appellant's predecessor, the Fibre Company, agreed "[t]hat it will indemnify and save harmless the Southern Company against any and all damage resulting from the negligence of the Fibre Company, its servants and employees," is a word of art used solely to designate injuries to property and does not include injuries to persons. Accepted authorities, however, do not support appellant's view, and we perceive nothing in the context in which the word "damage" was here employed why its meaning should be so narrowly confined. Black's Law Dictionary (4th Ed.) defines "damage" as "[l]oss, injury, or deterioration, caused by the negligence, design, or accident of one person to another, in respect of the latter's *person* or property," and Webster's Third New International Dictionary defines "damage" as "injury or harm to *person,* property, or reputation." (Emphasis added.) We hold that the phrase "any and all damage," as employed in the contract now before us, was intended by the parties and did include injuries to persons and was not limited, as appellant contends, merely to property losses.

[4] Appellant next contends that, even if it be conceded that the words "any and all damage" includes a loss involving personal injuries, the indemnification provision here before us was intended to apply only to damage caused by the sole negligence of Champion, and that Southern having also been found guilty of negligence in this case, Champion has no obligation to indemnify it. To adopt appellant's interpretation effectively robs the indemnity clause of nearly all meaning. Three categories of "damage resulting from the negligence" of Champion are possible: (1) damage to property of Southern; (2) damage to property of Champion; and (3) damage to person or property of a third party (including an employee of either). Assuming in a particular case that damage is caused by negligence of Champion (which must exist, else the clause by its own language does not become operative), and that Southern is not negligent, then quite apart from the indemnity contract Southern would have a right of recovery against Champion for damage in the first category and would not itself be responsible for damage in the second and third categories. In such a case there would seem little reason for the indemnity provision. Indeed, it is *only* when damage results from the negligence both of Southern and Champion that the provision attains any real meaning. By inserting the provision in their contract the parties obviously contemplated that there might be claims for indemnity, and they must have been cognizant of the fact that in the ordinary case the occasion for Southern seeking indemnity would not arise unless it had itself been guilty of some fault, for otherwise no judgment could be recovered against it. In *Gibbs v. Light Co.*, 265 N.C. 459, 144 S.E. 2d 393, our Supreme Court held that an indemnity provision in the contract then before it provided indemnity against claims based on the indemnitee's negligence, pointing out that otherwise it had "no meaning or purpose." Consistent with that reasoning, we hold that the language employed in the indemnity provision in the contract now before us obligates Champion to indemnify Southern in a case such as this, in which it has been determined that plaintiff's injuries resulted from negligence of both Champion and Southern. While certainly any case involving interpretation of a written contract must be decided upon the exact words used by the parties viewed in the light of relevant circumstances peculiar to that case, other courts interpreting indemnity provisions in railroad spur track agreements have reached results consistent with our present holding. See cases in Annotation: "Construction and

effect of liability exemption or indemnity clause in spur track agreement," 20 A.L.R. 2d 711.

[5] Finally, appellant contends that to interpret the indemnity provision so as to make it operative to protect Southern from consequences of its own negligence renders the provision void as against public policy, citing the well established principle that a public service corporation or public utility cannot contract so as to escape liability from its own negligence occurring in the regular course of its business or in performing one of its duties of public service. However, "[e]ven a public service corporation is protected by an exculpatory clause when the contract is casual and private and in no way connected with its public service." *Gibbs v. Light Co., supra.* Such was the contract here. Under it Southern obligated itself to perform acts and render services in connection with Champion's privately owned railroad tracks and yard which it was not obligated to perform for the public generally. An exculpatory clause in a similar contract was held valid to protect the railroad in *Slocumb v. R. R.*, 165 N.C. 338, 81 S.E. 335. By entering into and performing the agreement under which it furnished services on Champion's yard, Southern subjected its equipment and employees to special hazards to which they were not normally exposed while furnishing services to the general public on Southern's own tracks. As the present case dramatically illustrates, one of these especial hazards was that a Southern employee might be injured by the active negligence of Champion's employees engaged in operating Champion's switch engine in the yard at the same time Southern's employees were present. We perceive no grounds of public policy why the parties could not validly contract for Southern's indemnity under such circumstances. Moreover, "[t]here is a distinction between contracts whereby one seeks to wholly exempt himself from liability for the consequences of his negligent acts, and contracts of indemnity against liability imposed for the consequences of his negligent acts. The contract in the instant case is of the latter class and is more favored in law." *Gibbs v. Light Co., supra.* We hold the indemnity provision here involved valid and enforceable against Champion in this case. Appellant's assignments of error based on the contrary assumption are overruled.

[6] Appellant's contention that Southern is not entitled to invoke the indemnity clause in the 8 November 1905 contract

because "it neither alleged nor offered evidence to establish that it had undertaken to comply with the alleged contract" is without merit. In general, "[w]here a complaint is based on contract, all that is necessary to state is the making of the contract, the obligation thereby assumed, and the breach." 61 Am. Jur. 2d, Pleading, § 89, p. 524. This Southern did in its third-party complaint, to which Champion responded in its answer by what was in effect simply a general denial. If as a defense Champion intended to rely upon some asserted breach or failure to perform by Southern, it should have set forth affirmatively any such failure of consideration or "other matter constituting an avoidance or affirmative defense." G.S. 1A-1, Rule 8(c). Only when the contract sued upon contains some condition precedent to defendant's liability thereunder is it necessary for plaintiff to plead performance, 61 Am. Jur. 2d, Pleading, § 94, p. 528, and even in such case "it is sufficient to aver generally that all conditions precedent have been performed and have occurred," in which event any denial thereof upon which defendant intends to rely "shall be made specifically and with particularity." G.S. 1A-1, Rule 9(c). The 8 November 1905 contract contains no express condition precedent to make the indemnity clause therein operative, and we find nothing in the contract which by reasonable construction implies that full and exact performance by Southern must first be established before the indemnity clause comes into play. We hold, therefore, that Southern was not required to allege and prove full performance on its part but that it was incumbent upon Champion to come forward with allegation and proof as to any asserted failure of performance by Southern upon which it intended to rely to relieve it of its indemnity obligation. Champion made no such allegation and there is no evidence in the record to indicate that Southern failed to comply substantially with its obligations under the contract.

[7] Appellant assigns error to the trial judge's refusal to submit to the jury an issue as to plaintiff's contributory negligence. In this we find no error. Southern's third-party action against Champion was not predicated upon Champion's liability to plaintiff under the general law of torts, under which plaintiff's contributory negligence would have been a defense, but upon the indemnity contract under which Champion became obligated to indemnify and save harmless Southern "against any and all damage resulting from the negligence" of Champion. The jury determined that plaintiff's injuries did result from

Champion's negligence. As a consequence of that negligence, Southern became obligated to plaintiff under F.E.L.A. for its failure to furnish him a safe place to work, and Champion in turn by contract became obligated to indemnify and save harmless Southern. Under these circumstances the contributory negligence of plaintiff, if any existed, would not have been a defense to Southern's contract action against Champion to enforce the indemnity agreement. *Chicago, R.I. & P.R. Co. v. Dobry Flour Mills,* 211 F. 2d 785 (10th Cir. 1954), cert. denied, 348 U.S. 832; Annotation: "Claim, for Contribution or Indemnity Against Joint Tortfeasor, of Employer Liable to Employee under Federal Employer's Liability Act, As Affected by Contributory Negligence of Employee," 6 A.L.R. 3d 1307. Plaintiff's contributory negligence, if any, was available in mitigation of damages in plaintiff's F.E.L.A. action against Southern, but it should be noted that in this case the amount of plaintiff's recovery was ultimately settled by the consent judgment of 11 May 1971 in which all parties, including Champion, joined.

[8] During the trial Champion offered in evidence and the court excluded a certain written "Memorandum of Understanding" dated 6 September 1905, which was signed by Peter G. Thomson and by Southern. This document was properly excluded from evidence. It expressly provided that "[t]his memorandum is to be used as a basis for a formal contract to be prepared by the Railway Company for execution within the next ten days, or as early thereafter as possible," and in general it dealt with the same matters which were expanded and covered in greater detail by the written contract of 8 November 1905. It is clear that the later contract was intended by the parties to supersede all prior agreements.

The trial court also properly excluded from evidence a document dated 6 December 1916 which was executed solely by the Fibre Company and by which it conveyed to Southern an easement to use a strip of land 12½ feet wide on either side of the center line of industrial tracks on the Fibre Company's property. This document was not relevant to any issue in this case.

[9] The court properly refused to permit appellant's counsel the right to argue to the jury the legal effect of the indemnity contract between the parties. The sole issue before the jury was whether plaintiff had been injured through negligence of Champion. The jury could not properly base its findings on that

issue upon the legal consequences of its verdict under the written agreement between the parties. The legal consequences flowing from the jury's verdict in this case presented solely a question of law for the court to decide. G.S. 84-14, which provides that "[i]n jury trials the whole case as well of law as of fact may be argued to the jury," does not authorize counsel to argue law which is not applicable to the issues properly presented for jury decision. *In re Will of Farr*, 277 N.C. 86, 175 S.E. 2d 578.

We have carefully examined all of appellant's remaining assignments of error which are brought forward in its brief and find no prejudicial error.

No error.

Chief Judge MALLARD and Judge MORRIS concur.

STATE OF NORTH CAROLINA v. ROSA WESSON

No. 722SC601

(Filed 20 December 1972)

1. Indictment and Warrant § 9— sufficiency of warrant or indictment to withstand motion to quash

In order to withstand a timely motion to quash, a warrant or indictment must allege the essentials of the offense charged in a plain and explicit manner so as to (1) identify the offense, (2) protect the accused from being twice put in jeopardy for the same offense, (3) enable the accused to prepare for trial, and (4) support the judgment upon conviction or plea of guilty.

2. Larceny § 3— larceny as misdemeanor or felony

Under North Carolina law, except in those instances where G.S. 14-72 does not apply, whether a person is guilty of a felony or guilty of a misdemeanor depends on whether the stolen property exceeds the value of $200.

3. Indictment and Warrant § 9— misdemeanor charge — use of word "feloniously"

It is not essential to use the word "feloniously" in a warrant charging a misdemeanor.

4. Larceny § 1— felonious intent as element of crime

"Felonious intent" is an essential element of the crime of larceny without regard to the value of the stolen property.

5. **Larceny § 1— felonious intent defined**

"Felonious intent" as applied to the crime of larceny is the intent which exists where a person knowingly takes and carries away the personal property of another without any claim or pretense of right with the intent wholly and permanently to deprive the owner of his property and to convert it to the use of the taker or to some other person than the owner.

6. **Criminal Law § 111— instructions — felonious intent**

What is meant by "felonious intent" is a matter for the court to explain to the jury and no exact words are required to instruct the jury as to its meaning.

7. **Larceny § 4— steal as synonymous with felonious intent — sufficiency of warrant to withstand motion to quash**

Where the warrant in a larceny case alleged that the defendant did "unlawfully, wilfully, steal, take and carry away" the described property, it was not necessary to allege that defendant intended to convert the property to her own use; rather, the word "steal" as used in the warrant charging misdemeanor larceny encompassed and was synonymous with the required "felonious intent" and was therefore sufficient to withstand defendant's motion to quash.

8. **Courts § 7; Criminal Law § 18— appeal from district court to superior court**

The jurisdiction of the superior court on appeal from a conviction in district court is derivative, and defendant may not be tried *de novo* in the superior court on the original warrant without a trial and conviction in the district court.

9. **Courts § 7; Criminal Law §§ 18, 134— appeal from district court to superior court — failure of district court expressly to determine defendant's guilt**

Where the record in a larceny case showed that there was a trial, a judgment, and notice of appeal given in the district court, defendant was convicted in district court within the meaning of G.S. 7A-290, thereby giving the superior court jurisdiction, though that portion of the blank form of the judgment relating to the disposition of the matter entered in district court was not filled out and did not contain an express determination of defendant's guilt.

10. **Criminal Law § 134— necessity for express adjudication of conviction or finding of guilt**

An express adjudication of conviction or finding of guilt is not necessary if it is apparent from other matters in the record that the court made a judicial determination of conviction or guilt.

APPEAL by defendant from *Cohoon, Judge,* 8 March 1972 Session of Superior Court held in MARTIN County for the trial of criminal cases.

Defendant was arrested on 17 July 1971 pursuant to a warrant charging her with the larceny of a 3½ horsepower lawn

mower of the value of $61.95, the property of Martin Supply Co., Inc., Williamston, North Carolina. The cause was tried in district court upon the warrant and from a judgment of imprisonment, defendant appealed to superior court for trial de novo. The trial in the superior court was also upon the warrant. At the trial of the cause in superior court, the defendant moved to quash the warrant on the grounds that it did not charge a crime and on the grounds that there was no verdict in the district court. Both motions were denied.

The evidence for the State tended to show that the defendant had taken the lawn mower from a display at the front of the store of Martin Supply Co., Inc., and transported it to her residence in a taxicab, where she then concealed the lawn mower under a house occupied by another person. Defendant offered no evidence.

The jury returned a verdict of guilty of misdemeanor larceny, a violation of G.S. 14-72(a), and judgment was entered upon the verdict sentencing defendant to eighteen (18) months in prison. Defendant appealed, assigning error.

Attorney General Morgan and Associate Attorney Haskell for the State.

John H. Harmon for defendant appellant.

MALLARD, Chief Judge.

Defendant presents two questions on appeal. Initially, defendant contends that the warrant upon which she was tried in district court and in superior court was fatally defective in that there was no allegation in the warrant that defendant committed the alleged theft with the specific felonious intent to permanently deprive the owner of his property or to convert the property to the defendant's own use.

The pertinent portions of the challenged warrant read as follows:

> ". . . (T)hat at and in the County named above and on or about the 22nd day of June, 1971, the defendant named above did unlawfully, wilfully, steal, take, and carry away one 1-310-22 inch, 3½ H.P. lawn mower . . . the personal property of Martin Supply Co., Inc., . . . such property having a value of $61.95. The offense charged here

was committed against the peace and dignity of the State and in violation of law G.S. 14-72(a)."

[1] In order to withstand a timely motion to squash, a warrant or indictment must allege the essentials of the offense charged in a plain and explicit manner so as to (1) identify the offense, (2) protect the accused from being twice put in jeopardy for the same offense, (3) enable the accused to prepare for trial, and (4) support the judgment upon conviction or plea of guilty. *State v. Sparrow,* 276 N.C. 499, 173 S.E. 2d 897 (1970), *State v. McBane,* 276 N.C. 60, 170 S.E. 2d 913 (1969).

[2] At common law, the larceny of personal property of any value was a felony. *State v. Benfield,* 278 N.C. 199, 179 S.E. 2d 388 (1971); *State v. Cooper,* 256 N.C. 372, 124 S.E. 2d 91 (1962). Under our law, except in those instances where G.S. 14-72 does not apply, whether a person who commits the crime of larceny is guilty of a felony or guilty of a misdemeanor depends on whether the stolen property exceeds the value of $200. It was held in *State v. Whaley,* 262 N.C. 536, 138 S.E. 2d 138 (1964), that "bills of indictment charging felonies, in which there has been a failure to use the word 'feloniously,' are fatally defective, unless the Legislature otherwise expressly provides."

In *State v. Jesse,* 19 N.C. 297 (1837), Chief Justice Ruffin held that the word "feloniously" in an indictment charging a felony has no synonym and admits of no substitute. However, Justice Bobbitt (later Chief Justice) in *State v. Cooper, supra,* said:

> "True, 'felonious intent' is an essential element of the crime of larceny without regard to the value of the stolen property. The phrase, 'felonious intent,' originated when both grand larceny and petit larceny were felonies. Now, 'felonious intent,' in the law of larceny, does not necessarily signify an intent to commit a felony. For definitions of 'felonious intent,' as an element of the crime of larceny, see *S. v. Powell,* 103 N.C. 424, 9 S.E. 627; *S. v. Kirkland,* 178 N.C. 810, 101 S.E. 560; *S. v. Booker,* 250 N.C. 272, 108 S.E. 2d 426."

[3] It is not essential to use the word "feloniously" in a warrant charging a misdemeanor. It has been held in a misdemeanor case charging an assault with a deadly weapon that the use of

the word "feloniously" therein was surplusage and could be ignored. *State v. Hobbs,* 216 N.C. 14, 3 S.E. 2d 431 (1939).

[4-6] In the case before us, the defendant is charged with stealing property of the value of less than $200, which is a misdemeanor. G.S. 14-72. In *State v. Cooper, supra,* "felonious intent" was held to be an essential element of the crime of larceny without regard to the value of the stolen property. And, where a special intent is an essential element of the crime charged, it must be alleged in the warrant or indictment. *State v. Miller,* 231 N.C. 419, 57 S.E. 2d 392 (1950); *State v. Friddle,* 223 N.C. 258, 25 S.E. 2d 751 (1943). However, the "felonious intent" as applied to the crime of larceny is the intent which exists where a person knowingly takes and carries away the personal property of another without any claim or pretense of right with the intent wholly and permanently to deprive the owner of his property and to convert it to the use of the taker or to some other person than the owner. *State v. McCrary,* 263 N.C. 490, 139 S.E. 2d 739 (1965); *State v. Booker,* 250 N.C. 272, 108 S.E. 2d 426 (1959). And, what is meant by "felonious intent" is a matter for the court to explain to the jury and no exact words are required to instruct the jury as to its meaning. *State v. Westry,* 15 N.C. App. 1, 189 S.E. 2d 618 (1972), *cert. denied,* 281 N.C. 763.

In the warrant herein it is alleged that the defendant did "unlawfully, wilfully, steal, take and carry away" the described property. In 50 Am. Jur. 2d, Larceny, § 2, it is stated:

> "The word 'steal' has a uniform signification when used in connection with personal property, and in common as well as legal parlance, means the felonious taking and carrying away of the personal goods of another. 'Stealing' is taking without right or leave, with intent to keep wrongfully; that is, *to steal is to commit larceny.* * * *" (Emphasis added.)

In Black's Law Dictionary, 4th Ed., "steal" is defined as follows:

> "This term is commonly used in indictments for larceny, ('take, *steal,* and carry away,') and denotes the commission of theft, that is, the felonious taking and carrying away of the personal property of another, and without right and without leave or consent of owner . . . and with intent to keep or make use wrongfully. * * *"

In Webster's Third New International Dictionary (1968), "steal" is defined in this manner:

> "* * * 1a: to take and carry away feloniously and usu. observed: take or appropriate without right or leave and *with intent to keep* or make use of wrongfully . . . ." (Emphasis added.)

In other jurisdictions it has been held that an allegation in an indictment that the defendant "did steal, rob, take and carry away" the goods of another is equivalent to an allegation in the indictment of an intent to steal. *State v. Tierney,* 104 N.H. 408, 188 A. 2d 333 (1963); *State v. Hillis,* 145 Kan. 456, 65 P. 2d 251 (1937). See also, *In re Shelton,* 103 Ohio App. 436, 145 N.E. 2d 673 (1957). *Compare, Head v. Commonwealth,* 211 Ky. 41, 276 S.W. 1061 (1925).

[7] In *State v. Williams,* 265 N.C. 446, 144 S.E. 2d 267 (1965), it was held that the allegation that the intent to convert the personal property stolen to the defendant's own use is not required to be alleged in a bill of indictment charging the felonious taking of goods from the person of another by the use of force or a deadly weapon. Similarly, in the case before us it was not necessary to allege in the warrant the exact words that the defendant intended to convert the personal property stolen to her own use. While no exact words are necessary to allege the required "felonious intent" in a warrant charging misdemeanor larceny, those who prepare warrants charging the misdemeanor of larceny would be well advised to use words clearly meaning "with the felonious intent to steal." However, we hold that the word "steal" as used in the warrant charging misdemeanor larceny in the case before us encompassed and was synonymous with the required "felonious intent" and was therefore sufficient to withstand the defendant's motion to quash.

Defendant next contends that the trial court erred in denying her motion to quash the warrant for the reason that there was no "verdict in the district court," the lack of which deprived the superior court of any derivative jurisdiction. Defendant has cited no authority in support of her contention, and we are of the opinion that her position is untenable.

The judgment sentencing defendant in the district court reads as follows:

> "The defendant having entered a plea of not guilty to the offense charged, the court upon the trial of the case

finds the defendant ..... and imposes the following judgment: 9 mo Women Prison—Appeal to Superior Ct—500.00 Bond.

This the 1 day of Sept, 1971.

CHAS. H. MANNING

Magistrate or District Judge"

[8] The jurisdiction of the superior court on appeal from a conviction in district court is derivative. *State v. Walls,* 271 N.C. 675, 157 S.E. 2d 363 (1967); *State v. Thompson,* 2 N.C. App. 508, 163 S.E. 2d 410 (1968). Defendant may not be tried de novo in the superior court on the original warrant without a trial and conviction in the district court. *State v. Johnson,* 251 N.C. 339, 111 S.E. 2d 297 (1959).

G.S. 7A-290 provides in part:

"* * * Any defendant *convicted* in district court before the judge may appeal to superior court for trial de novo. * * *" (Emphasis added.)

[9] The issue before us is whether the defendant was "convicted" in district court within the meaning of G.S. 7A-290, where that portion of the blank form of the judgment relating to the disposition of the matter entered in district court was not filled out and did not contain an express determination of defendant's guilt. If the judgment in district court was void, then the superior court had no jurisdiction to enter its judgment after trial de novo, and in North Carolina, jurisdiction is essential to a valid judgment. *State v. Fisher,* 270 N.C. 315, 154 S.E. 2d 333 (1967); *State v. Byrd,* 4 N.C. App. 672, 167 S.E. 2d 522 (1969).

The record shows that in this case there was a trial, a judgment, and notice of appeal given in the district court. There is a presumption that the defendant would not have been sentenced before the end of his trial or on a verdict of not guilty, or on the declaration of a mistrial by the district judge. Neither could the defendant have appealed from a verdict of not guilty. It is apparent from the record in this case that the defendant was found guilty in the district court and from the sentence imposed appealed to the superior court.

[10] Viewing the record as a whole, we are of the opinion and so hold that a conviction and a determination of guilt was made

by the district court and understood by the defendant. In holding that defendant was "convicted," we note that the judgment in district court *sentenced* defendant to a term in prison and also *set bond for appeal* to the superior court. Our holding that defendant was determined guilty and convicted is consistent with the majority rule in other jurisdictions that an express adjudication of conviction or finding of guilt is not necessary if it is apparent from other matters in the record that the court made a judicial determination of conviction or guilt. See *Davis v. Utah Territory,* 151 U.S. 262, 38 L.Ed. 153, 14 S.Ct. 328 (1894); *State v. Apodaca,* 80 N.M. 155, 452 P. 2d 489 (1969); Annot., 69 A.L.R. 792 (1930); 21 Am. Jur. 2d, Criminal Law, § 531.

In the trial we find no prejudicial error.

No error.

Judges BROCK and BRITT concur.

WARD B. COLLINS AND WIFE, LORRAINE C. COLLINS v. CALDWELL FURNITURE COMPANY, INC.

No. 7225SC594

(Filed 20 December 1972)

1. **Negligence § 32— circumstantial evidence**

Negligence may be inferred from facts and attendant circumstances, and if the facts proved establish the more reasonable probability that the defendant was guilty of actionable negligence, the case cannot be withdrawn from the jury, though the possibility of accident may arise on the evidence.

2. **Fires § 3; Negligence § 32— fire case — circumstantial evidence**

Actual causation may be proved by circumstantial evidence, and this principle is equally as true in fire cases as in any other tort liability case.

3. **Fires § 3; Negligence § 29— prima facie case of negligence**

When the plaintiff shows his property was injured by fire which had its origin with the defendant, such showing makes out a *prima facie* proof of the defendant's negligence.

4. **Fires § 1; Negligence § 29— defendant's fire as proximate cause of plaintiffs' fire**

Where plaintiffs showed that defendant started a fire on its property which defendant was under a duty to control, it was a question

for the jury to decide whether plaintiffs' fire was the proximate result of defendant's fire.

5. **Fires §§ 1, 3; Negligence § 29— sufficiency of evidence to submit issue of negligence to jury**

Since common experience has established that a large conflagration in an open field offers an inherent and serious hazard of fire to adjoining areas if not properly supervised and since it is not improbable, unnatural, unreasonable or unforeseeable that fire is a consequence of a serious fire hazard, it would not amount to mere conjecture on the part of the jury to conclude that large sparks from defendant's burning of trash on its lot caused the fire in plaintiffs' building which resulted in substantial damage to the structure and equipment therein.

APPEAL by plaintiffs from *Grist, Judge,* 17 January 1972 Session of CALDWELL Superior Court.

Plaintiffs alleged that defendant negligently allowed sparks and burning debris from a trash fire behind its factory to fall on plaintiffs' building, igniting highly flammable material used in plaintiffs' furniture manufacturing business which destroyed a substantial part of plaintiffs' building and equipment therein.

At the close of plaintiffs' evidence, defendant's motion for directed verdict was granted for that negligence and proximate cause were not shown.

Wilson & Palmer by George C. Simmons III for plaintiff appellants.

Hedrick, McKnight, Parham, Helms, Warley & Kellam by Philip R. Hedrick and Richard T. Feerick for defendant appellee.

CAMPBELL, Judge.

Upon motion for directed verdict, all evidence which tends to support the plaintiffs' claim must be taken as true and considered in its light most favorable to the plaintiffs, giving them the benefit of every reasonable inference which legitimately may be drawn therefrom. Contradictions, conflicts and inconsistencies are to be resolved in plaintiffs' favor. *Bowen v. Gardner,* 275 N.C. 363, 168 S.E. 2d 47 (1969).

Plaintiffs' evidence, thus viewed, tends to show the following:

1. Plaintiffs' building was located approximately 150 feet from a field behind defendant's building.

2. It was the defendant's custom to burn large quantities of trash paper, wood and veneer scraps in the field behind its building. These fires were always unattended, and burned without attempt on the part of the defendant to control their spreading to other areas. Plaintiffs had called the fire danger to the attention of defendant without satisfaction.

3. On 19 November 1968 the trash pile behind defendant's building consisted of paper and veneer covering an area of about 50 feet by 25 or 30 feet, and piled 10 feet deep. At approximately 3:00 p.m. this trash pile was set on fire by the defendant, and it continued to burn for the remainder of the day.

4. Wind, and heat from the fire, which was burning with large flames rising in height to some 20 or 30 feet, caused large sparks to rise, some of them "the size of your hand up to six by six inches. They were still flaming and falling everywhere, and some of them fell on my property. As a result of this, I watered down the roof and the surroundings."

5. When plaintiff, Ward B. Collins, left his building about 6:00 or 6:30 p.m., the fire on defendant's lot was still burning. The Sawmills Community Volunteer Fire Department was notified that plaintiffs' building was burning at 7:30 p.m. Upon returning from Salisbury, North Carolina, at about midnight, Collins learned that his building had been partially destroyed by fire; and when he arrived at the site of his burned building, he saw that the defendant's trash fire was still burning.

6. Mr. James H. Edwards, an insurance investigator who was accepted by the court as an expert in the field of investigation of fire losses and determination of the origin of fires, investigated the fire in plaintiffs' building, beginning at about 9:30 a.m. on the next day, 20 November 1968. When he arrived at the scene, he observed that the defendant's trash fire was still burning, and he saw flaming debris rise from that fire and fall on adjoining property.

7. Edwards testified that he checked the building for all possible sources of fire, and found that none of the electric wiring and electric motors was defective; that none of the waste cans and rags in the building had burned; and that the heating system of the building was not defective or burned.

8. The major portion of the fire damage was in the finishing room and the spray booth on one end of the building where

the rafters were heavily burned. The spray booth was ventilated by an electric exhaust fan which blew dust and lacquer spray residue out of the building. Part of this dust and lacquer spray was deposited on the outside of the building and on the roof near the vent for the fan.

The witness testified that in his opinion the fire *inside the building* started at the rear of the spray booth where the exhaust fan vented to the outside of the building, and that the fire moved in a downward direction from the roof rafters, while at the same time moving in an outward direction from the back wall of the spray booth toward the finishing room inside the main plant. By examining the cracks in the burned rafters, the expert witness testified that he was able to determine the origin and direction of the fire within plaintiffs' building.

9. The expert witness testified that:

". . . I also examined the area of the roof over the spray booth, and I found evidence of burning on that roof where the exhaust of the spray booth goes outside of the building. . . . The exhaust pipe from the spray booth area is located directly under that portion of the roof. This was a metal roof and I found where there had been some burning on top of it; I found some debris from wood up there which was charred and burned. The entire area of this metal roof showed evidence of having been burned. . . ."

10. On cross-examination the expert further testified that:

". . . I did testify that, in my opinion, the fire in some way started out there, [referring to the outside of the building around the area of the spray booth exhaust fan vent] came down into the spray booth on the side of the vent. The vent was not completely coated and covered with lacquer, thinner or sealer; that is, it was not coated on the outside of the vent, but it was coated on the inside. The roof is here and the ventilator here and the fire came here and not down to the vent. It came from here on the roof down to this point and entered and did not come on down to the vent. . . ."

Although we are unable to tell what the witness was describing with reference to the words "here" and "this point," the testimony does show the witness's opinion that the fire began on the roof of plaintiffs' building and then moved into

the building through the spray booth wall somewhere within the vicinity of the exhaust fan.

The trial court held that this evidence was not sufficient to show negligence of the defendant which was a proximate cause of the plaintiffs' injury. We hold otherwise.

[1] Negligence may be inferred from facts and attendant circumstances, and if the facts proved establish the more reasonable probability that the defendant was guilty of actionable negligence, the case cannot be withdrawn from the jury, though the possibility of accident may arise on the evidence. *Drum v. Bisaner,* 252 N.C. 305, 113 S.E. 2d 560 (1960).

[2] Actual causation may be proved by circumstantial evidence, and this principle is equally as true in fire cases as in any other tort liability case. *Simmons v. Lumber Co.,* 174 N.C. 220, 93 S.E. 736 (1917), and the vast multitude of railroad steam locomotive cases reported in this State.

In *Simmons v. Lumber Co., supra,* the court held that evidence that a fire started along defendant's track at a time and place where its steam engine was momentarily standing, which fire ignited trash along the track and spread to the plaintiff's land, was sufficient to support a jury verdict for the plaintiff despite the fact that no witness actually saw sparks coming from the engine at the time.

In *Simmons* it was held that:

> "The cause of the fire is not required to be shown by direct and positive proof, or by the testimony of an eyewitness. It may, as we have seen, be inferred from circumstances, and there are many facts like this one, which cannot be established in any other way. It is true that there must be a causal connection between the fire and its supposed origin, but this may be shown by reasonable inference from the admitted or known facts, for otherwise presumptive evidence would be excluded. We have held, proof as to the emission of sparks from locomotives or stationary engines to be sufficient for the purpose of showing that a fire was started by them, where no one saw the sparks dropping on the place which was burned, and for the reason that the surrounding circumstances tended to prove that they were the cause of the fire, by reasonable presumption or inference. . . . [The evidence in this case]

is not merely conjectural or speculative, but is such as warranted the jury in forming a reasonably safe conclusion that the fire was set out by the engines; there being, in addition to all this proof, the fact that there was nothing else there to cause the fire. . . ."

[3] The railroad cases have established the rule that when the plaintiff shows that his property was injured by fire which had its origin with the defendant, such showing makes out a prima facie proof of the defendant's negligence. Further, the connection of the plaintiff's fire and the defendant's conduct may be shown by circumstantial evidence. *Ashford v. Pittman,* 160 N.C. 45, 75 S.E. 943 (1912); *Mfg. Co. v. R.R.,* 122 N.C. 881, 29 S.E. 575 (1898).

In the case of *Patton v. Dail,* 252 N.C. 425, 114 S.E. 2d 87 (1960), plaintiff's evidence that his house was completely destroyed by fire which began under the bathroom floor where the defendant had been soldering water pipes with a torch one half hour before the fire was discovered was held sufficient evidence of the defendant's negligence to carry the case to the jury.

[4] The plaintiffs, having shown that the defendant started a fire on its property, which fire the defendant was under a duty to control, it is a question for the jury to decide whether the plaintiffs' fire was the proximate result of the defendant's fire. *Hardy v. Lumber Co.,* 160 N.C. 113, 75 S.E. 855 (1912). The intervention of time or distance between the defendant's fire and the plaintiffs' fire—for example, that the fire in plaintiffs' building was not discovered until one hour to one and one half hours after the plaintiff Ward Collins locked and left the building—is not fatal to the plaintiffs' case, but is properly to be considered by the jury on the question of proximate cause. *Hardy v. Lumber Co., supra.*

[5] Common experience has established that a large conflagration in an open field offers an inherent and serious hazard of fire to adjoining areas if not properly supervised. Further, it is not improbable, unnatural, unreasonable, or unforeseeable that fire is a consequence of a serious fire hazard. And it would not amount to mere conjecture on the part of the jury to reach such a conclusion on the evidence in this case.

The present case is clearly distinguishable from *Maharias v. Storage Company,* 257 N.C. 767, 127 S.E. 2d 548 (1962) and

Phelps v. Winston-Salem, 272 N.C. 24, 157 S.E. 2d 719 (1967). In both of those cases the actual cause of the fires was unknown and plaintiff's evidence merely showed conduct on the part of the defendants which created merely a risk of a fire. For a discussion of these two cases see Byrd, Actual Causation In North Carolina Tort Law, 50 N.C.L. Rev. 261, 280 (1972). Likewise, the instant case is clearly distinguishable from *Mills, Inc. v. Foundry, Inc.,* 8 N.C. App. 521, 174 S.E. 2d 706 (1970), where there was no evidence that the defendant had started any type of fire or that its smokestack emitted any sparks at the time on the day plaintiff's property was damaged by fire.

In the instant case we think the evidence offered by the plaintiffs, when considered in the light most favorable to the plaintiffs, presented a question for the jury.

New trial.

Judges MORRIS and PARKER concur.

STATE OF NORTH CAROLINA v. LARRY WAYNE SHUE, ALIAS BROTHER SHUE
STATE OF NORTH CAROLINA v. CARL WILLIAM SHUE, JR., ALIAS MONKEY SHUE

No. 7220SC719

(Filed 20 December 1972)

1. **Criminal Law § 91— motion to continue — denial proper**

Defendants failed to show that the trial judge abused his discretion in denying their motion to continue made on 22 May 1972 where they filed no affidavits in support of the motion, but the record did show that counsel learned of his appointment on 5 May 1972 and that the case had been continued once before on motion of defense counsel from 15 May to 22 May.

2. **Criminal Law § 84; Searches and Seizures § 1— entry under arrest warrant — seizure of watch in plain view — admissibility**

A wrist watch allegedly taken from the victim of an armed robbery and found in defendants' premises was properly admitted into evidence where it appeared on *voir dire* that officers, in an attempt to make an arrest pursuant to a valid warrant, entered the premises and seized the watch which was lying in plain view.

3. **Arrest and Bail § 5— probable cause to search for concealed person**

The trial judge's finding that officers had probable cause to believe that one Wright was in defendants' premises when the officers

entered to search for him was supported by plenary competent evidence and hence was binding on appeal.

4. **Arrest and Bail § 5— arrest with warrant — necessity for demanding and being denied entrance**

Even though officers had warrants for the arrest of the defendants and one Wright and had reasonable grounds to believe that Wright was in defendants' premises, it was necessary that the officers first demand and be denied admittance before they could lawfully enter the premises.

5. **Arrest and Bail § 5— arrest with warrant — actions constituting demand for and denial of admittance**

Where officers armed with arrest warrants surrounded defendants' premises and ordered the occupants to come out, arrested the two defendants who came out, sprayed tear gas into the house when a third person failed to come out, and then entered the house to search for the third person, actions of the officers were sufficient to advise any occupant of their official status and satisfied any requirement that admittance be demanded and denied.

APPEAL by defendants from *Webb, Judge,* 22 May 1972 Special Session of Superior Court held in STANLY County.

The defendants, Larry Wayne Shue, alias Brother Shue, and Carl William Shue, Jr., alias Monkey Shue, were charged in a joint bill of indictment, proper in form, with the armed robbery of Roy Alvis Coats. Defendants pleaded not guilty. The material evidence offered by the State tended to show the following:

On 9 March 1972 Roy Alvis Coats, owner of a three-room building at Lake Tillery known as Shark's Place, opened and began selling beer and liquor to five men. At about 9:00 p.m., Larry Wayne Shue (Larry Shue) and Carl William Shue, Jr., (Carl Shue) arrived and purchased two beers. Defendants left then re-entered carrying two sawed-off shotguns which they aimed at Coats and the other men in the premises. Defendant Carl Shue stated, "This is it." "You are dead. If you move you will get a load of buckshot." Coats and the five other men were then told to lie on the floor and defendant Larry Shue removed approximately $1,100 from Coats' pockets and wallet, while aiming a pistol at his head. Coats stated, "Another fellow came in in the meantime and had a mask on and also had a shotgun." Larry Shue then asked Coats where the rest of the money was, and Coats told him that he had no more. Coats stated that he moved his head slightly and "When I did Larry he stomped me in the back of the head 2 or 3 times pretty hard, as hard as he

could stomp me." Larry Shue then made Coats remove his clothing and crawl from behind the counter to where the other men were lying. Upon being asked by Carl Shue whether there were any more guns in the premises, Coats replied negatively; whereupon, "They said they found a rifle and they said just go ahead and kill that son of a bitch for lying . . . ." One of the defendants then struck Coats in the back of the head two or three times with the butt end of a rifle or shotgun. The defendants told Coats and the five other men to lie on the floor for ten minutes. Coats testified, "They was going around singing a song. Singing a song made up saying, 'Don't raise your head or you will be dead,' and saying, 'It's all over but the crying,' and stuff like that." Coats was bleeding "pretty bad" and after two or three minutes, when Junius Archer, a patron, raised his head to determine the extent of Coats' injuries, "One of them opened the door and shot him through the shoulder and into the neck." Coats waited a few more minutes, then got up and telephoned for an ambulance and the Sheriff's Department.

The following other property was taken from Coats by the defendants on this occasion: a .38 caliber Colt pistol; a Bulova wrist watch with the following engraved on its back, "R A C love L R C" (State's exhibit 3); a pocket knife; and a hunting knife.

Defendants offered no evidence and were found guilty as charged. From judgments imposing prison sentences of 30 years each, defendants appealed.

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

Coble, Morton & Grigg by Ernest H. Morton, Jr., for defendant appellants.

HEDRICK, Judge.

[1] Defendants assign as error the court's denial of their motion to continue made on 22 May 1972.

Motions to continue are addressed to the sound discretion of the trial judge and his rulings thereon will not be upset on appeal absent a showing of such abuse of discretion as would deprive the defendants of a fair trial. *State v. Gibson,* 229 N.C. 497, 50 S.E. 2d 520 (1948); *State v. Lewis,* 7 N.C. App. 178, 171 S.E. 2d 793 (1970), cert. denied 276 N.C. 328 (1970). De-

fendants' motion was not supported by affidavit. The record, however, does contain counsel's statements when he made the motion to the effect that he was appointed to represent the defendants on 1 May 1972 and that he learned of this appointment on 5 May 1972 and that the case had been continued on motion of defense counsel from 15 to 22 May 1972. Counsel for defendants argues that he did not have sufficient time to adequately prepare for the trial of this case. Defendants have failed to show that the trial judge abused his discretion in denying the motion to continue.

[2] Defendants assign as error the admission into evidence of State's exhibit 3, a Bulova wrist watch, found in defendants' premises.

> "When a defendant in a criminal case objects to the admissibility of the State's evidence on the ground that it was obtained by unlawful search, the proper procedure to be followed by the trial court is the same as required for determining the admissibility of evidence as to a confession. *State v. Pike,* 273 N.C. 102, 159 S.E. 2d 334; *State v. Wood,* 8 N.C. App. 34, 173 S.E. 2d 563; *State v. Fowler,* 3 N.C. App. 17, 164 S.E. 2d 14." *State v. Basden,* 8 N.C. App. 401, 174 S.E. 2d 613 (1970).

Upon defendants' motion to suppress the evidence resulting from a search of defendants' residence, the court conducted a *voir dire* hearing in the absence of the jury regarding the entry and search of defendants' premises. The court heard testimony of Ralph L. McSwain, Sheriff of Stanly County and Jack Coppley, State Bureau of Investigation, (the defendants offered no evidence) and made the following pertinent findings and conclusions:

> "1. That Sheriff Ralph McSwain and Jack Coppley and other law enforcement officers went to 49 Crestwell Place, Concord, North Carolina, with warrants for the arrest of the defendants and Franklin DeWayne Wright.
>
> 2. That they had probable cause to believe that Franklin DeWayne Wright was inside the premises at 49 Crestwell Place, Concord, North Carolina.
>
> 3. That the defendants came outside the premises at 49 Crestwell Place, Concord, North Carolina, and were placed under arrest. The law enforcement officers on the

scene had probable cause to believe that Franklin DeWayne Wright was inside the premises and they entered the premises to search for him. While inside the premises they saw the watch which has been offered into evidence as State's Exhibit '3' in plain view on the mantel in the living room. . . .

THE COURT, THEREFORE, FINDS that the watch offered in evidence as State's Exhibit '3' should be received in evidence as a search warrant was not required for it. . . ."

Defendants argue the officers' entry into their premises was unlawful. They first contend, "there was no evidence that a felony had been committed."

A police officer in making an arrest pursuant to a warrant charging a criminal offense has authority to enter the dwelling occupied by the person whose arrest is directed, even during the nighttime. *State v. Shook,* 224 N.C. 728, 32 S.E. 2d 329 (1944); *State v. Mooring,* 115 N.C. 709, 20 S.E. 182 (1894); 1 Strong, N. C. Index 2d, Arrest and Bail § 5, p. 277. The trial judge's finding that the officers had warrants for the arrest of defendants and Wright obviated the necessity of a finding that a felony had been committed.

[3] Defendants next contend, "there was no reasonable grounds for the officers to believe that the guilty person was concealed in the house." The trial judge's findings that the officers had probable cause to believe that Wright was in the premises when they entered to search for him is supported by plenary competent evidence. Such findings, when supported by competent evidence, are binding on appeal. *State v. Pike, supra.* The evidence tended to show that when the officers from the Cabarrus County Sheriff's Department, Concord Police Department, Stanly County Sheriff's Department, Mecklenburg County Police and the State Bureau of Investigation went to defendants' premises at 49 Crestwell Place, Concord, shortly after midnight on 21 March 1972, they had warrants for the arrest of the defendants and Franklin DeWayne Wright (Wright), a declared outlaw. They had information and believed that the defendants were in their premises and that they had been harboring Wright therein.

[4, 5] Further the defendants contend that "the record is devoid of any evidence whatever that any demand was ever made by any officer to enter the Shue premises." We do not agree.

This contention raises two questions: (1) Even though the officers had warrants for the arrest of the defendants and Wright and had reasonable grounds to believe that Wright was in the Shue premises, was it necessary that they first demand and be denied admittance before they could lawfully enter the premises and (2) if so, is the evidence sufficient to show that such a requirement was met? Both questions must be answered in the affirmative.

In *State v. Covington,* 273 N.C. 690, 698, 161 S.E. 2d 140, 146 (1968), Justice Bobbitt, now Chief Justice, stated:

> "Under G.S. 15-44 admittance, in the absence of hostile action from inside the dwelling prior to such demand, must me 'demanded and denied' before a forcible entry is lawful where, as here, there is neither a search warrant nor a warrant for the arrest of an occupant or supposed occupant. Indeed, *State v. Mooring,* 115 N.C. 709, 20 S.E. 182, seems to support the view that this requirement would apply even though the officers have a search warrant or warrant of arrest. See 15 N.C.L.R. 101, 125."

Although Judge Webb made no findings as to whether admittance to the premises had been demanded and denied, his failure to do so, in the absence of conflicting evidence, is not fatal. *State v. Bell,* 270 N.C. 25, 153 S.E. 2d 741 (1967); *State v. Keith,* 266 N.C. 263, 145 S.E. 2d 841 (1966); *State v. Basden, supra.* The requirement that a police officer, armed with an arrest warrant or search warrant must demand and be denied admittance before making forcible entry, serves to identify his official status and to protect both the officer and the occupant. *State v. Covington, supra.* The uncontradicted evidence in the record tends to show that officers from five separate law enforcement agencies armed with arrest warrants, went to and surrounded the defendants' residence shortly after midnight on 21 March 1972. The officers used loud speakers to call into the premises and order the occupants to come out. In response, the defendants came out, were arrested and placed in a patrol car. Tear gas was sprayed into the house and when Wright failed to come out, officers entered the house to search for him. Surely the actions of the officers in this case immediately before entering the defendants' premises were sufficient to advise any occupant of their official status and satisfied any requirement that admittance be demanded and denied. We hold that under the circumstances of this case the officers were authorized to enter

defendants' premises to search for Wright and this authority was not vitiated by the fact that he was not actually found therein. *State v. Mooring, supra.*

[2] Additionally, defendants contend that the discovery of State's exhibit 3 was the result of an unlawful search. Defendants ground this argument on the fact that the officers had no search warrant.

The trial judge after the *voir dire* hearing in effect found and concluded that State's exhibit 3 was discovered by the officers "in plain view on the mantel in the living room" when they entered the premises to search for Wright, and that a search warrant was not required. This finding and conclusion is supported by the evidence. An officer in the discharge of his official duties may seize, without a warrant, articles in plain view. *State v. Harvey,* 281 N.C. 1, 187 S.E. 2d 706 (1972); *State v. Virgil,* 276 N.C. 217, 172 S.E. 2d 28 (1970); *State v. Howard,* 274 N.C. 186, 162 S.E. 2d 495 (1968). The trial judge did not err in admitting State's exhibit 3 into evidence.

The defendants had a fair trial free from prejudicial error.

No error.

Judges VAUGHN and GRAHAM concur.

STATE OF NORTH CAROLINA v. WILLIAM THOMAS McGHEE

No. 725SC614

(Filed 20 December 1972)

1. **Criminal Law § 169— improper hypothetical question — similar testimony admitted without objection — no prejudice**

Though a hypothetical question put to an expert witness by the solicitor was ineptly framed in that it omitted any reference to whether the jury "should find from the evidence" or "find the facts to be from the evidence," error, if any, committed by allowing the question and answer into evidence was not prejudicial in view of the fact that a previous question, eliciting almost the same response from the expert witness, was admitted without objection.

2. **Criminal Law § 101— homicide scene — jury view — no error**

The trial court in a murder case did not abuse its discretion in denying defendant's motion for a jury view of the scene of the homicide.

3. Criminal Law § 130— misconduct of defendant — denial of motion for mistrial — no error

The trial court did not abuse its discretion in refusing to declare a mistrial on defendant's motion therefor after defendant, instead of answering a question asked him by his counsel, made unsolicited statements concerning his desire for a new trial.

APPEAL by defendant from *James, Judge,* 6 March 1972 Session of Superior Court held in NEW HANOVER County for the trial of criminal cases.

Defendant was charged in a bill of indictment, proper in form, with the premeditated and deliberate murder of Daniel James Joye on 4 October 1971. Defendant pleaded not guilty. At the trial of the cause, the State introduced evidence tending to show that the deceased and his wife operated a small grocery store at 219 Castle Street, Wilmington, North Carolina, and that Mr. and Mrs. Joye lived in the adjacent house at 217 Castle Street. On 4 October 1971, the Joyes closed their store at about 7:00 p.m., ate supper, and went to the front porch of their house and sat down to rest. The front of the Joye house was well-lighted at night. The front porch faced Castle Street and there were no obstructions between the house and the street. The deceased owned a .38 caliber pistol which he kept on top of the television set in the living room of his house at night. The living room adjoins the front porch. On the evening of 4 October 1971, the deceased's pistol was located on top of the television set and the deceased did not have the pistol with him on the porch.

At about 8:55 p.m. on that same day, the defendant, William Thomas McGhee, drove up in front of the Joye house in his car and looked at the Joyes, but no words were spoken by any party. Shortly after 9:00 p.m., the defendant walked down the opposite side of Castle Street toward the Joye house carrying a rifle. The defendant stopped at a utility pole across the street from the Joye house and said, "Mr. Joye." Then the defendant fired one shot which struck Mr. Joye in his left side, killing him.

The State's evidence also tended to show that on 4 October 1971 Officer J. F. Newber of the Wilmington Police Department was on duty as the desk officer at the police station. At about 9:40 p.m. on that same day, the defendant entered the police station and told Officer Newber that he had shot Mr. Joye in the 200 block of Castle Street. Thereafter, defendant

showed police officers his rifle lying on the back seat of his car. Sergeant Bloomer of the Wilmington Police Department went to the Joye house at about 9:45 p.m. on 4 October 1971. Sergeant Bloomer inspected the living room of the Joye house where he located a .38 caliber revolver on top of the television set. Sergeant Bloomer testified that based on the fact that the pistol "smelled" clean and freshly oiled and that there was no spent shell in the cylinder, in his opinion the revolver had not been recently fired.

Dr. Henry Singletary testified that he had conducted an autopsy on the body of the deceased; that in his opinion the deceased died of a gunshot wound in the abdomen; and that the same gunshot had shattered the deceased's elbow joint before entering his body through the abdomen.

The State also introduced evidence tending to show that an empty cartridge of the same caliber as the rifle in defendant's possession was found next to a telephone pole, approximately 70 feet across the street from where the deceased's body was located; that the defendant's rifle was a British Enfield model, .303 caliber; and that when the defendant gave up the weapon to the police officers, there was one live round in the chamber and eight live rounds in the clip found in the weapon.

The defendant introduced evidence tending to show that the deceased did not like Negroes; that the deceased had been observed carrying a gun when checking over his car after another car had bumped into his; that the deceased had threatened children in the neighborhood and that the police department had received complaints concerning the deceased's language and conduct; and that approximately three weeks before the shooting at issue, the defendant had talked with police officers about threats of bodily harm to the defendant's children made by the deceased.

The defendant testified in his own behalf that on 4 October 1971, he left his home about 8:30 p.m. to get some food; that he stopped opposite deceased's home while waiting for a red light to change; that the deceased had a pistol in his hand on the front porch and that the deceased pointed the pistol at the defendant and said, "Nigger, I'm going to kill you"; that the defendant purchased the food, then returned home, got his rifle from the closet, put a clip in it, and walked up toward the deceased's house; that the deceased cursed the defendant and said,

"Nigger, you get on back to the house"; that the deceased fired his pistol at the defendant; that the defendant fired back at the deceased in self-defense; that after the shooting was over a neighbor of Mr. Joye's placed the pistol back in the house; and that prior to this occasion defendant had had several minor arguments with the Joyes.

At the close of all the evidence, the defendant made a motion for judgment as of nonsuit. Motion was denied. The jury returned a verdict of guilty of second degree murder. The defendant made a motion to set aside the verdict for errors committed during the trial. Motion was denied. The defendant made a motion for a new trial. Motion was denied. Judgment was entered upon the verdict that defendant be imprisoned for not less than 28 nor more than 30 years. Defendant appealed, assigning error.

Attorney General Morgan and Staff Attorney Davis for the State.

Charles E. Rice III and Jeffrey T. Myles for defendant appellant.

MALLARD, Chief Judge.

[1] Defendant assigns as error the form of a hypothetical question asked by the solicitor of the State's expert witness, Dr. Henry Singletary. The question reads as follows:

> "Q. Doctor, the question that I presented to you hypothetically and which has been brought out in testimony in this case is that the subject, assuming hypothetically that the subject is seated on his front porch, and assume further that the subject having the rifle and shooting the rifle sat at an angle to that subject on the front porch standing on the street—porch is elevated. Can you tell me, sir, on the basis of your testimony, can you tell me, sir, on the basis of the impact whether or not that is probably within reasonable certainty the direction from which the bullet came and whether or not probably that is the manner in which the damage to his elbow occurred."

We agree with the defendant that this hypothetical question was ineptly framed in that it omitted any reference to whether the jury "should find from the evidence" or "find the facts to be from the evidence." *Dempster v. Fite,* 203 N.C. 697,

167 S.E. 33 (1932); Stansbury, N. C. Evidence 2d, § 137. However, we are of the opinion that the error, if any, committed by allowing the question and answer into evidence was not prejudicial in view of the fact that a previous question, eliciting almost the same response from the expert witness, was admitted without objection. An exception is waived when other evidence of the same import is admitted without objection. *State v. Stepney,* 280 N.C. 306, 185 S.E. 2d 844 (1972); *Price v. Gray,* 246 N.C. 162, 97 S.E. 2d 844 (1957); *State v. Baxley,* 15 N.C. App. 544, 190 S.E. 2d 401 (1972). This assignment of error is overruled.

Defendant assigned as error the admission in evidence, over objection, of Wilmington City Ordinance 15-120, prohibiting persons from riding bicycles upon the sidewalks of the City of Wilmington. The defendant contended that some of the difficulties between him and the deceased arose when the deceased accused his, the defendant's, children of riding bicycles on the sidewalk in front of deceased's store. This assignment of error is overruled.

[2] Defendant assigns as error the court's denial of the defendant's motion for a jury view of the scene of the homicide at the close of the State's evidence. Whether or not a jury view should be granted is discretionary with the trial court and will be reviewed on appeal only for an abuse of that discretion. *State v. Payne,* 280 N.C. 150, 185 S.E. 2d 116 (1971); *State v. Ross,* 273 N.C. 498, 160 S.E. 2d 465 (1968); 7 Strong, N. C. Index 2d, Trial, § 13. We hold that the trial court did not abuse its discretion in denying the defendant's motion. This assignment of error is overruled.

[3] Defendant assigns as error the failure of the trial judge to declare a mistrial on defendant's motion therefor, after defendant instead of answering a question asked him by his counsel, made, among others, the following unsolicited statement:

> "I want a new trial. This is not going right. You can take me up there and lock me up there in jail. I am not going to testify for things."

Whether or not the trial court shall grant a mistrial for the "necessity of doing justice" on account of the misconduct of the defendant is within its sound discretion and will not be reviewed upon appeal except for gross abuse. *State v. Battle,* 267 N.C. 513, 148 S.E. 2d 599 (1966); *State v. Hines,* 266 N.C. 1, 145

S.E. 2d 363 (1965); *State v. Birckhead,* 256 N.C. 494, 124 S.E. 2d 838, 6 A.L.R. 3d 888 (1962); *State v. Williams,* 7 N.C. App. 51, 171 S.E. 2d 39 (1969). We hold that no abuse of discretion is revealed by this record and that the trial judge therefore properly denied the defendant's motion for a mistrial.

Defendant has directed eight assignments of error to the charge of the court to the jury. We have considered each and every one of these assignments of error but find none prejudicial to the defendant's cause. We hold that the court's instructions, when viewed as a whole, were substantially correct and without prejudicial error. These assignments of error are overruled.

In the trial we find no prejudicial error.

No error.

Judges BROCK and BRITT concur.

STATE OF NORTH CAROLINA v. BILLY H. HOWELL AND PENNY PHIPPS

No. 7221DC831

(Filed 20 December 1972)

Contempt §§ 3, 6— indirect contempt charge — interference with rights of litigant — insufficiency of evidence to support conviction

Where the evidence tended to show that defendants mailed a purported summons for magistrates court to one Ayers and his wife, that Ayers appeared in magistrates court, and that the magistrate spent 25 minutes investigating the false summons while others with scheduled cases had to wait, such evidence was insufficient to warrant conviction of defendants as for contempt under G.S. 5-8 since there was no showing that defendants' actions were such as tended to defeat, impair, impede, or prejudice the rights or remedies of a party to an action then pending in court.

APPEAL by defendants from *Alexander, Chief District Judge,* 13 July 1972 Session of District Court held in FORSYTH County.

This is an appeal from an order finding defendants, Billy H. Howell and Penny Phipps, in contempt of court and imposing fines of $300.00 against each.

On 31 May 1972 Magistrate H. W. Thomerson, Sr., signed an order, which was not entitled as in any case, directing Billy H. Howell, one of the present appellants, to appear before Chief District Judge Alexander on 12 June 1972 at 3:00 p.m. to show cause why he "should not be adjudged in indirect contempt of the Magistrates Court for the use of false and fraudulent process issued against Jerald Wayne Ayers and Kay Ayers . . . all of which is in violation of General Statutes 5-7 and 8." Attached to the order was a copy of what purports to be a "Magistrate Summons" in a civil action entitled: "Billy H. Howell, Mgr., W. T. Grant Co., Reynolda Manor, Reynolda Manor Shop. Center v. Jerald Wayne Ayers, Kay Ayers, Route 1, Pfafftown, N. C." This summons appears to have been prepared on a printed form provided for use in civil actions brought before the magistrate in the district court division of the general court of justice in Forsyth County. On the line provided for entry of the case file number there was typed "#242CVD225." The summons was dated 26 May 1972 and directed the defendants named therein to appear before Magistrate Thomerson at 9:30 a.m. on 31 May 1972 "to defend against proof of the claim stated in the complaint filed in this action." Written in at the bottom of this summons were the words: "Defendant responsible for all court costs." On the line provided for the signature of the "Deputy/Assistant/Clerk of Superior Court" there appeared a signature which was illegible.

The record on appeal indicates that Billy H. Howell did appear before Chief Judge Alexander on 12 June 1972, as he had been directed to do in Magistrate Thomerson's order of 31 May 1972, but does not indicate what, if anything, occurred at that time.

On 30 June 1972 Chief Judge Alexander signed an order, which is entitled as in the case on this appeal, to wit: "State of North Carolina vs. Billy H. Howell and Penny Phipps," directing the defendants to appear before the judge presiding over the District Court of Forsyth County on 13 July 1972 at 3:00 p.m. to show cause why they should not be punished "as for contempt" of court "on account of their causing to have issued a false summons against one Jerald Wayne Ayers and Kay Ayers." This order recites that it was issued "upon motion of the State." The record on this appeal contains the following motion, which was also entitled as in the present case:

> "NOW COMES H. W. Thomerson, Magistrate of Forsyth County, North Carolina, and respectfully shows unto the

Court that on the 31st day of May, 1972, at 9:30 a.m., one Jerald Wayne Ayers and wife, Kay Ayers, appeared at your affiant's office and informed your affiant that they were scheduled to appear before him on said date; that said Jerald Wayne Ayers showed your affiant a Magistrate Summons the said Ayers had received which did state that the said Ayers was to appear before your affiant on May 31, 1972, at 9:30 a.m.; that a copy of said Magistrate Summons is attached hereto as Exhibit A and incorporated herein by reference;

"Your affiant further shows unto the Court that your affiant did not have a hearing scheduled on said date for the defendant Billy H. Howell against the said Ayers; that your affiant was hearing cases on said morning and had to interrupt his court schedule in order to investigate the matter; that your affiant further shows unto the Court that there was no such file number as '242 CVD 225' as appears on the Magistrate Summons, and that because of your affiant's necessity to investigate this matter for said Ayers the business of the Court was interrupted and delayed for approximately 30 minutes or more.

"WHEREFORE, your affiant prays that an order issue directing the defendants to appear before the Judge Presiding over the District Court Division of the General Court of Justice of Forsyth County, North Carolina, and show cause, if any there be, as to why they should not be punished as for contempt of Court.

H. W. THOMERSON,

Magistrate of Forsyth County"

This motion was undated, unverified, and the record does not indicate where or when it was filed.

On 13 July 1972 defendants Howell and Phipps appeared before Judge Alexander as they had been directed to do in his order of 30 June 1972, and, through counsel, each moved to quash the show cause order on the grounds that (1) it was not supported by petition, affidavit or other proper verification; (2) the motion and order did not sufficiently inform as to the nature of this proceeding and the alleged acts upon which it is based; (3) no willful violation of an order of court had been shown; and (4) no act of either defendant had been shown such

as tended to defeat, impair, impede, or prejudice the rights or remedies of a party to an action then pending in court. Defendants' motions to quash were denied, and the matter proceeded to hearing.

The State presented the testimony of Magistrate Thomerson, who testified in substance as follows: At 9:30 a.m. on 31 May 1972 he had cases calendared for trial. At that time Mr. and Mrs. Jerald Wayne Ayers appeared before him and showed him "a paper writing in the form of a summons," but he had no case with the name and number shown on the paper writing. On checking in the office of the Clerk of Superior Court he found that no such case was docketed in Forsyth County. He spent approximately 25 minutes finding this out. People with cases scheduled at 9:30 were okay; others had to wait until he investigated the Ayers matter. On cross-examination, Magistrate Thomerson testified he did not know the names of any people who had to wait.

Jerald Wayne Ayers testified that he had received the purported summons through the mail. An assistant clerk of superior court testified that there was no file number and no case in the records in the clerk's office such as appeared on the purported summons and that no name of any member of the office of the clerk was similar to the one shown on the purported summons.

The State then called each of the defendants as witnesses, and the court, over their objections, required each to testify. In substance, their testimony showed the following:

Defendant Penny Phipps is credit manager at the W. T. Grant Company store at Reynolda Manor Shopping Center and works under the supervision of the defendant Billy H. Howell. The account of Jerald Wayne Ayers with the store was delinquent. Defendants had discussed several accounts, and Howell told Phipps they might have to send a copy of a civil complaint to the customers telling them that if they did not pay by a certain date they would have to send such papers through the court. Defendant Phipps filled out the purported summons against Ayers, copying off of the summons in the Linda Hawks file, a case which had been properly filed in court and which had been before Magistrate Thomerson. Defendant Howell had handled the entire Linda Hawks case. Phipps knew nothing about legal proceedings and thought she was giving Mr. Ayers until May

31st to pay or they would take him to court. She wrote the note, State's Exhibit 3, stating "Mr. Howell, Mgr. & Plaintiff will drop charges for amount past due *25.00* if paid before court *date.*" Howell knew nothing about the purported summons against Ayers before it was sent out, did not authorize it to be sent, and had never seen it until he appeared in court on 12 June 1972.

At the close of the State's evidence the court overruled defendants' motions to dismiss and entered judgment making findings of fact, adjudging both defendants to be in contempt of court, and ordering each to pay a fine of $300.00. From this judgment defendants appealed to the Court of Appeals.

Attorney General Robert Morgan by Associate Attorney Ruth G. Bell for the State, appellee.

Deal, Hutchins & Minor by William Kearns Davis for defendant appellant, Billy H. Howell.

Moore & Green by Thomas W. Moore, Jr., for defendant appellant, Penny Phipps.

PARKER, Judge.

Defendants have been charged with violation of G.S. 5-8, which grants to every court of record power to punish certain conduct as for contempt "when the act complained of was such as tended to defeat, impair, impede, or prejudice the rights or remedies of a party to an action then pending in court." In our opinion the evidence in the present case falls short of being sufficient to support the trial court's finding that defendants violated this statute. There was no showing that any act of defendants, however improper, was such as tended to defeat, impair, impede, or prejudice the rights or remedies of any party to any action then pending in court. Mr. and Mrs. Ayers were not parties to any action then pending in court, and therefore any acts of defendants, however violative of the Ayers' rights, were not such as warranted punishment of defendants "as for contempt" under G.S. 5-8. The closest which the evidence came to showing that the rights of any party to a pending action may have been impeded as result of improper acts of the defendants was the magistrate's testimony that he spent approximately 25 minutes investigating the false summons and that while he did so "others had to wait." However, the magistrate could not remember the name of any person who was thereby

required to wait, and it is pure conjecture to conclude, as the trial court did, that the "others" referred to included "a party to an action then pending in court." Conviction as for contempt must be supported by a more substantial foundation than the evidence in this case disclosed.

The evidence may tend to show a violation of G.S. 14-118.1, but we hold it insufficient to warrant punishment of defendants "as for contempt" under G.S. 5-8. In view of this holding we find it unnecessary to pass upon appellants' remaining contentions, some of which appear to have merit.

The judgment appealed from is

Reversed and vacated.

Judges BRITT and VAUGHN concur.

STATE OF NORTH CAROLINA v. JOHN ROBERT SHANKLIN AND JAMES RONALD COLE

No. 7215SC793

(Filed 20 December 1972)

1. **Burglary and Unlawful Breakings § 3; Indictment and Warrant § 9— description of subject premises — sufficiency**

Though the better practice in a felonious breaking, entering and larceny case is to identify the subject premises by street address or by some clear description and designation to set them apart from like and other structures, the bill of indictment in this case was sufficient where it clearly identified the county in which the subject building was located and identified the name of the business carried on in the building and also identified one E. M. Smith as owner of the property allegedly taken from the building.

2. **Searches and Seizures § 3— issuance of search warrant — probable cause**

Information contained in affidavits was sufficient for the magistrate to find probable cause for issuance of search warrants for defendants' premises where such information included a statement that a reliable informer had seen part of the stolen property in defendants' premises.

3. **Searches and Seizures § 3— incorporation of matter into search warrant by reference**

The description of items to be searched for, as well as a description of the place to be searched, may be incorporated into a search warrant by reference to the affidavit.

4. **Searches and Seizures § 3— description of items searched for — incorporation by reference proper**

Where each affidavit to obtain a search warrant and each warrant for arrest of the respective defendants incorporated by reference the attached lists of goods allegedly taken and each list contained approximately sixty individual entries including, where appropriate, the generic name of the items and the brand name and individual price, the reqirements of G.S. 15-26(a) with respect to the description of items to be seized were met.

5. **Criminal Law § 86— cross-examination of defendant — impeachment**

Where the solicitor asked defendant Cole on cross-examination if he had broken into one of three specific places of business, the questions related solely to what the witness had done, not to what others had accused him of doing and, in the absence of a showing of bad faith, were proper for purposes of impeachment.

APPEAL by defendants from *McKinnon, Judge,* 24 April 1972 Session of Superior Court held in ORANGE County.

Each defendant was charged with felonious breaking, entering and felonious larceny and each entered a plea of not guilty. The cases were consolidated for trial without objection and each defendant was found guilty as charged.

The State's evidence tended to show that E. M. Smith's grocery store had been broken into sometime between 8:30 p.m. on 13 January 1972 and 7:00 a.m. on 14 January 1972. A television set and a radio had been taken along with a variety of foodstuffs and 100 to 125 cartons of cigarettes, according to a list prepared by Mr. Smith with the aid of police. The value of the property taken was estimated to be approximately $700.00. On 20 January 1972 the police obtained search warrants and searched the home of each defendant. Details of the search warrants are discussed in the opinion. In defendant Shanklin's home the police found a radio and "enough cigarettes, meat and canned goods to load up a small pickup truck." At defendant Cole's home the police found a television set, a case of toilet tissue, washing detergents and frozen food still in wrappers identified as having come from Mr. Smith's store. Arrest warrants were obtained and both defendants were arrested sometime around midnight of 20 January. The next morning, after being advised of his rights, defendant Shanklin rode to the scene and identified Mr. Smith's store as one into which he and Cole had forced entry. Shanklin stated that he and Cole had used Cole's van in the break-in and that they had pried the door open, got their arms full of goods and loaded the van. Testi-

mony was introduced which tended to show that defendant Cole, having been advised of his rights, was present during Shanklin's statements and Cole stated that what Shanklin said was true.

Defendants' evidence tended to show that during the search of defendant Cole's home, the officers damaged clothing, furniture and crockery and generally ransacked the house. The Cole family consists of husband and wife and five children. Mrs. Cole testified that, as a rule, she kept her freezer full and that she has known her husband to purchase cigarettes by the case. Defendant Cole testified that on the night of 14 January 1972 he and defendant Shanklin went out to drink, play cards and talk. While they were thus occupied, defendant Cole testified that a boy took his van, which had been parked with the keys in it. When the boy returned two hours later, he offered to sell food, cirgarettes, a radio, clothing and washing powders to defendant Cole. Cole gave him $35.00 for some of the goods and it was this merchandise which the police found in Cole's home. Defendant Shanklin allegedly offered to buy part of the goods from Cole. Cole testified that after the search, he was read his rights and he drove his van to the Hillsborough jail. During this drive, Deputy Sheriff Hamlett allegedly offered to help out Cole if he would tell where he stole the merchandise. Cole said he was prevented from telephoning his wife from the jail and he was told to sign a paper to the effect that he had had his rights read to him. Cole denied being present when Shanklin made any statement about any break-in and he denied being at Mr. Smith's store on 14 January. Defendant Cole also denied breaking into three other stores specifically asked about on cross-examination. Defendant Shanklin did not testify.

Each defendant was sentenced to serve five years imprisonment and each was given credit against his sentence for time served in custody.

Attorney General Robert Morgan by James E. Magner, Jr., Assistant Attorney General for the State.

John H. Snyder for defendant appellants.

VAUGHN, Judge.

[1] Defendants' first two assignments of error challenge the denial of motions to quash the respective bills of indictment. Defendants argue that the location of the building allegedly broken

into is not stated and that the ownership of the property alleged to have been stolen is not indicated. The bill of indictment must allege all essential elements of the alleged offense with sufficient certainty so as to identify the offense, protect the accused from being twice placed in jeopardy, enable the accused to prepare of trial and support a judgment entered upon a plea or conviction. *State v. Sparrow,* 276 N.C. 499, 173 S.E. 2d 897; *State v. Carroll,* 10 N.C. App. 143, 178 S.E. 2d 10. A motion to quash the bill of indictment is a proper method by which the question of the sufficiency of the bill of indictment may be raised. *State v. Partlow,* 272 N.C. 60, 157 S.E. 2d 688; *State v. Roper,* 3 N.C. App. 94, 164 S.E. 2d 95. Defendants' argument is without merit. Each bill of indictment recites, in pertinent part, as to each respective defendant:

> "That [name of defendant] late of the *County of Orange* on the 14th day of January, 1972, with force and arms at and *in the County aforesaid,* a certain building occupied by one E. M. Smith trading as E. M. Smith and Son Grocery wherein merchandise, chattels, money, valuable securities and other personal property were being well kept, unlawfully, wilfully, and feloniously did break and enter with intent to steal, take and carry away the merchandise, chattels, money, valuable securities and other personal *property of the said, E. M. Smith* against the form and Statute in such case made and provided and against the peace and dignity of the State." [emphasis added.]

Furthermore, each indictment also twice lists specific property of the value of $800.00 "of the goods, chattels and moneys of the said E. M. Smith." The body of each bill of indictment clearly identifies the county in which the subject building is located and identifies the name of the business carried on in that building and also identifies E. M. Smith as owner of the property allegedly taken from the building. We hold the descriptions in the bills of indictment are sufficient. *State v. Roper, supra; State v. Carroll, supra.* At the same time, we take this opportunity to repeat that the better practice would be to identify the 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. *State v. Burgess,* 1 N.C. App. 142, 160 S.E. 2d 105.

[2] Defendants' third assignment of error attacks the denial of their motion to suppress evidence obtained through the use

of a search warrant which defendants contend was not issued on probable cause. In support of their position, defendants cite *United States v. Harris,* 403 U.S. 573, 29 L.Ed. 2d 723, 91 S.Ct. 2075; *Spinelli v. United States,* 393 U.S. 410, 21 L.Ed. 2d 637, 89 S.Ct. 584; *Aguilar v. Texas,* 378 U.S. 108, 12 L.Ed. 2d 723, 84 S.Ct. 1509; *Jones v. United States,* 362 U.S. 257, 4 L.Ed. 2d 697, 80 S.Ct. 725 and; *Nathanson v. United States,* 290 U.S. 41, 78 L.Ed. 159, 54 S.Ct. 11. Each deals with the sufficiency of affidavits used to support the issuance of a search warrant. As to the point raised in *Aguilar,* one affidavit in the present case contained the following:

> "Information was received from a reliable informer that he had seen part of the stolen property in [the trailer occupied by John Robert Shanklin.] Deputy McCullock has used information received from this same informer in the past and has gotten convictions from the information."

The section in brackets above was replaced in the other affidavit with the words "Roland Cole *(sic)* possession." The last sentence of the second affidavit read: "Deputy McCullock has used this informer in the past and has gotten conviction *(sic)* on information that was received from this informer." The *Spinelli* case, *supra,* requires that in the absence of a statement by the informer detailing the manner in which the information was gathered, it is especially important that he describe the accused's criminal activities in sufficient detail that the magistrate may know he is acting on something more substantial than a casual rumor or the accused's general reputation. *Nathanson, supra,* held that affirmation of suspicion and belief, standing alone, was an insufficient basis upon which to issue a search warrant. In the present case, however, the information received indicates the informant had seen part of the stolen property. The magistrate could reasonably infer from the details recited in the affidavit that the informant had gained his information in a reliable way. *Draper v. United States,* 358 U.S. 307, 3 L.Ed. 2d 327, 79 S.Ct. 329. An affidavit containing information within the personal knowledge of the informant and similar to the affidavit in the present case was upheld as sufficient to indicate the basis of a finding of probable cause in *State v. Moye,* 12 N.C. App. 178, 182 S.E. 2d 814. The date of "Friday morning 1-14-72" is recited as the date of the alleged crime in each affidavit and the date of the affidavit was 20 January 1972. The observations had to have been made within

that six day period and we hold that observations made within that period were recent enough to satisfy the standard of *Harris.*

We hold that the information contained in each affidavit was sufficent for the magistrate to find probable cause for the issuance of the search warrants for the premises of the respective defendants. It then follows that it was not error to deny defendants' motion to suppress evidence obtained through the use of these search warrants. Defendants' third assignment of error is without merit.

[3, 4] Defendants' fifth assignment of error alleges that the State had failed to particularly describe the items found and taken during the searches and that "the search made was a general search" in violation of the Fourth Amendment to the Constitution of the United States. It is required by G.S. 15-26(a) 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)." *State v. Foye,* 14 N.C. App. 200, 205, 188 S.E. 2d 67. The description of the items to be searched for, as well as a description of the place to be searched, may be incorporated in the warrant by reference to the affidavit. *State v. Flowers,* 12 N.C. App. 487, 183 S.E. 2d 820, *cert. den.* 279 N.C. 728, 184 S.E. 2d 885. In the present case, each affidavit to obtain a search warrant and each warrant for arrest of the respective defendants incorporates by reference the attached lists of goods allegedly taken. Each such list contains approximately sixty individual entries containing, where appropriate, the generic name of the items and the brand name and individual price. The requirements of G.S. 15-26(a) were satisfied by the affidavits and attached lists in the present case. Defendants point out, however, that one officer testified that certain items not on the lists attached to the warrants were taken during the search of defendant Cole's premises. From this, they argue that the entire search was unreasonable

and in violation of the Fourth Amendment. This contention is without merit.

[5] Defendants' final assignments of error are directed against questions asked by the solicitor of defendant Cole on cross-examination. Three questions were presented, each asking defendant Cole if he had broken into one of three specific places of business. Defendant responded in the negative to each question. A person charged with the commission of a crime is, at his own request, a competent witness but, if he is examined as a witness, he shall be subject to cross-examination as are other witnesses. In order to impeach a defendant's credibility as a witness, the solicitor is permitted to cross-examine the defendant as to collateral matters, including other criminal offenses and degrading actions, if the questions are based upon information and are asked in good faith. 2 Strong, N. C. Index 2d, Criminal Law § 86, p. 607. The questions related solely to what the witness had done, not to what others had accused him of doing and, in the absence of a showing of bad faith, were proper. *State v. Griffin,* 201 N.C. 541, 160 S.E. 826, *State v. Williams,* 279 N.C. 663, 185 S.E. 2d 174. Defendants' sixth, seventh and eighth assignments of error are overruled.

No prejudicial error has been made to appear.

No error.

Judges BRITT and PARKER concur.

LESLIE S. BERCEGEAY AND ETHEL FOY BERCEGEAY v. SURFSIDE REALTY COMPANY, INC., GEORGE F. SPELL, LOUISE McEACHAN SPELL, W. B. McLEAN AND RUTH PAXON McLEAN

— AND —

CARROLL BOOTHBY AND MARCIA M. BOOTHBY v. SURFSIDE REALTY COMPANY, INC., GEORGE F. SPELL, LOUISE McEACHAN SPELL, W. B. McLEAN AND RUTH PAXON McLEAN

No. 723DC593

(Filed 20 December 1972)

1. Rules of Civil Procedure § 15— trial as though statute of frauds pleaded

Appeal is treated as though the statute of frauds was specifically pleaded where the record discloses that the case was tried as though the statute of frauds was specifically pleaded. G.S. 1A-1, Rule 15(b).

2. Vendor and Purchaser § 3— contract to convey — insufficiency of description

The description of property in a purported contract to convey as "Block 36" and "Lot 12 Sound Front" is insufficient to satisfy the statute of frauds.

APPEAL by the individual defendants from *Whedbee, District Judge,* 20 March 1972 Session of CARTERET District Court.

Plaintiffs instituted these civil actions against the corporate and individual defendants to compel specific performance of purported contracts to convey real property.

On 13 May 1971 plaintiffs Bercegeay and plaintiffs Boothby filed substantially identical complaints against defendants, alleging in pertinent part as follows: On 18 May 1968 defendant George F. Spell (Spell), acting on his own behalf and as agent for the other defendants, executed written agreements with plaintiffs in which Spell agreed to sell two lots or parcels of real property to plaintiffs. As binding consideration for said sales plaintiffs paid $200.00 to Spell for himself and as agent for the other defendants. Plaintiffs have been and are ready, willing and able to perform their part of the agreements. They have tendered and do still tender compliance with terms and conditions of the said sale, but defendants fail and refuse to give to plaintiffs valid warranty deeds for the property in question.

Identical answers to the complaints were filed on 10 June 1971 denying the above allegations. Jury trial was waived by all parties and the two cases were consolidated for trial.

Evidence presented by plaintiffs tended to show: On 18 May 1968 the male plaintiffs talked with Spell, President of Surfside Realty Company, Inc. (Surfside) at the Surfside office in the Town of Emerald Isle, N. C., concerning the purchase of property fronting on Bogue Sound. Said plaintiffs, accompanied by Spell, went to the subject property, termed "Block 36," and Spell informed them that "seven (7) lots were already committed," but plaintiffs could measure from the property's beginning point (which Spell pointed out "give or take a few feet") distances of 75 feet (the size of each lot) and select two lots not previously committed. The lots had a purchase price of $3,000.00 each. Using a 100 foot steel tape, Bercegeay and Boothby measured 75 feet distances from the "starting point" and each picked a lot, marking the lot of his choice with "small wooden stakes." The two male plaintiffs returned to Spell's office

where they each paid a $100.00 deposit and received from Spell a written instrument reflecting the terms of purchase for Lot 12 and Lot 11 respectively. The written instrument given to plaintiffs Bercegeay is in words and form as follows:

(Printed)

"SURFSIDE REALTY CO., INC.

CHOICE BEACH PROPERTY

Route 1, Emerald Isle
Morehead City, N. C.

G. F. Spell, Pres.
Red Springs, N. C.

(In handwriting) 5-18-68

Leslie S. Bercegeay and Ethel Foy Bercegeay
P.O. Box 209, Newport, N. C., Carteret County
Block 36
Lot 12 Sound Front

3000.00
deposit 100.00
2900.00

$750.00 yr. at 6%

GEORGE F. SPELL"

The instrument given by Spell to plaintiffs Boothby is identical to that given the Bercegeays except for names and addresses and the Boothby's writing called for Lot 11.

At the time Bercegeay and Boothby made the purported agreement, the "Block 36" property had not been surveyed for division into lots and said property was reachable by driving down Salter Path Road to Bogue Inlet Drive, proceeding northerly along Bogue Inlet Drive to what is now Sound Drive, thence westerly up to what is now Block Drive and then proceeding on foot to the "Block 36" area. Neither Sound Drive nor Block Drive was a completed road on 18 May 1968.

Plaintiffs also introduced evidence tending to show: On 11 May 1968 one Claude L. Laterriere purchased property designated as Lot 1, Block 36, on Bogue Sound from Mr. Spell. Mr. Laterriere received from Spell a written memorandum of the purchase transaction similar to that received by plaintiffs, his memorandum providing for a payment of a $750.00 deposit on the $3,000.00 purchase price. Subsequently, on 5 November 1969 Mr. Laterriere and wife received a deed from the four

individual defendants conveying a lot 12½ feet east of the lot in "Block 36" that Mr. Laterriere had believed he purchased on 11 May 1968. On 14 May 1968 plaintiffs Bercegeay purchased Lot 3 in "Block 36" from Spell, the transaction being evidenced with a $100.00 deposit and receipt of a memorandum similar to that set forth above; plaintiffs Bercegeay received a deed dated 16 March 1970 from the individual defendants covering the lot agreed upon.

Plaintiffs called Spell as an adverse witness and he admitted the execution and signing of all documents attributed to him. He stated that he and W. B. McLean and others were shareholders in Surfside; that the subject property was owned by the individual defendants; that he did not have, and did not hold himself out as having, authority to make binding agreements regarding the property owned by the individual defendants; that all proposed sales of that property were made subject to defendant W. B. McLean's approval.

Defendants presented no evidence.

The trial court entered judgment (1) making detailed findings of fact as contended by plaintiffs, including a finding that the lots referred to in the paper writings from Spell to plaintiffs "are capable of location with the aid of extrinsic evidence"; (2) concluding as a matter of law that the actions against Surfside should be dismissed but that plaintiffs are entitled to specific performance of the contracts as against the individual defendants; and (3) ordering the individual defendants to execute and deliver to plaintiffs "good and sufficient warranty deeds" for specifically described lots. (Descriptions provided in the judgment are hereinafter set forth in the opinion.) The individual defendants appealed.

Bennett and McConkey, P.A. by Thomas S. Bennett for plaintiff appellee.

Wheatly & Mason by C. R. Wheatly, Jr., for defendant appellants.

BRITT, Judge.

Defendants contend that the descriptions set forth in the paper writings from defendant Spell to plaintiffs are not sufficient to support their actions for specific performance of contract.

[1] Although the question is not raised in the briefs, we must decide at the outset if the statute of frauds is presented in these cases inasmuch as defendants did not plead the statute as an affirmative defense. In their answers defendants did deny the contracts.

Prior to 1 January 1970, the effective date of G.S. 1A-1 (Rules of Civil Procedure), it appears to have been settled case law in this jurisdiction that the defense of the applicable statute of frauds could be raised (1) by pleading the statute specifically, (2) by denying the contract, or (3) by alleging another or different contract. *Pickelsimer v. Pickelsimer,* 257 N.C. 696, 127 S.E. 2d 557 (1962); *Weant v. McCanless,* 235 N.C. 384, 70 S.E. 2d 196 (1952); *Yaggy v. B.V.D. Co.,* 7 N.C. App. 590, 173 S.E. 2d 496 (1970).

G.S. 1A-1, Rule 8(c), provides for pleading affirmative defenses and lists statute of frauds along with statute of limitations, res judicata, and certain other defenses that must be *specifically* pleaded. The official comment states: "At least one change in existing law is involved in the inclusion of the defense of statute of frauds in this listing." See also § 970.65, 1970 Pocket Parts, Volume 1, McIntosh, N. C. Practice and Procedure.

However, G.S. 1A-1, Rule 15(b) provides in pertinent part as follows: "When issues not raised by the pleadings are tried by the express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings."

While the cases at bar were tried without a jury and there were no formal issues, a review of the record discloses that the cases were tried as though the statute of frauds had been properly pleaded and the briefs addressed themselves to the question. We hold that Rule 15(b) applies here and this appeal is treated as though the statute of frauds had been specifically pleaded.

[2] We now consider the sufficiency of the paper writings to support the plaintiffs' actions for specific performance of contract.

In Webster, *Real Estate Law in North Carolina,* § 121, p. 150, we find: "The memorandum or instrument required to satisfy the Statute of Frauds in a contract for the sale of land must contain a description of the land that is the subject of

the contract, either certain in itself, or capable of being reduced to a certainty by reference to something extrinsic to which the contract refers." See *Lane v. Coe,* 262 N.C. 8, 136 S.E. 2d 269 (1964); *Yaggy v. B.V.D. Co., supra.* Obviously, the instrument set forth above does not contain a description of the subject property sufficient in itself of certain location.

The only identifying factors set forth in the instrument from Spell to plaintiffs are "Block 36," a lot number, and "Sound Front." It is not clear from the instruments in question whether "Carteret County" is an extension of plaintiffs' address (Newport being located in Carteret County) or is meant as an identifying factor of the subject property. In either event, the instrument is vague and uncertain of description. It fails to describe with any certainty the property sought to be conveyed and contains no reference to anything extrinsic which is capable of making the description certain. *Builders Supplies Company v. Gainey,* 282 N.C. 261, 192 S.E. 2d 449 (1972); *Katz v. Daughtrey,* 198 N.C. 393, 151 S.E. 879 (1930). Parol evidence is admissible to fit a description to land, *McDaris v. "T" Corporation,* 265 N.C. 298, 144 S.E. 2d 59 (1965); but parol evidence is not to be used to "enlarge the scope of the descriptive words," *Baldwin v. Hinton,* 243 N.C. 113, 90 S.E. 2d 316 (1955). "The purpose of parol evidence is to fit the description to the property, not to create a description." *McDaris v. "T" Corporation, supra.*

The record discloses no map or plat containing a "Block 36." The judgment requires defendants to convey to plaintiffs Bercegeay a warranty deed conveying the following described premises:

> In the Town of Emerald Isle, Carteret County, North Carolina; Beginning at a point in the Northern right of way margin of Sound Drive which point is located S 78-39W, 825 feet from a concrete monument located at the Southeast corner of Lot No. One (1), Section "A," as described in Map Book 7, page 89, Carteret County Registry, said map being entitled, "Map of Section Three (3), Emerald Isle and being a portion of Block 260," and running thence N 6-15 W to the highwater mark of Bogue Sound; running thence in a westwardly direction with the highwater mark of Bogue Sound a distance of 75 feet; running thence S 6-15 E to the Northern right of way margin of Sound Drive; running thence N 78-39 E with the

Northern margin of Sound Drive, 75 feet to the point of beginning.

The judgment requires defendants to execute and deliver to plaintiffs Boothby a warranty deed conveying lands particularly described as set out above except that the beginning point is 750 feet from "a concrete monument."

We hold that the paper writings from defendant Spell to plaintiffs did not "contain a description of the land that is the subject of the contract, either certain in itself, or capable of being reduced to certainty by reference to something extrinsic *to which the contract refers.*" We perceive no way that the paper writings can justify the descriptions of lots set forth in the judgment.

For the reasons stated, the judgment appealed from is

Reversed.

Chief Judge MALLARD and Judge BROCK concur.

STATE OF NORTH CAROLINA EX REL. COMMISSIONER OF INSURANCE AND THE NORTH CAROLINA FIRE INSURANCE RATING BUREAU v. STATE OF NORTH CAROLINA EX REL. ATTORNEY GENERAL

No. 7210INS653

(Filed 20 December 1972)

1. **Insurance § 79.1— automobile physical damage insurance rates — insufficiency of findings**

In this automobile physical damage insurance rate hearing, the Insurance Commissioner's determination of a fair and reasonable profit was not supported by sufficient findings where the Commissioner failed to make findings as to (1) the reasonably anticipated loss experience during the life of the policies to be issued in the near future, (2) the reasonably anticipated operating expenses in the same period, and (3) the percentage of earned premiums which will constitute a fair and reasonable profit in that period.

2. **Insurance § 79.1— automobile physical damage insurance rates — fair and reasonable profit**

A finding that a profit of 5% of earned premiums has generally been accepted in North Carolina and throughout the United States for some 20 years in automobile physical damage insurance rate making is not sufficient to support a conclusion that 5% is "fair and reasonable" at this time.

3. Insurance § 79.1— automobile physical damage insurance rates — evidence considered by Commissioner of Insurance

In determining automobile physical damage rates, the Commissioner of Insurance is not required to consider investment income of the companies, rate of return to investors, amount of capital used and useful or unrealized capital gains.

APPEAL by Attorney General, Intervenor, from decision and order of Commissioner of Insurance dated 17 April 1972.

This proceeding before the Commissioner of Insurance was initiated by the North Carolina Fire Insurance Rating Bureau. On 22 January 1971, the Rating Bureau made a filing with the Commissioner of Insurance pursuant to G.S. 58-131.1. The filing was amended on 8 July 1971. As amended the filing proposed a schedule of increased rates on private passenger automobile physical damage insurance of 8.2% for comprehensive insurance, 34% for $50 deductible collision, and 22% for $100 deductible collision resulting in an overall increase of 23.5%, and proposing a decrease of 1.8% in the rates on commercial automobile physical damage insurance resulting in an overall increase of 17.7%.

The Attorney General intervened by notice of intervention filed with the Commissioner on 16 July 1971.

After due advertisement, as required by law, the Commissioner conducted a public hearing on 10 August 1971. The hearing was thereafter recessed and continued to 8 September 1971, and adjourned on 20 September 1971. The public hearing was reopened by the Commissioner on 18 October 1971 for the purpose of considering the effect on the proposed rates of the price freeze promulgated by the President of the United States. The public hearing was continued on 2 and 9 November 1971; 16 December 1971; 17 January 1972; 2 and 22 February 1972; 8 March 1972; and was concluded on 20 March 1972.

The Commissioner entered a decision on 17 April 1972, granting an overall increase of 14.5% for private passenger automobile collision and comprehensive insurance coverage. The overall requested increase of 23.5% was reduced to 14.5% in accordance with Federal Price Commission Regulations. For purpose of this appeal, intervenor has stipulated that these regulations have been correctly applied. Intervenor does not except to that portion of the decision relating to a decrease in the rates on commercial automobile physical damage insurance.

Attorney General Morgan, by Associate Attorney Benjamin H. Baxter, Jr., for appellant intervenor.

Joyner and Howison, by Walton K. Joyner, for North Carolina Fire Insurance Rating Bureau, appellee.

Hugh R. Owen, Department Staff Attorney, for North Carolina Department of Insurance, appellee.

MORRIS, Judge.

Intervenor poses as his first question for consideration the following: "Did the Commissioner of Insurance err in failing to make findings of fact necessary to support the determination that the present rates are inadequate because they are not producing a fair and reasonable profit to the companies writing automobile physical damage insurance in North Carolina?"

Among the facts found by the Commissioner is the following:

> "7. The Bureau included in its expense figures a figure of 5% of earned premiums for underwriting profit and contingencies. This percentage figure has been accepted in North Carolina and generally throughout the United States in automobile physical damage insurance rate making for approximately twenty to thirty years."

Among the conclusions of the Commissioner is the following:

> "3. Petitioner has reasonably anticipated the loss experience for the future, has reasonably anticipated operating expenses for the future and is entitled to anticipate a fair and reasonable underwriting profit of 5% of earned premiums."

The Fire Insurance Rating Bureau was created by Article 13 of Chapter 58, Insurance, General Statutes of North Carolina. Section 58-131.2 of that article provides:

> "*Reduction or increase of rates.*—The Commissioner is hereby empowered to investigate at any time the necessity for a reduction or increase in rates. If upon such investigation it appears that the rates charged are producing a profit in excess of what is fair and reasonable, he shall order such reduction of rates as will produce a fair and reasonable profit only.

If upon such investigation it appears that the rates charged are inadequate and are not producing a profit which is fair and reasonable, he shall order such increase of rates as will produce a fair and reasonable profit.

In determining the necessity for an adjustment of rates, the Commissioner shall give consideration to all reasonable and related factors, to the conflagration and catastrophe hazard, both within and without the State, to the past and prospective loss experience, including the loss trend at the time the investigation is being made, and in the case of fire insurance rates, to the experience of the fire insurance business during a period of not less than five years next preceding the year in which the review is made. . . . "

[1] In *In re Filing by Fire Insurance Rating Bureau,* 275 N.C. 15, 165 S.E. 2d 207 (1969), the filing was made pursuant to the same statutory provisions as are applicable here. We think that case is controlling here. We are not inadvertent to *In re Filing by Automobile Rate Office,* 278 N.C. 302, 180 S.E. 2d 155 (1971). We are, however, in accord with *State of North Carolina, Ex Rel, Commissioner of Insurance v. State of North Carolina, Ex Rel, Attorney General,* 16 N.C. App, 279, 192 S.E. 2d 138 (1972), in its conclusion that the question of whether there were sufficient findings of fact to support the Commissioner's conclusions and decision was not properly before the court in that case. That question was, however, before the court in *In re Filing by Fire Insurance Rating Bureau, supra.* There, Justice Lake, writing for a unanimous Court, stated at pp. 39-40:

"The ultimate question to be determined by the Commissioner is whether an increase in premium rates is necessary in order to yield a 'fair and reasonable profit' in the immediate future (i.e., treating the Bureau as if it were an operating company whose experience in the past is the composite of the experiences of all the operating companies), and, if so, how much increase is required for that purpose. This cannot be determined without specific findings of fact, upon substantial evidence, as to (1) the reasonably anticipated loss experience during the life of the policies to be issued in the near future, (2) the reasonably anticipated operating expenses in the same period, and (3) the percent of Earned Premiums which will constitute

a 'fair and reasonable' profit in that period." (Citation omitted.)

[2] As was pointed out by Justice Lake in *Rating Bureau, supra,* the percentage of "fair and reasonable" profit to which the Rating Bureau (treated as all companies operating in North Carolina) is entitled is a question of fact to be determined by the Commissioner upon evidence. A "fair and reasonable" profit varies from time to time. It is not a question of law, nor is it a question upon which the determination of the Bureau is conclusive, nor do we think a finding without more that the figure of 5% has been generally accepted in North Carolina and throughout the United States for some 20 years sufficient upon which to conclude that 5% is "fair and reasonable" at this time.

We, therefore, conclude that the holding of *Rating Bureau, supra,* requires that the decision of the Commissioner herein be vacated and the cause remanded to the Commissioner for further proceedings and findings of fact as required by *Rating Bureau, supra.*

[3] Intervenor also urges that the Commissioner of Insurance committed reversible error in that he failed to consider investment income of the companies, rate of return to investors, the amount of capital used and useful, unrealized capital gains. We note that the 1969 Legislature added a provision to § 58-246 of Article 25 entitled "Regulation of Automobile Liability Insurance Rates." The added section [§ 58-246(5)] requires that:

> "The bureau shall maintain and furnish to the Commissioner of Insurance on an annual basis the statistics on income derived by member companies from the investment of unearned premium reserves on automobile liability policies written in this State. Whenever the bureau has propounded a rate under this Article, it shall prepare a separate exhibit for the experience years in question showing the combined earnings realized from the investment of such unearned premium reserves on policies written in this State. The Commissioner may require further information as to such earnings and may require calculations of the bureau bearing on such earnings."

No such directive was incorporated into the statutes dealing with automobile physical damage rates. The statute applicable here, G.S. 58-131.2, clearly requires the Commissioner to deter-

mine whether the *rates charged* are adequate to produce a fair and reasonable profit. This, it seems to us, refers to underwriting profit and does not include investment income. Neither does the statute require consideration of rate of return to investors, the value of property used and useful, nor unrealized capital gains. The Commissioner of Insurance in setting rates is not by statute directed to consider the same elements as is the Utilities Commission by G.S. 62-133.

> "G.S. 58-131.2 imposes upon the Commissioner the duty of fixing such rates as will produce 'a fair and reasonable profit' and no more. In the statutory plan for the regulation of insurance premium rates, there is nothing comparable to the procedure prescribed by G.S. 62-133 for the fixing of rates by public utility companies for their services. The statutes conferring authority upon the Commissioner of Insurance, and directing his use of it, do not use the term 'fair return on fair value' of the property devoted to the insurance business in North Carolina. Here, the direction is to prescribe rates which will yield a 'reasonable profit.' " (Citation omitted.) *In re Filing by Fire Ins. Rating Bureau, supra,* p. 38.

Whether, under the statutory provisions governing this proceeding, the Commissioner would have committed error had he required evidence on the elements urged by the intervenor is not before us. Suffice it to say that his failure to consider them does not constitute reversible error.

The remaining contentions argued by intervenor have been carefully considered and found to be without merit.

For the reasons stated the decision appealed from is vacated and this cause remanded to the Commissioner of Insurance for further proceedings consistent with this opinion.

Remanded.

Judges CAMPBELL and PARKER concur.

JUDY W. GRAY v. WILLIE D. GRAY

No. 728DC589

(Filed 20 December 1972)

1. **Divorce and Alimony § 13— action for divorce on ground of separation — judgment on pleadings and summary judgment properly denied**

The trial court in a divorce action did not commit error in denying defendant's motions for judgment on the pleadings and summary judgment where defendant did not allege or prove facts which would be a bar to plaintiff's divorce and where defendant relied on a plea of *res judicata* based on the termination of a divorce action in defendant's favor some two years previously.

2. **Divorce and Alimony § 13— action for divorce on ground of separation — termination of prior action as beginning of separation**

Where plaintiff was denied a divorce in 1969 on the ground of separation upon a jury finding that the separation was "the fault of" the plaintiff, the original "fault" would be insufficient to bar forever an action by plaintiff against defendant for divorce on the grounds of separation; rather, the separation alleged in the case at bar would be one existing or continuing on and after 19 June 1969, the date of the termination of the first divorce case.

3. **Judgments § 35— plea of res judicata — identity of issues — plea properly denied**

Though the parties, the subject matter insofar as it related to obtaining a divorce on the grounds of separation, and the relief demanded, to wit, an absolute divorce, were identical in this action to those in a prior divorce action, defendant's plea of *res judicata* was properly denied since issues as to recrimination, time of residence and period of separation were different in the two cases.

APPEAL by defendant from *Wooten, District Judge,* 21 February 1972 Session of District Court held in WAYNE County.

This civil action for divorce was filed by plaintiff wife in Wayne County on 26 October 1971 on the grounds of one year separation under provisions of G.S. 50-6.

It was alleged in the complaint that the plaintiff and defendant, residents of Wayne County, were married on 27 August 1965, that they had lived continuously separate and apart from each other since 19 June 1969, and that no issue were born to the marriage.

Defendant answered and admitted the marriage and residence but did not deny that the parties have lived continuously separate and apart from each other since 19 June 1969 and

did not deny the allegation that no children were born to the union. Defendant filed what he denominated a plea in bar and also a counterclaim in his answer.

In the plea in bar, defendant asserts the plea of res judicata. In this plea it is alleged that on 19 June 1969, in a previous divorce action instituted by the plaintiff against the defendant, the jury answered the issues of residence, marriage and separation in plaintiff's favor but answered in the affirmative the issue, "Was the separation brought about by the fault of the plaintiff as alleged in the answer?" On 19 June 1969 the trial judge entered an order denying the plaintiff a divorce. In the answer in that case the defendant had alleged that the plaintiff had "wilfully, unlawfully, and wrongfully, abandoned the defendant by leaving a note saying: 'I am gone.'"

By way of further answer and counterclaim, defendant alleged that he was entitled (1) to recover actual and punitive damages because plaintiff, a resident of Wayne County, subsequent to 19 June 1969, had instituted an action for divorce on the grounds of separation against him in Henderson County, in which, plaintiff had taken a nonsuit on 8 October 1971, and (2) to a restraining order prohibiting plaintiff from bringing actions against him for divorce on the grounds of separation.

When the case was called for trial, the defendant announced the abandonment of his counterclaim. Defendant also moved that his plea of res judicata be allowed under Rule 8 of the Rules of Civil Procedure, for judgment on the pleadings under Rule 12(c), and for summary judgment under Rule 56(b). All three of these motions were denied.

After hearing the testimony of plaintiff's witnesses (the defendant offered no evidence), the court upon competent evidence made the following findings of fact and conclusions of law:

> "That this action for absolute divorce based on one year separation under the provisions of G.S. 50-6, was commenced by the issuance of summons and filing of a verified complaint on October 26, 1971; the defendant was personally served with summons, together with a copy of the complaint, on October 30, 1971; that on or about November 19, 1971, the defendant filed an answer containing a Further Defense and Counterclaim; that no request for trial by jury has been filed with the Clerk of Superior

Court by either party and that upon the call of the trial of this case, the defendant, through his attorney, announced to the Court that he was not pursuing his Counterclaim; that the plaintiff is a resident of Wayne County, North Carolina and has been a citizen and resident of the State of North Carolina for many years, particularly for more than six (6) months preceding the commencement of this action; that the plaintiff and defendant were married on or about August 27, 1965 and that there has been no issue born to the marriage; that the plaintiff and defendant have separated from one another and have lived continuously separate and apart from each other since the 19th day of June, 1969, a date more than one year next preceding the institution of this action, and at no time since that date have they resumed the marital relationship which formerly existed between them and it was the plaintiff's intention at the time of the separation that she and the defendant would live permanently separate and apart from each other.

Based upon the foregoing FINDINGS OF FACT, the Court makes the following CONCLUSIONS OF LAW:

1. The plaintiff is entitled to an absolute divorce from the defendant based upon one year separation.

2. The defense pled by the defendant in his answer, based upon a former divorce action between the parties and judgment rendered thereon, does not constitute a legal defense or bar to the plaintiff's cause of action.

Based upon the foregoing FINDINGS OF FACT and CONCLUSIONS OF LAW, the Court answers the issues arising under the complaint as follows:

'1. Were the plaintiff and defendant lawfully married as alleged in the complaint? ANSWER: Yes.

2. Has the plaintiff been a resident of the State of North Carolina for six (6) months next preceding the institution of this action? ANSWER: Yes.

3. Have the plaintiff and defendant lived separate and apart from one another for one (1) year next preceding the institution of this action? ANSWER: Yes.' "

From the entry of the judgment granting plaintiff a divorce, the defendant appealed to the Court of Appeals, assigning error.

Taylor, Allen, Warren & Kerr by Lindsay C. Warren, Jr., and John H. Kerr, III, for plaintiff appellee.

Herbert B. Hulse and George F. Taylor for defendant appellant.

MALLARD, Chief Judge.

[1] Defendant contends that the trial court committed error in failing to allow his motions for judgment on the pleadings under Rule 12(c) and for summary judgment under Rule 56(b). These contentions are without merit.

The pertinent parts of the statute (G.S. 50-6) under which plaintiff was proceeding in both actions read:

"Marriages may be dissolved and the parties thereto divorced from the bonds of matrimony on the application of either party, if and when the husband and wife have lived separate and apart for one year, and the plaintiff or defendant in the suit for divorce has resided in the State for a period of six months."

This section creates an independent cause of divorce. *Pickens v. Pickens,* 258 N.C. 84, 127 S.E. 2d 889 (1962). It is the law in North Carolina that a spouse may defeat an action of the other spouse for divorce by establishing as an affirmative defense that such spouse was guilty of misconduct which, in itself, would be a ground for divorce. *Hicks v. Hicks,* 275 N.C. 370, 167 S.E. 2d 761 (1969). However, the burden of pleading, as well as establishing such affirmative defense, is on the defendant. G.S. 1A-1, Rule 8(c); *Overby v. Overby,* 272 N.C. 636, 158 S.E. 2d 799 (1968); *Taylor v. Taylor,* 225 N.C. 80, 33 S.E. 2d 492 (1945). "And in order for such a defense to succeed, the person pleading it must prove it with the same character of evidence and the same certainty as if he were setting up a ground for divorce. 1 Lee, North Carolina Family Law, § 88, at 343 (2d ed. 1963); 1 Nelson, Divorce and Annulment, § 10.05, at 366 (2d ed. 1945)." *Hicks v. Hicks, supra.*

The defendant in the case before us did not plead or offer any evidence that the continuing separation of the parties, after the termination of the first divorce action in his favor, was caused by any conduct on the part of the plaintiff which, in itself, would be a ground for divorce. From the silent record in this case, it would appear that both parties impliedly acquiesced in their continued separation after the termination of the first divorce action in defendant's favor. The parties, according to the evidence, did not live together as husband and wife after the original separation on 12 June 1967, and insofar as is revealed by this record, the defendant has not supported the plaintiff since the termination of the first divorce action in his favor, and no effort appears to have been made at a reconciliation. While the defendant was entitled to allege in the pleadings in the case now before us and prove at the trial facts which would be a bar to plaintiff's divorce, he failed to do either and relied solely on his plea of res judicata. *Pickens v. Pickens, supra.* See also, Annot., 14 A.L.R. 3d 502, 510 (1967), and Annot., 166 A.L.R. 498 (1947).

The verdict of the jury at the trial in June, 1969 did not establish that the plaintiff was guilty of any criminal conduct or unlawful abandonment of the defendant. The recriminatory allegation in the defense to the first divorce case was that plaintiff "abandoned the defendant by leaving a note saying, 'I am gone.'" This is not an allegation of a criminal act. The jury found that the separation on 12 June 1967 was brought about by "the fault of" the plaintiff and did not specifically find that plaintiff was guilty of any criminal conduct or that she had unlawfully abandoned the defendant. We hold that the trial court did not commit error in denying defendant's motions for judgment on the pleadings and for summary judgment.

[2, 3] Defendant also contends that the trial court committed error in refusing to allow his plea of res judicata. In doing so, defendant contends that the stigma of the original "fault" of the plaintiff, as found by the jury in the 1969 trial, is sufficient to forever bar an action by plaintiff against defendant for a divorce on the grounds of separation. Under the circumstances of this case, we do not agree.

The first action for divorce by this plaintiff terminated on 19 June 1969 in defendant's favor because the plaintiff was found by the jury to have been "at fault" on the occasion of the separation on 12 June 1967. The separation alleged in the case

at bar is one existing or continuing on and after 19 June 1969, subsequent to the termination of the first divorce case.

In *Shaw v. Eaves,* 262 N.C. 656, 138 S.E. 2d 520 (1964), it is said:

> " * * * In order for a judgment to constitute *res judicata* in a subsequent action there must be identity of parties, subject matter, issues and relief demanded, and it is required further that the estoppel be mutual. *Light Co. v. Insurance Co.,* 238 N.C. 679, 79 S.E. 2d 167, *Stansel v. McIntyre,* 237 N.C. 148, 74 S.E. 2d 345; *Cameron v. Cameron,* 235 N.C. 82, 68 S.E. 2d 796; *Leary v. Land Bank,* 215 N.C. 501, 2 S.E. 2d 570. In order for a party to be barred by the doctrine of *res judicata,* it is necessary not only that he should have had an opportunity for a hearing but also that the identical question must have been considered and determined adversely to him. *Crosland-Cullen Co. v. Crosland,* 249 N.C. 167, 105 S.E. 2d 655. * * * "

The doctrine of res judicata has been held to apply to divorce actions as well as other civil actions. *Garner v. Garner,* 268 N.C. 664, 151 S.E. 2d 553 (1966). In order for the doctrine of res judicata to apply, there must be "identity of parties, subject matter, issues and relief demanded, and it is required further that the estoppel be mutual." In this case the parties, the subject matter insofar as it relates to obtaining a divorce on the grounds of separation, and the relief demanded, to-wit, an absolute divorce, are identical to those in the first divorce action, but the issues are not the same. In this case no issue was raised in the pleadings or evidence as to the question of recrimination. The issues as to the time of residence, as well as to the period of separation, were different in the two cases. We hold that the trial court did not err in denying defendant's plea of res judicata.

We have examined all of defendant's assignments of error and are of the opinion that the defendant has had a fair trial free from prejudicial error.

Affirmed.

Judges BROCK and BRITT concur.

STATE OF NORTH CAROLINA v. JESSE COLBERT SMITH, JR.

No. 728SC666

(Filed 20 December 1972)

1. **Homicide § 21— involuntary manslaughter — sufficiency of evidence**

The State's evidence was sufficient to be submitted to the jury on the issue of defendant's guilt of involuntary manslaughter where it tended to show that deceased and another were looking at a junked automobile in a field, that defendant was planting corn in an adjacent field and obtained his high-powered rifle to shoot at blackbirds, that defendant had earlier seen someone around the old car, that defendant aimed the rifle at the car and fired a shot, and that the bullet penetrated a bumper and fender of the car and struck deceased in the head.

2. **Criminal Law § 75— statements to officer at crime scene — failure to give defendant constitutional warnings**

The trial court did not err in allowing an officer to testify as to statements made to him by defendant before defendant was warned of his constitutional rights where the statements were made at the crime scene in answer to the officer's general question to determine what he was to investigate, and there was no objection to the testimony at the trial.

APPEAL by defendant from *Cowper, Judge,* 21 February 1972 Session of Superior Court held in GREENE County.

Defendant was charged in a bill of indictment, proper in form, with the felony of murder. He was placed upon trial on the lesser included offense of second degree murder, and was convicted of involuntary manslaughter.

The State's evidence tended to show the following:

On 16 April 1971 Johnny Smith, the deceased, and a companion, Roosevelt Wilkes, were working on a farm. They decided to look over a "junked" Cadillac automobile which was located in the edge of a field on defendant's father's land on the other side of a small patch of woods from where they were working. Deceased and his companion walked through the woods and out into the edge of the field to the "junked" automobile. They raised the hood to look at the size of the engine. Then deceased sat down in the driver's seat while Roosevelt stood beside the driver's door. Roosevelt looked across the top of the car and saw defendant prop a rifle against the clothesline post in defendant's father's yard and point the rifle towards Roosevelt and deceased. Roosevelt told deceased to "look out that someone

had a rifle pointed at us." Roosevelt and deceased "jumped down" beside the car. Deceased crawled to the rear of the car and peeped out. "When he peeped out there, he told me they still had the rifle and he told me not to run. Then he looked back out of the back of the car, and I heard something go pow, and Smith fell and groaned. I called him three times and he didn't answer me. He was lying back of the car." Roosevelt ran back through the woods and had someone call the rescue squad.

At the time in question, defendant was helping his father to plant corn in a field adjacent to the field in which the "junked" Cadillac automobile was located. Defendant observed some blackbirds scratching in the field where they had sowed corn. He went into his father's house and secured his 30.06 caliber rifle. The rifle was equipped with a telescopic sight. The "junked" automobile was two hundred and thirty seven yards from defendant's father's house and the blackbirds were about eight yards from the automobile. Defendant earlier had seen someone around the old car. Defendant propped the rifle on the clothesline post and fired one shot at the blackbirds. The birds flew away and shortly thereafter he saw someone run from the car to the woods. Defendant called his father and told him "something was wrong down there around the car, and he thought they should go down to the car and see if anything was wrong." Defendant and his father went to the car and found Johnny Smith; he had been hit in the head by the rifle bullet. The projectile had penetrated the bumper and fender before striking deceased.

Defendant's evidence tended to show the following:

On the day in question, defendant was helping his father plant corn. Some blackbirds were in the field scratching where corn had been sowed and defendant took his 30.06 caliber rifle from the house to shoot at them. Defendant had not seen anyone around the "junked" automobile and had no idea anyone was there. The blackbirds were across the ditch from the field in which the "junked" car was located. Defendant propped the rifle against the clothesline post and fired one time at the blackbirds. A short time after that he saw someone run from the car and he called his father to go with him to check the other end of the field. "I told him I had seen someone leave from that area around the car." When defendant and his father

reached the car they saw deceased lying there. That was the first time defendant had seen the deceased.

From his conviction, defendant appealed.

Attorney General Morgan, by Associate Attorney General Haskell, for the State.

Turner & Harrison, by Fred W. Harrison, for the defendant.

BROCK, Judge.

[1] Defendant assigns as error the denial of his motion for nonsuit. It is defendant's contention that, although he fired the rifle intentionally, he did not aim it at the deceased. Clearly, the State's evidence tends to show that defendant aimed the rifle at the car whether he intentionally aimed it at the deceased or not. Also, the State's evidence tends to show that defendant saw someone around the old car before he fired the shot.

A rifle which fires a projectile at sufficient velocity to penetrate a bumper and fender at two hundred and thirty seven yards distance and still strike a person with sufficient force to penetrate his skull, is clearly a high-powered rifle. It seems absurd to have fired such a weapon at a mere blackbird. Defendant's protestations now, that he had never fired the rifle before and did not know much about it, seem to emphasize a careless and reckless use of the rifle.

"Any careless and reckless use of a loaded gun which jeopardizes the safety of another is unlawful, and if death results therefrom it is an unlawful homicide." *State v. Brooks,* 260 N.C. 186, 132 S.E. 2d 354. "The unlawful killing of a human being, unintentionally and without malice, proximately resulting from some act done in a culpably negligent manner, when fatal consequences were not improbable under the existing circumstances, supports a verdict of guilty of involuntary manslaughter." *State v. Curtis,* 7 N.C. App. 707, 173 S.E. 2d 613.

Defendant next assigns as error that the investigating officer was allowed to testify as to statements made by defendant. Defendant contends he was not advised of his rights before making the statements.

[2] The officer testified that when he arrived at the scene there were a lot of folks standing around. He knew defendant

and asked him what happened. "He said he was shooting a rifle at some birds, and the bullet hit the ground, ricocheted, and hit a man. He said that prior to firing the rifle he had seen some people around the old car. He told me the rifle was a 30.06, and he went and got it for me." The record discloses no objection to the testimony, but in any event it was a general question to determine what the officer was to investigate. Defendant was not a suspect nor was he being interrogated. Immediately thereafter, and before any interrogation, the officer testified that he advised defendant of his rights and took him to the office for further questioning. Defendant was not arrested, but, with defendant's consent, was lodged in jail for the night for defendant's protection. After further investigation, defendant was charged with murder and placed under arrest. The record discloses that no objection was made during the officer's recitation of what defendant stated to him. It seems that at trial defendant was satisfied that he had been sufficiently warned of his rights. This assignment of error is overruled.

Defendant strenuously argues that a discrepancy between the officer's notes as to what defendant stated and the officer's testimony as to what defendant stated entitled him to a new trial. This discrepancy was fully brought out by defendant and was considered by the jury. It was for the jury to determine which version of defendant's statements it would believe.

We have examined defendant's remaining assignments of error and find them to be without merit. In our opinion defendant had a fair trial and the case was submitted to the jury upon appropriate principles of law.

No error.

Chief Judge MALLARD and Judge BRITT concur.

ANTHONY TILE AND MARBLE COMPANY, INC. v. H. L. COBLE CONSTRUCTION COMPANY, AND HOWARD F. SHARPE, TRADING AS SHARPE & COMPANY

No. 7226SC768

(Filed 20 December 1972)

1. **Contracts § 18— modification of contract**

Parties to a contract may, by mutual consent, agree to change its terms, but to be effective as a modification, the subsequent agreement must possess all the elements necessary to form a contract.

2. **Contracts § 18— modification of contract — burden of proof**

Where plaintiff admitted in its complaint that it failed to procure a performance bond within the time required by the original contract between the parties, it had the burden of proving a modification of the contract extending the time for procuring the bond by clear and convincing evidence.

3. **Contracts § 18— modification of contract — failure of consideration**

Alleged modification of an executory contract extending the time within which plaintiff could furnish a performance bond was unsupported by consideration and was therefore unenforceable.

4. **Contracts § 4— consideration — act promisor is already obligated to perform**

A promise to perform an act which the promisor is already bound to perform is insufficient consideration for a promise by the adverse party.

APPEAL by defendant H. L. Coble Construction Company from *Friday, Judge,* 17 April 1972 Schedule "A" Civil Session of MECKLENBURG Superior Court.

Civil action by plaintiff to recover damages for breach of contract. Plaintiff alleged in its complaint that on or about 27 August 1969, plaintiff and defendant H. L. Coble Construction Company (Coble) entered into an express executory contract under the terms of which plaintiff agreed to supply and install tile for a low rent housing project of which Coble was the prime contractor at an agreed price of $74,000. Plaintiff further alleged that it dutifully performed the conditions precedent to said agreement except the procurement of a performance bond, and that Coble through its agent, A. D. Shackelford, expressly informed plaintiff on 4 November 1969, that it could have additional time within which to provide the performance bond which was actually delivered to Coble on 6 November 1969. It was also alleged that Coble failed and neglected to perform

its contract with plaintiff corporation and contracted with another party for the supply and installation of the tile in the low rent housing project.

As to defendant Sharpe, plaintiff alleged that Sharpe failed to procure the performance bond on time in derogation of their contract thereby forcing plaintiff to obtain a bond through another party which was delivered to and refused by Coble on 6 November 1969; and that Sharpe's failure to procure the bond was the sole and proximate cause of plaintiff losing its contract with Coble. At trial, the court granted defendant Sharpe's motion for directed verdict at the close of plaintiff's evidence and defendant Sharpe is not involved in this appeal.

Defendant Coble's motion for a directed verdict at the close of plaintiff's evidence was overruled as was his renewal of that motion after electing not to present any evidence.

The case was submitted to the jury which found the following: That plaintiff and defendant Coble entered into a contract on 28 August 1969 which required plaintiff to furnish a performance and materials payment bond within 10 days; that plaintiff and defendant Coble thereafter modified and extended the 10-day requirement; and that defendant Coble willfully failed to abide by the terms and conditions of the modification and extension of the 10-day requirement. From a judgment awarding plaintiff $7,000 in damages, defendant Coble appealed.

Paul L. Whitfield for plaintiff appellee.

Warren C. Stack for defendant appellant.

MORRIS, Judge.

Defendant Coble assigns as error the trial court's failure to grant his motions for directed verdict and asserts among his contentions that there was insufficient consideration to support any modification extending the time required to secure a performance and materials payment bond under the agreement of 28 August 1969.

[1] Parties to a contract may by mutual consent agree to change its terms and a written contract may ordinarily be modified by a subsequent parol agreement and such subsequent agreement may be either express or implied by conduct of the parties. But to be effective as a modification, the subsequent

agreement, whatever its form and however evidenced must possess all the elements necessary to form a contract. *Electro Lift v. Equipment Co.*, 4 N.C. App. 203, 166 S.E. 2d 454 (1969), cert. denied 275 N.C. 340 (1969).

[2] Since plaintiff admits in its complaint that it failed to procure the bond within the 10 days required by the original agreement, it has the burden of proving the subsequent modification allegedly extending the period in which to procure the required bond. *Russell v. Hardwood Co.*, 200 N.C. 210, 156 S.E. 492 (1931).

Furthermore, evidence of an oral agreement that modifies a written contract should be clear and convincing. *Credit Co. v. Jordan*, 5 N.C. App. 249, 168 S.E. 2d 229 (1969) ; see also Annot., 94 A.L.R. 1278, at p. 1280 (1935).

Charles Marus, President of plaintiff company, offered testimony that in substance tends to show the following:

Under the agreement of 28 August 1969, subcontract No. 4045, plaintiff company was to execute and return five copies of subcontract No. 4045 to Coble within 10 days as well as obtain a performance and materials bond within the same period and deliver it to defendant. The five executed copies of the subcontract were sent to defendant on 23 September 1969.

Starting about the first of October 1968, Marus had several conversations with A. D. Shackelford, Vice-President of defendant Coble, and informed him that plaintiff was using the services of Mr. Howard Sharpe to obtain the bond. Shackelford stated to him that he knew Sharpe and felt he was a little slow in handling affairs but he did not object to defendant using him to procure the bond. On Friday, 31 October 1969, he received a telephone call from Mr. Shackelford informing him that he would have to have the bond by Monday, 3 November 1969. Marus advised Shackelford that it would be impossible to get any action over the weekend and made arrangements that same day to procure bond through another source. Later that same day he telephoned Shackelford and told him that the bond would be forthcoming the first of the week and that Shackelford's response was that, "that was good, just get it to me." On 3 November 1969 Marus received a telephone call from Shackelford asking why he had not received the bond to which Marus replied that it was on the way and would be delivered not later than 6 November 1969. In the same conversation

Shackelford advised him "to hurry up and get the bond." That same day, 3 November 1969, Marus received a telegram from Coble demanding the bond by 9:30 a.m. the next day or their negotiations would be null and void. On 4 November 1969, Marus received another telegram from Coble stating that it had not received the bond as of 9:30 a.m. and that all negotiations were hereby declared null and void. Marus then testified that he delivered the bond on 6 November 1969. On 7 November 1969, Marus received a letter from Mr. Shackelford reconfirming the telegram of 4 November declaring the negotiations at an end.

A. D. Shackelford was called as a witness by plaintiff and testified that on 31 October 1969 he telephoned Charles Marus and informed him that they had been talking about the bond for about two months and since the project had reached the critical stage, some action had to be taken. He further testified that he told Marus that if the bond was not in his office by 10:00 a.m., Monday, 3 November 1969, he would contract with someone else to do the tile work. He further stated that on 3 November 1969 defendant company sent plaintiff a telegram demanding the bond by 9:30 a.m. the next day and when no bond was forthcoming, a telegram was sent to plaintiff on 4 November declaring all negotiations between the parties null and void. Shackelford then stated that Coble entered into a contract with another company who completed the tile work involved in the project.

As stated above, to be effective as a modification, a new agreement must possess all elements necessary to form a contract. Certainly, consideration is as much a requisite in effecting a contractual modification as it is in the initial creation of a contract.

Plaintiff contends that since the 28 August agreement was still executory with obligations remaining to be performed on both sides, no additional consideration was required for any modification. We do not agree.

As to executory contracts, it is generally held that "[A] modification can be nothing but a new contract and must be supported by a consideration like every other contract." 17 Am. Jur. 2d, Contracts, § 469, p. 939. Accord. 6 Corbin on Contracts, §§ 1293-1294. See also 39 Cor. L.Q. 114 (1953) and 52 Mich. L.Rev. 909 (1954).

In support of its position plaintiff cites the following in its brief:

> "Any executory contract which is bilateral in the advantage and obligations given and assumed may at any time after it has been made and before a breach thereof has occurred be changed or modified in one or more of its details by a new agreement also bilateral by the mutual consent of the parties without any other consideration. 17 Am. Jur. 2d, Contracts, § 469, p. 941."

[3, 4] While we agree with the basic soundness of the above principle as to the requisite sufficiency of consideration needed to support a modification, plaintiff has failed to show any modification that is indeed bilateral. Under the alleged modification, plaintiff incurred no new obligations or duties. No detriment was to be suffered by plaintiff nor new benefit to be received by defendant. Assuming mutual consent of the parties to the modification, only the time period in which to procure the bond was changed. Plaintiff simply promised to perform what it was obligated to do under the 28 August agreement. It is generally established that a promise to perform an act which the promisor is already bound to perform is insufficient consideration for a promise by the adverse party. *Sinclair v. Travis*, 231 N.C. 345, 57 S.E. 2d 394 (1950). 1 Williston on Contracts, 3d Ed., § 130.

For the reasons expressed above, we feel that the alleged modification was unsupported by a sufficient consideration and that the trial court erred in failing to grant defendant Coble's motion for directed verdict.

Reversed.

Judges CAMPBELL and PARKER concur.

STATE OF NORTH CAROLINA v. TOMMY ROY GREGORY

No. 728SC843

(Filed 20 December 1972)

1. **Criminal Law § 84— warrantless search of vehicle — probable cause — consent**

The trial court did not err in the admission of evidence obtained as a result of a search of a truck driven by defendant where the *voir dire* evidence supported the trial court's determination that officers had probable cause to search the truck for stolen property, and uncontradicted *voir dire* evidence disclosed that the defendant gave officers permission to search the truck.

2. **Criminal Law § 76— admission of confession — failure to hold voir dire**

The trial court erred in the admission of defendant's confession over objection without conducting a *voir dire* hearing to determine whether the confession was voluntarily and understandingly made by defendant after he had been fully advised of his constitutional rights.

ON *certiorari* to review the trial of defendant before *Cowper, Judge,* and a jury, 22 May 1972 Session of Superior Court held in WAYNE County.

Defendant, Tommy Roy Gregory, was charged in separate bills of indictment, proper in form, with: (1) felonious breaking and entering, larceny and receiving of personal property from the home of W. Howard Johnson, Route 2, Goldsboro, and (2) felonious breaking and entering and larceny of personal property from the Girl Scout Council of Coastal Carolina, Inc., Route 2, Dudley. Upon defendant's pleas of not guilty, the State offered evidence tending to show that on the night of 12 March 1972 the home of W. Howard Johnson (Johnson) was broken into and an avocado colored refrigerator-freezer, color television, and black and white television were stolen. A white 1968 Frigidaire refrigerator, property of the Girl Scout Council of Coastal Carolina, Inc., was stolen from a locked building at Camp Trailee, Route 2, Dudley on 12 March 1972.

Rayburn Brown, a neighbor of Johnson, testified that while returning home on 12 March 1972 between the hours of 7:30 and 8:00 p.m. he observed a six wheel U-Haul truck about two miles from his home "with a car behind it flashing its lights on and off." Soon after his arrival at home, Brown noticed that a six wheel U-Haul truck had stopped in front of his home. Two men with long hair and not wearing shirts got out of the

truck and walked "back down the highway" toward the Johnson home. Brown took a flashlight and walked behind his home and shined the light in the direction of the Johnson residence; whereupon, the two men "jumped and ran back toward the truck and got in the truck and left." After walking to the Johnson home and finding a "mess under the carport" and ascertaining that a refrigerator had been removed from the Johnson home, Brown got into his automobile and attempted, without success, to catch the truck. Brown then returned home and telephoned Johnson to inform him of what had transpired.

Jeffrey Davis, who lives about one quarter mile from the Johnson home, testified that shortly after 9:00 p.m., 12 March 1972, he answered a ring of the doorbell and saw "two boys," one of whom he identified as defendant, standing on the front porch of his home. Davis stated that these males did not have shirts on and described their hair as being "kind of long." Davis testified: "They asked me did John Andrews live at my house because they said someone told them he lived there. I told them that he didn't." While conversing with these males Davis noticed that a six wheel Ford U-Haul truck bearing Virginia license plates was parked in his driveway. Davis stated: "When the truck left my driveway it headed toward Mr. Johnson's home." About 9:30 p.m., Davis related this information to Deputy Sheriff Kenneth Pennington of Wayne County.

Pennington, responding to a call, went to the Johnson residence at about 8:30 p.m., 12 March 1972, to investigate the reported breaking and entering. Upon seeing the broken glass in the kitchen door and getting a description of the stolen property, Deputy Sheriff Pennington spoke with Brown and Davis who described the U-Haul truck and the two males whom they had seen. While on patrol, later that night, Pennington spotted two males with long hair driving a truck matching the description given to him by Brown and Davis and after following the truck for a short distance, he turned on his blue light and the driver of the truck stopped in a parking lot. Pennington radioed for assistance, then approached the vehicle and asked defendant, the driver, for identification.

After receiving permission from the defendant and his companion to search the truck, the officers found in the truck various items of household and kitchen furniture including an avocado colored refrigerator-freezer and black and white television, subsequently identified as belonging to Johnson, and a

white 1968 Frigidaire refrigerator, subsequently identified as belonging to the Girl Scout Council of Coastal Carolina, Inc.

Defendant offered no evidence and was found guilty of felonious breaking and entering and larceny from the Girl Scout Council of Coastal Carolina, Inc., and from W. Howard Johnson. From judgments imposing concurrent prison sentences of 10 years, defendant appealed.

Attorney General Robert Morgan and Assistant Attorney General William F. Briley for the State.

Herbert B. Hulse and George F. Taylor for defendant appellant.

HEDRICK, Judge.

[1] Defendant assigns as error the court's denial of his motion to suppress the evidence obtained as a result of a search of the Ford U-Haul truck. The court conducted a *voir dire* hearing in the absence of the jury regarding all of the circumstances concerning the search of the vehicle and after hearing testimony from Rayburn Brown, Jeffrey Davis, and Deputy Sheriff Pennington of Wayne County (defendant offered no evidence) the court made detailed findings of fact and concluded that the officers had probable cause to stop and search the vehicle. Such findings, when supported by competent evidence, are binding on appellate courts. *State v. Pike,* 273 N.C. 102, 159 S.E. 2d 334 (1968). There was plenary competent evidence to support the trial judge's findings of fact, which support his conclusion. Moreover, uncontradicted evidence adduced on *voir dire* disclosed that the search was made after permission had been given by the defendant. One's consent to a search made by officers of the law dispenses with the necessity of a search warrant and that person may not thereafter contend that the lawfully obtained fruits of that search were not properly admitted into evidence. *State v. Grant,* 279 N.C. 337, 182 S.E. 2d 400 (1971); *State v. Virgil,* 276 N.C. 217, 172 S.E. 2d 28 (1970); *State v. Blackburn,* 6 N.C. App. 510, 170 S.E. 2d 501 (1969). The failure of the trial judge to make findings as to whether permission was given for the search, in the absence of conflicting evidence, is not fatal. *State v. Lynch,* 279 N.C. 1, 181 S.E. 2d 561 (1971); *State v. Basden,* 8 N.C. App. 401, 174 S.E. 2d 613 (1970).

There was plenary competent evidence to require submission of this case to the jury and the defendant's motion for judgment as of nonsuit was properly denied.

[2] Defendant assigns as error the court's allowing into evidence, over his objection, in-custody statements made by defendant to Deputy Sheriff Davis. When the State offered as substantive evidence in-custody statements allegedly made by the defendant to Deputy Sheriff Davis, defense counsel objected, stating: "[T]he defendant was in custody. He knew at the time he wanted an attorney." The trial judge overruled the objection without conducting a *voir dire* hearing and the witness was allowed to testify that the defendant told him that "he would talk to me now but he would wait and let the Court appoint him a lawyer." The witness then related that defendant told him that on 12 March 1972 he was helping his brother-in-law, Acie West, move to Virginia, stopped the U-Haul truck near the Johnson home, "went into the back door, broke the window in the door, opened the door and went in . . . . [T]hey got the avocado refrigerator, a portable television and a color television." After leaving the Johnson house they went to the home of defendant's sister to eat, then went to Camp Trailee "where they opened the back window or sash door that covers the window, went in the window and got a white refrigerator located in the building there, loaded it and went back to West's house. . . . " Deputy Sheriff Davis testified that defendant told him "they were going to try to sell the items that they got from Mr. Johnson's home and Camp Trailee."

We are of the opinion and so hold that while inculpatory in-custody statements attributed to a defendant are admissible over objection for the purpose of contradicting and impeaching his testimony before the jury, *State v. Bryant,* 280 N.C. 551, 187 S.E. 2d 111 (1972), such statements when offered by the State as substantive evidence and objected to by defendant are not admissible until after a *voir dire* hearing in the absence of the jury, the court, based upon sufficient evidence, makes factual findings that such statements were voluntarily and understandingly made by the defendant after he had been fully advised as to his constitutional rights. *State v. Catrett,* 276 N.C. 86, 171 S.E. 2d 398 (1970). Since these requirements were not met in the conduct of the instant trial, prejudicial error is made to appear.

We do not pass upon appellant's remaining assignments of error since the questions posed thereby may not arise upon

a second trial. For the error noted above, defendant is entitled to a

New trial.

Judges VAUGHN and GRAHAM concur.

ANALYTICAL INDEX

WORD AND PHRASE INDEX

ANALYTICAL INDEX

Titles and section numbers in this index, e.g. Appeal and Error § 1, correspond with titles and section numbers in N. C. Index 2d.

TOPICS COVERED IN THIS INDEX

ACCOUNTS

§ 1. Running Accounts

Trial court properly entered partial summary judgment in action on mutual running account where there was no genuine issue with respect to defendant's indebtedness. *Patrick v. Hurdle*, 28.

APPEAL AND ERROR

§ 6. Judgments and Orders Appealable

Court treated defendant's appeal from entry of partial summary judgment as petition for certiorari. *Patrick v. Hurdle*, 28.

Plaintiff could appeal as aggrieved party where the verdict as to damages was set aside as a matter of law. *Bowden v. Rental Co.*, 70.

Order denying motion to dismiss a complaint seeking disciplinary action against an attorney and denying a request for a jury trial is interlocutory and not subject to appeal. *In re Bonding Co.*, 272.

§ 24. Assignments of Error in General

Exceptions are deemed abandoned when assignments of error are not brought forward in appellant's brief. *Shamel v. Shamel*, 65.

Assignments of error not based on exceptions duly noted in the record are ineffectual. *Davenport v. Indemnity Co.*, 572.

§ 28. Assignments of Error to Findings of Fact

Defendant's broadside exceptions to findings of fact, conclusions of law and judgment entered thereon did not bring up for review the findings of fact or evidence on which they were based. *Davenport v. Indemnity Co.*, 572; *Aiken v. Collins*, 504.

§ 30. Objections to Evidence

Evidence not objected to is properly considered by the court even though it is incompetent and should have been excluded had objection been made. *Braswell v. Purser*, 14.

Plaintiff waived objection to testimony where same testimony was subsequently allowed into evidence without objection. *McNeil v. Williams*, 322.

§ 39. Docketing Record on Appeal

Trial court could not enter a valid order extending time for docketing the record on appeal after the original time for docketing had expired. *Reap v. Albemarle*, 171.

§ 42. Presumptions regarding Matters Omitted from Record on Appeal

Appellate court will presume trial judge acted within his discretion on evidence showing good cause in vacating an entry of default where evidence was not brought forward in record on appeal. *Crotts v. Pawn Shop*, 392.

§ 49. Error in Exclusion of Evidence

Plaintiff was not prejudiced by exclusion of a medical bill where the jury did not reach the issue of damages. *Long v. Clutts*, 217.

ARREST AND BAIL — Continued

§ 9. Right to Bail

Trial court acted within its discretion in revoking defendant's bail out of the jury's presence after the State had rested its case. *S. v. Hanford*, 353.

Trial court did not abuse its discretion in setting appearance bonds of $50,000 for each of two defendants and $25,000 for a third defendant pending their appeals from convictions of felonious burning, or in requiring defendants to abide by certain conditions in order to post bonds in lesser amounts. *In re Reddy*, 520.

§ 11. Liabilities on Bail Bonds

Chief district court judge's order forbidding appellants from executing bail bonds, entered without notice and hearing, is void. *In re Bonding Co.*, 649.

ASSAULT AND BATTERY

§ 5. Assault with a Deadly Weapon

Facts shown were sufficient to constitute assault with a deadly weapon where defendant fired at a vehicle but none of the shotgun pellets penetrated into the interior of the vehicle. *S. v. Snipes*, 416.

§ 13. Competency of Evidence

Evidence of Black Panther magazine and daily reports of defendants was admissible in felonious assault prosecution to show motive. *S. v. Jennings*, 205.

§ 15. Instructions

Jury instruction on battery was proper. *Ormond v. Crampton*, 88.

Failure of trial court to read indictments of each defendant in full during jury instructions did not constitute prejudicial error. *S. v. Jennings*, 205.

Trial court's instruction on self-defense was proper. *S. v. Douglas*, 597.

Where defendant's entire defense was his contention that the shooting was accidental, defendant was entitled to an instruction thereon without a special request. *Ibid.*

ATTORNEY AND CLIENT

§ 10. Disbarment Procedure

There are two methods by which disciplinary action or disbarment may be imposed upon attorneys—statutory and judicial. *In re Bonding Co.*, 272.

Complaint alleged sufficient facts to subject an attorney to disciplinary action or disbarment for attorney's action in drunken driving case in which the warrant, bond and shuck file disappeared from the clerk's office. *Ibid.*

An attorney does not have the right to a trial by jury in a judicial disciplinary or disbarment proceeding. *Ibid.*

AUTOMOBILES

§ 19. Right of Way at Intersections

Trial court properly instructed jury on duty of driver on the left to yield right of way at intersection. *Hathcock v. Lowder,* 255.

Driver of fire truck is not relieved from standard of due care. *City of Winston-Salem v. Rice,* 294.

§ 23. Brakes

Violation of a statute requiring motorists to maintain automobile brakes in good working order is negligence per se. *Tate v. Bryant,* 132.

§ 44. Presumptions and Burden of Proof

Doctrine of res ipsa loquitur was inapplicable in action involving one-car accident where there was evidence that the car left the road when it struck a wet spot in the road. *Lewis v. Piggott,* 395.

§ 45. Relevancy and Competency of Evidence

Evidence that defendant entered a plea of guilty to a traffic offense arising out of the same collision in which plaintiff sustained injuries was admissible in plaintiff's civil action for damages. *Teachey v. Woolard,* 249.

§ 50. Nonsuit on Issue of Negligence in General

Trial court properly denied one defendant's motion to dismiss personal injury action against him where evidence tended to show that negligence of both defendants in operating their vehicles caused plaintiff's injury. *Ramsey v. Ramsey,* 614.

§ 54. Sufficiency of evidence as to Passing on Right

Evidence was sufficient to withstand nonsuit in action for personal injuries and property damage where it tended to show that defendant wrongfully passed a vehicle on the right. *Teachey v. Woolard,* 249.

§ 57. Sufficiency of Evidence as to Yielding Right of Way

Trial court properly instructed jury on duty of driver on the left to yield right of way at intersection. *Hathcock v. Lowder,* 255.

§ 68. Sufficiency of Evidence as to Operating Defective Vehicle

Plaintiff's evidence was sufficient to be submitted to the jury on the issue of defendant's negligence in operating her automobile with defective brakes. *Tate v. Bryant,* 132.

§ 72. Sufficiency of Evidence as to Sudden Emergency

Trial court properly refused to charge the jury on doctrine of sudden emergency where defendant's conduct contributed to whatever emergency arose. *Bryant v. Winkler,* 612.

§ 88. Sufficiency of Evidence of Contributory Negligence

Trial court properly granted directed verdicts in automobile collision case where evidence showed both plaintiff and defendant guilty of contributory negligence as a matter of law. *Dawkins v. Benton,* 58.

Instruction on unreasonably slow speed and submission of issue of plaintiff's contributory negligence were proper. *Fonville v. Dixon,* 664.

AUTOMOBILES — Continued

§ 90. Instructions in Accident Cases

Trial judge's instruction on passing a vehicle on the right was proper. *Teachey v. Woolard,* 249.

§ 91. Issues

Trial court should submit separate issues of damages for personal injuries and damages for injury to property. *Ford v. Marshall,* 179.

§ 110. Assault and Homicide — Culpable Negligence

An unintentional violation of a safety statute, without more, is not culpable negligence. *S. v. Alexander,* 95.

§ 114. Assault and Homicide — Instructions

Trial court erred in manslaughter trial in failing to require jury to find that defendant's manner of driving was proximate cause of the collision. *S. v. Boone,* 368.

Trial court erred in failing to instruct on crossing yellow line of highway. *Ibid.*

§ 126. Relevency of Evidence in Prosecution for Driving under the Influence

Evidence of results of breathalyzer test given four hours after automobile collision was relevant and of probative value. *S. v. Alexander,* 95.

Trial court committed prejudicial error in allowing results of breathalyzer test into evidence without a showing by the State of compliance with statutory requirements in administering test. *S. v. Warf,* 431.

AVIATION

§ 3. Injury to Persons in Flight

In an action for the wrongful death of an airplane passenger, complaint was sufficient to state a claim for relief against the person who arranged for the flight. *Lewis v. Air Service,* 317.

BAILMENT

§ 5. Rights in Regard to Third Persons

Husband was entitled to prosecute claim against carrier for value of contents of lost baggage though portion of contents belonged to his wife. *Neff v. Coach Co.,* 466.

BROKERS AND FACTORS

§ 6. Right to Commissions

Broker was entitled to no compensation for sale of defendant's home by defendant where broker was unable to obtain purchaser pursuant to his agreement. *Aiken v. Collins,* 504.

BURGLARY AND UNLAWFUL BREAKINGS

§ 3. Indictment

Bill of indictment in felonious breaking and entering and larceny case was sufficient where it clearly identified county in which the subject building was located and named the business carried on in the building. *S. v. Shanklin*, 712.

§ 4. Competency of Evidence

Trial court properly admitted list of merchandise found outside building defendants purportedly broke into. *S. v. Harlow*, 312.

§ 5. Sufficiency of Evidence

State's evidence was sufficient to withstand nonsuit in prosecution for breaking and entering and larceny of chain saws and larceny of an automobile. *S. v. Brady*, 365.

State's evidence was sufficient to withstand nonsuit in prosecution for breaking and entering and larceny. *S. v. Peele*, 227.

State's evidence was sufficient to be submitted to the jury on defendant's guilt of breaking or entering a service station. *S. v. DeWalt*, 546.

CANCELLATION AND RESCISSION OF INSTRUMENTS

§ 2. Cancellation for Fraud

Mere fact that a grantor who can read and write signs a deed does not preclude him from showing that he was induced to sign by fraud on the part of the grantee or that he was deceived by grantee's false statements. *Turner v. Weber*, 574.

§ 11. Instructions

In an action to set aside deeds on grounds of fraud and undue influence, trial court committed prejudicial error in instructing the jury that a letter from plaintiffs to defendant created a confidential relationship between the parties as a matter of law. *Cross v. Beckwith*, 361.

CARRIERS

§ 2. State License and Franchise

Applicant for permit to operate as a contract carrier is not required to show a public demand and need for the proposed service. *Utilities Comm. v. McCotter, Inc.*, 475.

Utilities Commission properly granted application for authority to operate as a contract carrier for a boat manufacturer. *Ibid.*

Utilities Commission had authority to grant contract authority although common carrier authority had been requested in the application. *Ibid.*

Applicant's previous unlawful transportation of boats under mistaken belief that no intrastate authority was needed did not require a finding that the applicant is unfit to perform as a contract carrier in this State. *Ibid.*

CONSTITUTIONAL LAW—Continued

§ 20. Equal Protection

Statute and regulations which require that in-state resident status be accorded only to those students who are domiciliaries of N. C. and who have been so domiciled without being enrolled in an institution of higher education for at least 12 months preceding the date of first enrollment or re-enrollment held constitutional. *Fox v. Trustees,* 53.

§ 21. Right to Security in Person and Property

Evidence obtained from a search of defendant's home by an individual was admissibile. *S. v. Peele,* 227.

§ 26. Full Faith and Credit

Trial court erred in finding that child custody order entered in Georgia was not entitled to full faith and credit. *Spence v. Durham,* 372.

§ 30. Due Process

Elapse of four months between commission of offense and issuance of arrest warrant is not unreasonable and prejudicial delay. *S. v. McLawhorn,* 153.

§ 31. Right of Confrontation

Trial court properly allowed into evidence witness's transcribed testimony given at defendant's preliminary hearing where judge's order disclosed good faith effort by the State to secure presence of witness. *S. v. Biggerstaff,* 140.

Trial court did not err in refusing to require State's witness to reveal identity, whereabouts and present status of confidential informer. *S. v. McLawhorn,* 153.

It was not necessary for trial court to conduct a voir dire hearing as to reliability of informant after police officer testified he called State's witness as result of information he received from an informant. *S. v. Young,* 101.

Affiant was not required to reveal identity of alleged narcotics users whom he had seen entering defendant's home. *S. v. McKoy,* 350.

§ 32. Right to Counsel

Trial court erred in failing to determine defendant's indigency and to appoint counsel for him until after he had entered his plea and the jury had been empaneled. *S. v. Moses,* 174.

Failure of defendant's counsel to object at trial to admission of breathalyzer test results does not entitle defendant in a drunken driving case to a new trial. *S. v. Harrell,* 620.

§ 33. Self-Incrimination

Trial court properly ruled that a co-defendant on trial could not be required over his own objection to testify as a witness for defendant. *S. v. Hanford,* 353.

CONSTITUTIONAL LAW—Continued

§ 34. Double Jeopardy

Second trial of defendant for first degree murder after first trial ended in mistrial placed defendant in double jeopardy. *S. v. Allen*, 159.

Defendant was not subjected to double jeopardy in his second trial for second degree murder. *S. v. Holloway*, 266.

An order of mistrial entered upon motion of defendant in an assault case did not support defendant's plea of former jeopardy in a subsequent trial for the same offense. *S. v. Martin*, 609.

§ 36. Cruel and Unusual Punishment

Where punishment does not exceed limits fixed by statute, it cannot be classified as cruel and unusual. *S. v. Broadway*, 167.

CONTEMPT

§ 3. Indirect Contempt

Evidence was insufficient to support conviction of defendants on indirect contempt charge. *S. v. Howell*, 707.

CONTRACTS

§ 4. Consideration

A promise to perform an act which the promisor is already bound to perform is insufficient consideration for a promise by the adverse party. *Tile and Marble Co. v. Construction Co.*, 740.

§ 12. Construction and Operation generally

The phrase, "I will accept a fee paid position only" did not relieve defendant of obligation to pay employment agency stipulated fee in the event defendant left the employment secured him by the agency. *Personnel, Inc. v. Harbolick*, 107.

§ 18. Modification

Alleged modification of an executory contract extending the time within which plaintiff could furnish a performance bond was unsupported by consideration and was therefore unenforceable. *Tile and Marble Co. v. Construction Co.*, 740.

§ 27. Sufficiency of Evidence

Defendant's evidence failed to show he was employed by third party defendant for sufficient length of time to make third party defendant liable for employment agency's fee. *Personnel, Inc. v. Harbolick*, 107.

Summary judgment was properly entered against plaintiff football player who failed to comply with terms of scholarship contract. *Taylor v. University*, 117.

§ 29. Measure of Damages for Breach

Trial court properly refused to award interest on plaintiff's recovery where plaintiff's original claim included "accrued interest." *Credit Corp. v. Ricks*, 491.

CORPORATIONS

§ 11. Estoppel of Corporation by Acts of Officers

By accepting the benefits of a contract executed by its president prior to its corporate existence, a corporation became bound to perform the obligations incident to such a contract. *Beachboard v. Railway Co.*, 671.

§ 25. Contracts

Contract entered in 1905 by predecessor of third-party corporate defendant was binding on the third party defendant. *Beachboard v. Railway Co.*, 671.

COSTS

§ 1. Generally

Plaintiff was entitled to an award of attorney's fees in a suit brought to recover balance due on a conditional sales contract. *Credit Corp. v. Ricks*, 491.

COURTS

§ 7. Appeals to Superior Court

Failure of the district court specifically to determine defendant's guilt would not deprive superior court of jurisdiction where the record showed that there was a trial, a judgment and conviction and notice of appeal. *S. v. Wesson*, 683.

§ 21. Governing Law in Conflict Between Laws of States

Interpretation of a contract executed in Virginia is governed by the laws of that state. *Credit Corp. v. Ricks*, 491.

Pennsylvania law governs the interpretation of a contract entered in that state and the measure of damages for breach of the contract, and N. C. law governs matters of procedure. *Transportation v. Strick Corp.*, 498.

The law of Pennsylvania determined whether plaintiff could recover interest as damages for breach of a contract. *Ibid.*

CRIMINAL LAW

§ 9. Principals

Evidence was insufficient in armed robbery prosecution to convict defendant as principal where the evidence tended to show that defendant was 10 to 15 blocks away from the scene of the crime. *S. v. Wiggins*, 527.

§ 10. Accessories Before the Fact

Distinction between a principal and an accessory before the fact still exists in this State. *S. v. Wiggins*, 527.

§ 18. Jurisdiction on Appeals to Superior Court

Failure of the district court specifically to determine defendant's guilt would not deprive superior court of jurisdiction where the record showed that there was a trial, a judgment and conviction and notice of appeal. *S. v. Wesson*, 683.

CRIMINAL LAW — Continued

§ 21. Preliminary Hearing

Defendants were not entitled to quashal of their indictments on ground that they were denied a preliminary hearing. *S. v. Roberts,* 607.

§ 23. Guilty Plea

Trial court's finding of voluntariness of guilty plea was fully supported by the evidence. *S. v. Thompson,* 62.

Defendant's appeal from voluntary guilty plea presents for review only whether indictment charged an offense punishable under the Constitution and law. *Ibid; S. v. Snipes,* 416.

Defendant was not prejudiced by questions with respect to influence exerted over him to obtain his guilty plea. *S. v. Chrisco,* 157.

Acceptance of guilty plea will not be disturbed on appeal where record supports trial court's findings that plea was made voluntarily and understandingly. *S. v. Wyatt,* 626; *S. v. Shepherd,* 643; *S. v. Absher,* 633.

§ 26. Plea of Former Jeopardy

Jeopardy attaches when defendant is placed on trial on a valid indictment or information, before a court of competent jurisdiction, after arraignment and plea, and when a competent jury has been impaneled. *S. v. Allen,* 159.

Defendant was not subjected to double jeopardy in his second trial for second degree murder. *S. v. Holloway,* 266.

An order of mistrial entered upon motion of defendant in an assault case did not support defendant's plea of former jeopardy in a subsequent trial for the same offense. *S. v. Martin,* 609.

§ 30. Pleas of the State

Defendant was not prejudiced where nolle prosequi had been entered against the prosecuting witness in another action charging him with an offense arising from the same incident which gave rise to the charge against defendant. *S. v. Williams,* 422.

§ 32. Presumptions

Statutory provision that possession of more than five grams of marijuana shall be prima facie evidence of possession for sale does not deprive defendants of presumption of their innocence nor relieve the State from burden of proving guilt beyond reasonable doubt. *S. v. Garcia,* 344.

§ 33. Facts Relevant to Issues in General

Evidence of Black Panther magazine and daily reports of defendants was admissible in felonious assault prosecution to show motive. *S. v. Jennings,* 205.

Although defendant's motion for a bill of particulars had been denied upon the solicitor's statement that the State would rely on the theory of the case as disclosed in the preliminary hearing, trial court did not err in admission of testimony not presented at the preliminary hearing. *S. v. Hanford,* 353.

CRIMINAL LAW — Continued

§ 34. Evidence of Defendant's Guilt of other Offenses

Evidence that defendant charged with robbery told his victim shortly before the taking that he had "just shot a man" was relevant as showing a design on the part of the defendant to put his victim in fear. *S. v. Lassiter*, 377.

§ 40. Evidence at Former Proceeding

Trial court properly allowed into evidence witness's transcribed testimony given at defendant's preliminary hearing where judge's order disclosed good faith effort by the State to secure presence of witness. *S. v. Biggerstaff*, 140.

§ 42. Articles Connected with Crime

Trial court properly permitted the witness to testify that defendant offered to sell her two rings which victim testified were taken from her by defendant. *S. v. Young*, 101.

A wire allegedly used to gain entry to a locked automobile was sufficiently identified for admission into evidence. *S. v. Morehead*, 181.

Trial court properly allowed testimony as to the condition of a pistol found on the body of deceased in a murder prosecution. *S. v. Jefferies*, 235.

§ 43. Photographs and Motion Pictures

Trial judge properly instructed jury to consider motion picture belonging to defendant for purposes of corroboration. *S. v. Alexander*, 95.

Trial court's admission of photograph into evidence without limiting instruction was proper. *S. v. Holloway*, 266.

§ 50. Expert and Opinion Testimony

Investigating officer was properly allowed to give his opinion as to cause of death in murder trial. *S. v. Starnes*, 357.

Lay witness was properly allowed to give opinion as to emotions displayed by the prosecuting witness. *S. v. Higgens*, 434.

Trial court properly excluded testimony by defendant's witness regarding his opinion that blackjack was a game of skill, since the question of whether the game was one of chance or of skill was a question for the jury. *S. v. Eisen*, 532.

§ 51. Qualification of Experts

Trial court properly allowed State's witness to give his opinion that vegetable matter was marijuana though the court made no specific finding that the witness was an expert. *S. v. Hicks*, 635.

State's witnesses could give opinions on the issue of obscenity without specific finding by the court that they were experts. *S. v. Bryant*, 456.

§ 53. Medical Expert Testimony

Testimony of an expert as to his opinion of the cause of death was inadmissible where opinion was based in part on something told him outside of court. *S. v. Hamilton*, 330.

CRIMINAL LAW — Continued

§ 60. Evidence as to Fingerprints

State's evidence was sufficient to withstand nonsuit in prosecution for breaking and entering and larceny though the only evidence linking defendant with the crime was fingerprint evidence. *S. v. Stewart*, 419.

§ 66. Evidence of Identity by Sight

Voir dire evidence supported trial court's determination that assault victim's identification of defendant as her assailant did not result from any out-of-court confrontation. *S. v. Young*, 101.

Testimony by an eyewitness to a robbery was properly admitted after voir dire though trial court failed to make findings of fact. *S. v. Bynum*, 637.

Defendant was not entitled to counsel at the pretrial identification in a poolroom where he was not in custody and no charges had been made against him. *S. v. Rollins*, 616.

§ 73. Hearsay Testimony in general

Defendant's testimony as to information he had received from third parties about robberies of other gambling games was not excludable as hearsay. *S. v. Miller*, 1.

Statement of prosecuting witness to third person was properly admitted as part of the res gestae. *S. v. Higgens*, 434.

§ 75. Admissibility of Confession in General

Trial court did not err in allowing officer to testify as to statements made to him by defendant at crime scene before defendant was warned of his constitutional rights. *S. v. Smith*, 736.

§ 76. Determination of Admissibility of Confession

Voir dire evidence supported trial court's determination that defendant voluntarily waived his constitutional rights before confessing to a police officer. *S. v. Young*, 101.

Trial court did not err in admission of defendant's in-custody statements for purpose of impeaching defendant's trial testimony without holding a voir dire hearing to determine the voluntariness of the statements. *S. v. Dunlap*, 176.

Trial court erred in admission of defendant's confession without conducting a voir dire hearing to determine whether defendant had been fully advised of his constitutional rights. *S. v. Gregory*, 745.

§ 77. Declarations

Trial court properly excluded testimony of investigating officer as to self-serving declarations of defendant. *S. v. Jefferies*, 235.

§ 80. Records and Private Writings

Police officer could properly testify from notes typed by third person three months after alleged homicide. *S. v. Holloway*, 266.

Trial judge's order requiring delivery of police investigative files to party charged with the crime was improperly entered. *S. v. Bellar*, 339.

CRIMINAL LAW — Continued

§ 84. Evidence Obtained by Unlawful Means

Statutory exclusionary rule applies in any trial, not just in a trial for the offense for which the illegal search was initially undertaken. *S. v. Miller*, 1.

Trespassers had no standing to object to a search of premises wrongfully held by them. *S. v. Jennings*, 205.

Warrantless search of defendant's automobile after the automobile had been removed to the police station following defendant's arrest was lawful. *S. v. Higgins*, 581.

Search was conducted in reasonable manner where officer who had reasonable grounds to believe that felony was being committed upon the premises entered a house under a valid search warrant, identified himself and indicated his authority to search. *S. v. Turnbull*, 542.

Trial court properly admitted evidence obtained in search of truck driven by defendant where officer had probable cause to search the truck and defendant consented to the search. *S. v. Gregory*, 745.

Seizure of a wristwatch in plain view by officers who entered defendant's premises under valid arrest warrant was proper. *S. v. Shue*, 696.

§ 86. Credibility of Defendant and Interested Parties

Injuries inflicted by police officers upon defendant and other occupants of a gambling house following the shooting of an officer were competent to show the bias of officers against defendant. *S. v. Miller*, 1.

It was proper for the solicitor to ask defendant for the purpose of impeachment if he had been convicted of stealing an automobile. *S. v. Hill*, 631.

Cross-examination of defendant with respect to prior instances of breaking and entering was proper for purposes of impeachment. *S. v. Shanklin*, 712.

§ 87. Direct Examination

Allowance of leading questions is a matter within discretion of trial judge. *S. v. Biggerstaff*, 140.

§ 88. Cross-Examination

It is proper to bring out on cross-examination the fact of prior criminal conviction and the length of time served on such conviction. *Ormond v. Crampton*, 88.

Exclusion of testimony showing bias of witness did not constitute abuse of discretion. *S. v. Biggerstaff*, 140.

Where witness's testimony concerning her observations of a defense witness in her backyard clearly involved a collateral matter, the trial court erred in allowing such testimony. *S. v. Scott*, 551.

§ 89. Corroboration and Impeachment

Jury instruction to consider evidence only for purpose of corroboration if it was in fact corroborative was not error. *S. v. Laws*, 129.

CRIMINAL LAW — Continued

A witness may not be cross-examined for impeachment purposes as to whether he has been indicted for a criminal offense. *S. v. Cowe*, 301.

Trial court properly refused to allow defendant to give an indication of his witness's character by asking whether the witness was on work release and where he was employed. *S. v. Wright*, 562.

§ 91. Continuance

Defendant failed to show prejudicial error in denial of his motion for continuance. *S. v. Parker*, 165; *S. v. Helms*, 162.

Trial court in a robbery prosecution did not err in denial of defendant's motion for continuance made on the ground that one of his witnesses was absent from the State at the time of the trial. *S. v. Lassiter*, 377.

§ 92. Consolidation

Trial court properly consolidated for trial the cases of three defendants charged in identical bills of indictment. *S. v. Garcia*, 344.

Defendant was not prejudiced by consolidation of charges against defendant and a co-defendant for identical crimes, although each defendant had made a statement incriminating the other. *S. v. DeWalt*, 546.

§ 95. Admission of Evidence Competent for Restricted Purpose

Defendant must expressly request instructions that admissions as to prior convictions were competent for restrictive purpose of showing defendant's credibility. *S. v. Alexander*, 95.

§ 96. Withdrawal of Evidence

Trial court's instructions to the jury "not to consider what he said" sufficiently informed the jury what it was to disregard. *S. v. Morehead*, 181.

§ 97. Introduction of Additional Evidence

Trial court did not abuse its discretion in allowing State to recall witnesses. *S. v. Stewart*, 419.

§ 98. Custody of Witnesses

Defendant's motion to sequester witnesses was properly denied. *S. v. Garcia*, 344.

§ 101. Custody of Jury

Trial court did not abuse its discretion in denying defendant's motion for jury view of homicide scene. *S. v. McGhee*, 702.

§ 102. Argument of Solicitor

The solicitor's reference to absence of defense witnesses in his jury argument did not constitute prejudicial error. *S. v. Hill*, 631.

§ 107. Nonsuit for Variance

There was no fatal variance between charge and proof in prosecution for possessing and transporting cocaine. *S. v. McLawhorn*, 153.

CRIMINAL LAW — Continued

§ 111. Form and Sufficiency of Instructions in General

Failure of trial court to read indictments of each defendant in full during jury instructions did not constitute prejudicial error. *S. v. Jennings*, 205.

§ 113. Statement of Evidence and Application of Law Thereto

Trial court's jury charge with respect to entrapment was proper. *S. v. McLawhorn*, 153.

Trial court's instructions in murder prosecution complied with G.S. 1-180. *S. v. Jefferies*, 235.

Trial court's charge properly instructed the jury that they could find either one or both of defendants guilty or not guilty. *S. v. Roberts*, 607.

§ 115. Instruction on Lesser Degrees

Trial court did not err in refusing to give instructions on lesser included offense of assault in prosecution for aiding and abetting in attempted armed robbery with the use of firearms. *S. v. Parker*, 165.

§ 116. Charge on Defendant's Failure to Testify

Trial judge's comment on defendant's failure to testify did not constitute prejudicial error. *S. v. Harlow*, 312.

§ 117. Charge on Credibility of Witnesses

Trial court's charge with respect to accomplice testimony was proper. *S. v. Brady*, 365.

§ 127. Arrest of Judgment

Motion in arrest of judgment was properly denied where indictment was sufficient and no defect appears on the face of the record. *S. v. Murrary*, 638.

§ 128. Mistrial

Trial court did not err in denial of defendant's motion for mistrial when his co-defendant changed his plea from not guilty to guilty. *S. v. DeWalt*, 546.

§ 130. New Trial for Misconduct Affecting Jury

Trial court properly denied defendant's motion for mistrial on ground of misconduct of defendant. *S. v. McGhee*, 702.

§ 134. Form and Requisites of Sentence in General

Sentencing procedure was fair and proper in prosecution for forging a check and uttering the check knowing it had been forged. *S. v. Kallam*, 67.

§ 138. Severity of Sentence and Determination Thereof

Trial court properly heard testimony concerning offenses as to which a nolle prosequi was entered where such testimony was heard after guilty plea and for the purpose of aiding the court in determining what sentence should be imposed. *S. v. Chrisco*, 157; *S. v. Goode*, 188.

CRIMINAL LAW — Continued

Trial court properly denied petitioner's request for credit upon his sentence for life imprisonment for time spent in custody awaiting trial and for time spent in custody pending appeal. *Haynes v. State,* 407.

Imposition of a greater sentence after conviction by jury in superior court, upon appeal from a district court, did not violate defendant's constitutional rights. *S. v. Martin,* 609.

§ 140. Cumulative Sentences

Sentence imposed to commence at the expiration of the sentence defendant is now serving meets the requirement of certainty of judgment in criminal cases. *S. v. Thompson,* 62.

§ 145.1. Probation

Evidence was sufficient to support revocation of defendant's probation. *S. v. Dahl,* 438.

Condition of defendant's probation judgment that he avoid persons or places of disreputable or harmful character was specifically permitted by statute and was not unreasonably vague. *S. v. Boggs,* 403.

§ 146. Appellate Jurisdiction of Court of Appeals in Criminal Cases

Defendant's plea of guilty presented only question of whether error appeared on the face of the record proper. *S. v. Wyatt,* 626; *S. v. Absher,* 633.

§ 155.5. Docket of Record on Appeal

Defendant's appeal was dismissed for failure to docket record on appeal within time allowed. *S. v. Hamby,* 122; *S. v. Scott,* 424; *S. v. LoSicco,* 401.

§ 160. Correction of Record

Trial court improperly ordered records in a criminal case in which nonsuit was entered permanently removed from the clerk's office. *S. v. Bellar,* 339.

§ 162. Objections to Evidence

Defendant's objection to admission of breathalyzer test results came too late when made for first time on appeal. *S. v. Harrell,* 620.

§ 163. Assignments of Error to Charge

Assignments of error based on exception to the judgment presents only question of whether error of law appears on the face of the record. *S. v. Wallace,* 647.

Where defendant presented no assignments of error, appeal itself constituted an exception to the judgment. *Ibid.*

Assignments of error to the charge should set forth the portion of the charge to which defendant objects, and an assignment of error based on failure to charge should set forth the charge defendant contends should have been given. *Ibid.*

§ 164. Assignment of Error to Refusal of Motion for Nonsuit

Sufficiency of evidence is reviewable on appeal even without a specific challenge as prescribed by G.S. 15-173. *S. v. Wiggins,* 527.

CRIMINAL LAW — Continued

§ 166. The Brief

Defendant's appeal is subject to dismissal for failure to file brief as required by the rules. *S. v. LoSicco*, 401.

Exceptions not set out in defendant's brief are deemed abandoned. *S. v. Brady*, 365.

§ 169. Harmless and Prejudicial Error in Admission or Exclusion of Evidence

Admission of hearsay testimony was not prejudicial where witness was thereafter allowed to give the same testimony without objection. *S. v. Dunlap*, 176.

Improper exclusion of testimony was not prejudicial where similar testimony had already been given. *S. v. Biggerstaff*, 140.

It is proper to bring out on cross-examination the fact of prior criminal convictions and length of time served on such convictions. *Ormond v. Crampton*, 88.

Admission over objection of witness's answer allegedly not responsive to the question was not error where similar testimony was subsequently given without objection. *S. v. Wilson*, 307.

Motion for mistrial was properly denied where any possible prejudice resulting from improper question was cured. *S. v. Holloway*, 266; *S. v. Jefferies*, 235.

Exclusion of witnesses' testimony is not prejudicial where record did not show what testimony would have been had the witnesses been permitted to give it. *S. v. Wright*, 562.

Error, if any, committed by allowing hypothetical question and answer into evidence was not prejudicial where similar testimony was admitted without objection. *S. v. McGhee*, 702.

DAMAGES

§ 3. Compensatory Damages for Personal Injury

Where there is evidence from which a conclusion of permanent injury proximately resulting from the wrongful act may properly be drawn, the court should instruct the jury so as to permit its inclusion in an award of damages. *Jones v. Development Co.*, 80.

§ 13. Relevancy of Evidence on Issue of Compensatory Damages

Trial court properly excluded statutory life table where plaintiff did not show permanency of injury. *McCoy v. Dowdy*, 242; *Teachey v. Woolard*, 249.

§ 15. Sufficiency of Evidence as to Damages

Trial court properly allowed jury to assess damages for permanent injury. *Bryant v. Winkler*, 612.

DEATH

§ 1. Proof of Cause of Death

A death certificate certified by the State Registrar is prima facie evidence of cause of death. *S. v. Hamilton,* 330.

§ 4. Time Within Which Wrongful Death Action Must be Instituted

Commencement of wrongful death action by a foreign administrator in N. C. will not toll statute of limitations. *Merchants Distributors v. Hutchinson,* 655.

Trial court properly refused to allow defendant to amend answer to assert counterclaim which had been barred by statute of limitations. *Ibid.*

§ 7. Determination of Life Expectancy; Damages

Where there is evidence tending to show that persons entitled to receive the damages in an action for wrongful death have a shorter life expectancy than that of deceased, the court must instruct the jury to consider the life expectancy of such persons in determining the amount of damages. *Bowen v. Rental Co.,* 70.

Testimony by a nurse as to what decedent told her with respect to his drinking habits was competent for consideration on the issue of damages. *Long v. Clutts,* 217.

DEEDS

§ 9. Deeds of Gift

Plaintiff was not entitled to have deeds declared to be deeds of gift where each deed contained a recital of consideration. *Pelaez v. Pelaez,* 604.

§ 20. Restrictive Covenants as Applied to Subdivision Developments

A subdivision restrictive covenant stating "No duplexes or apartment houses for rental property" prohibited construction of a two-family duplex dwelling for rental purposes. *Berryhill v. Morgan,* 584.

DESCENT AND DISTRIBUTION

§ 1. Nature and Titles by Descent

Statute restricting right of nonresident alien to inherit property is constitutional on its face. *In re Johnston,* 38.

Nonresident alien is entitled to inherit by intestate succession as fully as a citizen of the U. S. if the alien proves reciprocal rights of inheritance. *Ibid.*

DIVORCE AND ALIMONY

§ 2. Pleadings

Failure of defendant to file answer in action for alimony without divorce based on abandonment constituted admission of abandonment. *Whitaker v. Whitaker,* 432.

§ 13. Separation for Statutory Period as Grounds for Absolute Divorce

Termination of a prior divorce action in favor of defendant upon a jury finding that an alleged separation was the fault of the plaintiff would

DIVORCE AND ALIMONY — Continued

not bar later action by plaintiff against defendant for divorce on the grounds of separation. *Gray v. Gray,* 730.

§ 21. Enforcing Payment of Alimony

Trial court in an alimony case had no jurisdiction to order trustee in a deed of trust on entirety property owned by the parties to pay net surplus proceeds of a foreclosure sale to the clerk of court, or to order the clerk to pay half of the proceeds to plaintiff and the other half in accordance with the order of the court. *Koob v. Koob,* 326.

§ 22. Jurisdiction in Custody Proceedings

Courts of this State have jurisdiction to enter orders providing for custody of children affected by foreign custody order when they are physically present in this State. *Spence v. Durham,* 372.

§ 24. Custody

Evidence did not support judgment modifying child custody order. *Spence v. Durham,* 372.

A finding that the mother "is now residing in Mecklenburg County, North Carolina" is not a finding of a substantial change of circumstances that will support the modification of a child custody order. *Harrington v. Harrington,* 628.

EJECTMENT

§ 1. Nature and Scope of Summary Ejectment

A tenant in possession is not estopped to deny his landlord's title when that title was allegedly obtained by fraud from the tenant. *Turner v. Weber,* 574.

§ 8. Defendant's Bond in Ejectment to Try Title

Though defendant in action to recover possession of realty failed to file defense bond, court properly considered defendant's answer where defendant filed affidavits in lieu of bond after plaintiff objected to the failure to find bond. *Turner v. Weber,* 574.

ELECTRICITY

§ 8. Liability for Injury—Contributory Negligence

Plaintiff's evidence did not establish that his intestate was contributorily negligent as a matter of law in an action for wrongful death of intestate who was electrocuted when the cable of a crane struck a power line. *Bowen v. Rental Co.,* 70.

ESCAPE

§ 1. Elements and Prosecutions

State's evidence was sufficient to be submitted to jury where it tended to show defendant's escape from custody. *S. v. Laws,* 169.

EVIDENCE

§ 43. Nonexpert Opinion Evidence as to Sanity

Trial court properly sustained plaintiff's objections to general questions seeking to obtain opinion testimony as to decedent's physical and mental condition during a specific period of time since the questions did not relate to the mental capacity of decedent to know and understand the nature and effect of the contract in question. *Mikeal v. Savings & Loan Assoc.*, 595.

§ 49. Examination of Expert

Failure to preface one of many hypothetical questions with the requirement that the facts stated must be found by the jury "from the evidence and by its greater weight" did not constitute prejudicial error. *Long v. Clutts*, 217.

Trial court properly struck portions of expert witness's explanation of his answer to a hypothetical question which were not referred to in the facts contained in the hypothetical question. *Ibid.*

§ 51. Blood Tests

Expert testimony as to alcohol content of blood was properly admitted. *McNeil v. Williams*, 322.

EXECUTORS AND ADMINISTRATORS

§ 3. Appointment of Ancillary Administrators

An administrator appointed by the court of another state may not maintain an action for wrongful death occurring in N. C. *Merchants Distributors v. Hutchinson*, 655.

Clerk of superior court in the county in which personal service may be had upon an alleged tortfeasor has authority to appoint ancillary administrator to sue for wrongful death though deceased was a nonresident. *Ibid.*

FIRES

§ 1. Liabilities of Person Starting Fire on Own Land

Evidence was sufficient to submit issue of defendant's negligence to jury where plaintiff showed his property was injured by fire which had its origin with defendant. *Collins v. Furniture Co.*, 690.

§ 3. Negligence in Starting Fires

Actual causation may be proved by circumstantial evidence in fire cases and in other tort liability cases. *Collins v. Furniture Co.*, 690.

FRAUD

§ 10. Burden of Proof and Presumptions

In an action to set aside deeds on grounds of fraud and undue influence, trial court committed prejudicial error in instructing jury that a letter from plaintiffs to defendant created a confidential relationship between the parties as a matter of law. *Cross v. Beckwith*, 361.

GAMBLING

§ 4. Games of Chance

Trial court properly excluded testimony by defendant's witness regarding his opinion that blackjack was a game of skill, since the question of whether the game was one of chance or of skill was a question for the jury. *S. v. Eisen,* 532.

Trial court did not err in an action for gambling and establishing, using and keeping a blackjack table in refusing to rule as a matter of law that the game of blackjack is a game of skill. *Ibid.*

GAMES AND EXHIBITIONS

§ 2. Liability of Proprietor to Patrons

Court on appeal was bound by trial court's findings that plaintiff was injured while on defendant's property but that defendant was guilty of no negligent act or omission. *Lineberry v. Country Club,* 600.

HABEAS CORPUS

§ 3. Right to Custody of Children

In action where custody of minor children was awarded to defendant, trial court did not abuse its discretion in limiting plaintiff's visitation rights. *Shamel v. Shamel,* 65.

HOMICIDE

§ 15. Relevancy and Competency of Evidence

In prosecution for murder of a police officer during a police raid on a gambling house, testimony by defendant concerning information he had received about robberies of other gambling games in the area was relevant as bearing on the reasonableness of defendant's apprehension that a robbery was in progress when the shooting occurred. *S. v. Miller,* 1.

Injuries inflicted by police officers upon defendant and other occupants of a gambling house following the shooting of an officer were competent to show the bias of officers against defendant. *Ibid.*

State's witness was properly allowed to give opinion as to defendant's intoxicated condition. *S. v. Alexander,* 95.

Investigating officer was properly allowed to give his opinion as to cause of death in murder trial. *S. v. Starnes,* 357.

§ 17. Evidence of Motive

Evidence with respect to defendant's motive for speeding was admissible as being relevant and competent on issue of criminal negligence. *S. v. Alexander,* 95.

§ 21. Sufficiency of Evidence and Nonsuit

State's evidence was sufficient to withstand nonsuit in manslaughter case arising from culpable negligence of defendant in operation of automobile. *S. v. Alexander,* 95.

INDICTMENT AND WARRANT

§ 1. Preliminary Proceedings

Defendants were not entitled to quashal of their indictments on ground that they were denied a preliminary hearing. *S. v. Roberts,* 607.

§ 9. Form and Sufficiency of Charge

Trial court properly denied defendants' motions to quash warrants charging them with disseminating obscenity in a public place where the warrants specifically described the motion pictures alleged to be obscene. *S. v. Bryant,* 456.

Bill of indictment in felonious breaking and entering and larceny case was sufficient where it clearly identified county in which the subject building was located and named the business carried on in the building. *S. v. Shanklin,* 712.

It is not essential to use the word "feloniously" in warrant charging a misdemeanor. *S. v. Wesson,* 683.

§ 10. Sufficiency of Identification of Accused

Doctrine of idem sonans is applicable where the indictment, judgment and commitment refer to defendant as "John Louis Murray" and the caption of the case in the record on appeal names defendant as "John Lewis Murrary." *S. v. Murrary,* 638.

§ 12. Amendment

Trial court's error in striking part of the second count of the indictment was not prejudicial. *S. v. Peele,* 227.

§ 13. Bill of Particulars

Although defendant's motion for a bill of particulars had been denied upon the solicitor's statement that the State would rely on the theory of the case as disclosed in the preliminary hearing, trial court did not err in admission of testimony not presented at the preliminary hearing. *S. v. Hanford,* 353.

§ 18. Sufficiency of Indictment to Support Conviction of Other Degrees of Crime

The crime of accessory before the fact to a felony charged in an original bill of indictment is included in the charge of the principal crime. *S. v. Wiggins,* 527.

INFANTS

§ 9. Hearing and Grounds for Awarding Custody

Trial court was authorized to award custody of child to father though he had filed no pleading asking for custody. *In re Branch,* 413.

There was sufficient evidence to support finding of changed conditions in custody action. *Ibid.*

Trial court erred in making findings based on private examination of a child conducted over plaintiff's objections and out of the presence of plaintiff and his counsel. *Smith v. Rhodes,* 618.

INJUNCTIONS

§ 14. Hearing on the Merits

Trial court erred in permanently restraining defendants upon a hearing had on the return of a show cause order seeking a temporary injunction. *Power Co. v. Hogan,* 622.

INSURANCE

§ 1. Control and Regulation Generally

Commissioner of Insurance had no authority to enjoin an insurance company from entering into an agreement to lease property owned by the company's president and treasurer. *Insurance Co. v. Lanier,* 381.

§ 79.1. Automobile Liability Insurance Rates

Automobile liability insurance rate case is remanded for specific findings as to earned premiums, anticipated loss experience, anticipated operating expenses, and reasonable profit. *Comr. of Ins. v. Attorney General,* 279.

Automobile physical damage insurance rate case is remanded to Commissioner of Insurance for proper determination of a fair and reasonable profit. *Comr. of Ins. v. Attorney General,* 724.

In determining automobile physical damage rates, the Commissioner of Insurance is not required to consider investment income of the companies, rate of return to investors, amount of capital used and useful or unrealized capital gains. *Ibid.*

§ 87. Omnibus Clause; Drivers Insured

Driver of automobile was not "person in lawful possession" within meaning of automobile liability policy where she did not have permssion to use the automobile from either the owner or the owner's daughter who had the owner's permission to use it. *Jernigan v. Insurance Co.,* 46.

The loading and unloading of a tank truck is use of the truck within the meaning of a liability policy insuring against loss "arising out of the ownership, maintenance or use" of the truck, and all persons actively engaged in the loading and unloading are additional insureds under the policy. *Casualty Co. v. Insurance Co.,* 194.

§ 93. Excess Insurance Clause

The "pro rata" clause in a liability policy on a truck and the "excess insurance" clause in a general liability policy are not repugnant so as to require that they be read out of the policies. *Casualty Co. v. Insurance Co.,* 194.

§ 128. Waiver of Forfeitures and Conditions

In an action on a fire policy involving the issue of whether the one-year limitation for instituting suit on the policy had been waived, testmony by defendant's local agent tending to show that he had negotiated with plaintiff after the one-year period had expired was erroneously admitted. *Bell v. Insurance Co.,* 591.

§ 143. Construction of Property Damage Policies

"All risk" policy obligates insurer to pay for loss caused by a fortuitous event. *Avis v. Insurance Co.,* 588.

INSURANCE — Continued

§ 144. Actions on Property Damage Policies

Loss occasioned when paint applied to woodwork in plaintiffs' home began to blister and peel and attempts to remove all the paint and repaint areas where paint had been removed were unsuccessful because of qualities in the wood or finish on the wood was not a fortuitous event covered by an all risk policy. *Avis v. Insurance Co.*, 588.

INTEREST

§ 1. Items Drawing Interest in General

Trial judge, in applying Pennsylvania law, did not abuse his discretion in allowing interest on damages awarded for breach of warranty from the date the breach occurred. *Transportation v. Strick Corp.*, 498.

JUDGMENTS

§ 35. Conclusiveness of Judgments and Bar in General

Defendant's plea of res judicata was properly denied where issues as to recrimination, time of residence and period of separation were different in two divorce cases. *Gray v. Gray*, 730.

§ 37. Matters Concluded in General

Judgment dismissing prior action for failure of present defendants to prove their title is not res judicata in an action by plaintiffs to be declared owners of the land in controversy. *Mayberry v. Campbell*, 375.

§ 49. Life of Lien

Action commenced on 20 February 1969 to preserve the lien of a judgment entered on 11 February 1959 was not barred by the ten-year statute of limitations where the judgment debtor died on 20 August 1965 and letters of administration were issued in November 1966, since the time between the debtor's death and the issuance of letters is not counted. *Ingram v. Smith*, 147.

When a judgment is satisfied, it is absolutely discharged even though an assignment had been made to a trustee to keep it alive if the payor is not, aside from the judgment, entitled to contribution, subrogation or indemnity. *Ibid.*

§ 50. Actions on Domestic Judgments

Summary judgment was properly entered in favor of plaintiff in an action to renew a default judgment obtained in 1962. *Electric Service v. Granger*, 427.

JURY

§ 5. Selection Generally

Fact that jury commission used names from county tax list, which list may have contained disproportionate male-female ratio, in drawing up list of prospective jurors for county did not render jury selection process intentionally discriminatory. *S. v. Tant*, 113.

LABORERS' AND MATERIALMEN'S LIENS

§ 1. Nature and Grounds of Lien of Contractor

A contractor may not enforce a lien on real property for labor performed in constructing a golf course upon the land pursuant to a contract with a party who had an option to purchase the land but never exercised the option or otherwise acquired any ownership in the land. *Gentry Brothers v. Development Corp.*, 386.

LANDLORD AND TENANT

§ 3. Title of Landlord and Estoppel of Tenant Relative Thereto

A tenant in possession is not estopped to deny his landlord's title when that title was allegedly obtained by fraud from the tenant. *Turner v. Weber*, 574.

LARCENY

§ 4. Warrant and Indictment

Trial court's error in striking part of the second count of the indictment was not prejudicial. *S. v. Peele*, 227.

The word "steal" as used in a warrant charging misdemeanor larceny was synonymous with the required "felonious intent" and the warrant was therefore sufficient to withstand defendant's motion to quash. *S. v. Wesson*, 683.

§ 7. Sufficiency of Evidence and Nonsuit

State's evidence was sufficient to withstand nonsuit in prosecution for breaking and entering and larceny of chain saws and larceny of an automobile. *S. v. Brady*, 365.

State's evidence was sufficient to withstand nonsuit in prosecution for breaking and entering and larceny. *S. v. Peele*, 227.

State's evidence was sufficent to be submitted to the jury as to defendant's guilt of larceny after breaking and entering a service station. *S. v. DeWalt*, 546.

Trial court erred in denying one defendant's motion for directed verdict where evidence showed only that defendant was a passenger in a stolen vehicle 24 hours after the vehicle had been stolen. *S. v. Franklin*, 537.

Trial court properly denied one defendant's motion for directed verdict where evidence showed defendant was at the wheel of a stolen vehicle 24 hours after it had been stolen. *Ibid.*

§ 8. Instructions

In prosecution for larceny of property from land, trial court erred in giving jury instructions which would have permitted it to return verdict of guilty upon a finding of the elements of common law larceny. *S. v. Gaddy*, 436.

LIMITATION OF ACTIONS

§ 4. Accrual of Right of Action and Time from which Statute Begins to Run

Action for indemnity arising from primary-secondary liability is subject to the three-year statute of limitations. *Ingram v. Smith*, 147.

LIMITATION OF ACTIONS — Continued

§ 9. Death and Administration

Action commenced on 20 February 1969 to preserve the lien of a judgment entered on 11 February 1959 was not barred by the ten-year statute of limitations where the judgment debtor died in August 1965 and letters of administration were issued in November 1966, since the time between the debtor's death and the issuance of letters is not counted. *Ingram v. Smith,* 147.

MASTER AND SERVANT

§ 9. Actions to Recover Compensation

In an action to recover for breach of employment contract, court's instructions sufficiently covered the meaning of the terms legal justification, sufficient cause and wrongful discharge. *Faeber v. E. C. T. Corp.,* 429.

§ 40. F.E.L.A.—Contributory Negligence of Employee

Trial court properly refused to submit an issue as to plaintiff employee's contributory negligence in a railroad's third-party action against a paper company to recover under an indemnity agreement an amount recovered by the employee in an F.E.L.A. action against the railroad. *Beachboard v. Railway Co.,* 671.

MORTGAGES AND DEEDS OF TRUST

§ 24. Foreclosure by Action

Trial court properly entered summary judgment where there was no genuine issue with respect to defendant's obligation under notes executed by him. *Patrick v. Hurdle,* 28.

MUNICIPAL CORPORATIONS

§ 17. Injuries on Streets or Sidewalks—Contributory Negligence and Duty of Travelers

Plaintiff's evidence disclosed that she was contributorily negligent as a matter of law in falling over a cement street light base being constructed beside a city street. *McClelland v. Concord,* 136.

§ 21. Injuries in Connection with Sewage Disposal

Defendant municipality was entitled to summary judgment in an action by landowners to enjoin the municipality from discharging sewage into a creek. *Reap v. Albemarle,* 171.

NARCOTICS

§ 1. Elements of Statutory Offenses

Possession of any quantity of heroin constitutes a felony. *S. v. Higgins,* 581.

NARCOTICS — Continued

§ 3. Competency and Relevancy of Evidence

Statutory provision that possession of more than five grams of marijuana shall be prima facie evidence of possession for sale does not deprive defendants of presumption of their innocence nor relieve the State from burden of proving guilt beyond reasonable doubt. *S. v. Garcia*, 344.

§ 4. Sufficiency of Evidence and Nonsuit

There was sufficient evidence to support conviction of defendant for felonious possession of heroin where items containing heroin were found in defendant's room. *S. v. Brady*, 555.

Evidence was sufficient to submit case to jury in prosecution for possession of heroin where evidence tended to show that defendant was eight feet from open closet containing heroin and that defendant was apparently under the influence of a depressant drug. *S. v. Turnbull*, 542.

NEGLIGENCE

§ 3. Distinctions Between Negligence and Other Torts

Trial court was not required to instruct on issue of negligence where plaintiff's complaint alleged intentional infliction of harm. *Ormond v. Crampton*, 88.

§ 12. Last Clear Chance

Trial court in wrongful death action properly refused to submit issue of last clear chance to jury. *McNeil v. Williams*, 322.

§ 29. Sufficiency of Evidence of Negligence

Trial court properly denied one defendant's motion to dismiss personal injury action against him where evidence tended to show that negligence of both defendants in operating their vehicles caused plaintiff's injury. *Ramsey v. Ramsey*, 614.

Evidence was sufficient to submit issue of defendant's negligence to jury where plaintiff showed his property was injured by fire which had its origin with defendant. *Collins v. Furniture Co.*, 690.

§ 30. Nonsuit

Trial court properly denied defendant's motion for directed verdict, judgment NOV and to set judgment aside where the facts with respect to the parties' negligence were in dispute. *Jones v. Development Co.*, 80.

§ 32. Circumstantial Evidence

Actual causation may be proved by circumstantial evidence in fire cases and in other tort liability cases. *Collins v. Furniture Co.*, 690.

§ 34. Contributory Negligence — Sufficiency of Evidence

Trial court erred in entering judgment NOV in action for property damages on ground that plaintiff was contributorily negligent as a matter of law in intersection collision with defendant's fire truck. *City of Winston-Salem v. Rice*, 294.

NEGLIGENCE — Continued

§ 35. Nonsuit for Contributory Negligence

Plaintiff's evidence did not establish that his intestate was contributorily negligent as a matter of law in an action for wrongful death of intestate who was electrocuted when the cable of a crane struck a power line. *Bowen v. Rental Co.*, 70.

Trial court erred in directing a verdict for defendant where the evidence tended to show that defendant was negligent and that plaintiff was not contributorily negligent as a matter of law. *McCoy v. Dowdy*, 242.

§ 37. Instructions on Negligence

Trial court was not required to instruct on issue of negligence where plaintiff's complaint alleged intentional infliction of harm. *Ormond v. Crampton*, 88.

§ 40. Instruction on Proximate Cause

Trial court erred in failing properly to define negligence and proximate cause. *Ford v. Marshall*, 179.

OBSCENITY

Trial court properly denied defendants' motions to quash warrants charging them with disseminating obscenity in a public place where the warrants specifically described the motion pictures alleged to be obscene. *S. v. Bryant*, 456.

G.S. 14-190.1 requires finding of intent and guilty knowledge before conviction for disseminating obscenity in a public place. *Ibid.*

Films shown in defendants' place of business which had no plot, no motive and no objectives other than to appeal to a prurient interest in sex were uncontrovertibly obscene. *Ibid.*

PARENT AND CHILD

§ 4. Right of Child to Maintain Action for Alienation of Affections of Parent

Minor children may not maintain an action for alienation of the affection of their father. *Roth v. Parsons*, 646.

§ 6. Right to Custody of Child

Trial court was authorized to award custody of child to father though he had filed no pleading asking for custody. *In re Branch*, 413.

PHYSICIANS AND SURGEONS

§ 16. Sufficiency of Evidence of Malpractice

Jury could reasonably conclude that physician was negligent in leaving unconscious patient unsecured and unattended on examining table. *Brawley v. Heymann*, 125.

Trial court in a malpractice action did not err in permitting the jury to consider defendants' activities on only two specified dates on the issue of negligence. *Long v. Clutts*, 217.

PRINCIPAL AND AGENT

§ 4. Proof of Agency

In an action on a fire policy involving the issue of whether the one-year limitation for instituting suit on the policy had been waived, testimony by defendant's local agent tending to show that he had negotiated with plaintiff after the one-year period had expired was erroneously admitted. *Bell v. Insurance Co.*, 591.

PROPERTY

§ 4. Criminal Prosecutions for Wilful or Malicious Destruction of Property

Indictment was sufficient to charge conspiracy to damage property by use of an explosive device. *S. v. Hanford*, 353.

RAPE

§ 18. Assault With Intent to Commit Rape

Trial court did not err in describing the elements of the crime of rape in defining the crime of assault with intent to commit rape. *S. v. Young*, 101.

RELIGIOUS SOCIETIES AND CORPORATIONS

§ 3. Actions

Trial court sufficiently instructed jury in action to determine true leadership of a religious society. *Braswell v. Purser*, 14.

In action to determine true leadership of a religious society, trial court did not express an opinion in stating reasons for excluding testimony, in referring to "this man's church" or in stating that the court had heard enough as to plaintiff's being carried out of the church. *Ibid.*

ROBBERY

§ 2. Indictment

A bill of indictment for armed robbery can support a conviction of attempted armed robbery or common law robbery, but not both for the same conduct. *S. v. Barksdale*, 559.

The crime of accessory before the fact to an armed robbery charged in an original bill of indictment is included in the charge of the principal crime. *S. v. Wiggins*, 527.

§ 4. Sufficiency of Evidence and Nonsuit

There was no fatal variance between indictment charging robbery with a shotgun and evidence that robbery was committed with "a gun." *S. v. Dunlap*, 176.

State's evidence was sufficient for submission to the jury on the issue of defendant's guilt of armed robbery, although defendant himself may not have offered violence to the victim. *S. v. Lassiter*, 377.

Evidence was sufficient to withstand nonsuit where it tended to show that defendant and two others robbed a clothing store of money and clothes. *S. v. Springs*, 641.

RULES OF CIVIL PROCEDURE — Continued

§ 55. Default

In order to set aside entry of default, all that need be shown is good cause. *Crotts v. Pawn Shop,* 392.

§ 59. New Trials

Trial court properly granted defendant's motion for new trial on the issue of damages. *City of Winston-Salem v. Rice,* 294.

SALES

§ 5. Express Warranties

Attempted disclaimer of warranty in a sales contract entered in Pennsylvania was void under Pennsylvania law where it was printed in the same color as the other printing in the contract and in the smallest print. *Transportation v. Strick Corp.,* 498.

§ 15. Burden of Proof in Breach of Warranty Action

Proviso in a warranty that repairs would be made where parts proved to be defective "in the company's judgment" subjected defendant company's judgment as to defective material to judicial review. *Credit Corp. v. Ricks,* 491.

§ 17. Sufficiency of Evidence in Breach of Warranty Action

Evidence was sufficient to support judgment for defendant on his cross-claim for breach of warranty where evidence tended to show that a farm tractor purchased under warranty was equipped with a defective hydraulic system. *Credit Corp. v. Ricks,* 491.

Plaintiff's evidence was sufficient for the jury in an action to recover damages for breach of an implied warranty of fitness of trailers purchased from defendant. *Transportation v. Strick Corp.,* 498.

SEARCHES AND SEIZURES

§ 1. Generally; Search Without Warrant

Employee of a gambling house had standing to question the validity of search of the premises. *S. v. Miller,* 1.

Fact that officers could observe gambling after passing through two doors of a house and opening a third door did not give them authority to enter and seize gambling apparatus in use. *Ibid.*

Trespassers had no standing to object to a search of premises wrongfully held by them. *S. v. Jennings,* 205.

Evidence obtained from a search of defendant's home by an individual was admissible. *S. v. Peele,* 227.

Warrantless search of defendant's automobile after the automobile had been removed to the police station following defendant's arrest was lawful. *S. v. Higgins,* 581.

Search was conducted in reasonable manner where officer who had reasonable grounds to believe that felony was being committed upon the premises entered a house under a valid search warrant, identified himself and indicated his authority to search. *S. v. Turnbull,* 542.

SEARCHES AND SEIZURES—Continued

§ 3. Requisites and Validity of Search Warrant

Although police officer's affidavit would have been sufficient to support finding of probable cause for issuing a warrant to search a house for gambling equipment, it was insufficient to support warrant actually issued authorizing search of the house for intoxicating liquor. *S. v. Miller*, 1.

Affidavit of a police officer based on information received from a confidential informant was insufficient to support issuance of a warrant to search for LSD where it contained no allegations that either the affiant or the confidential informant had personal knowledge that LSD was on defendant's premises. *S. v. Graves*, 389.

Affiant's statement of circumstances supporting informant's reliability was sufficient to sustain the issuance of a search warrant. *S. v. McKoy*, 350.

There was sufficient evidence of probable cause to support issuance of a search warrant for narcotics, and the warrant and affidavit were properly attached. *S. v. Brady*, 555.

Search warrant incorporating by reference description of items to be seized met statutory requirements. *S. v. Shanklin*, 712.

Seizure of a wristwatch in plain view by officers who entered defendant's premises under valid arrest warrant was proper. *S. v. Shue*, 696.

SOLICITORS

Defendant was not prejudiced where the solicitor was not the prosecuting attorney but was called as a character witness for the prosecuting witness. *S. v. Williams*, 422.

TAXATION

§ 24. Situs of Property

Tax situs for over-the-road vehicles was in township where taxpayer maintained principal place of business rather than the location used infrequently for handling of freight. *In re Trucking Co.*, 261.

TORTS

§ 3. Rights Inter Se of Defendants Joined by Plaintiff

Action for indemnity arising from primary-secondary liability is subject to the three-year statute of limitations. *Ingram v. Smith*, 147.

When a judgment is satisfied, it is absolutely discharged even though an assignment had been made to a trustee to keep it alive if the payor is not, aside from the judgment, entitled to contribution, subrogation or indemnity. *Ibid.*

A separate action for indemnity arising from primary-secondary liability may not be commenced until after payment and satisfaction of the debt. *Ibid.*

TRIAL

§ 11. Argument of Counsel

In an action to enforce an indemnity contract, trial court properly refused to permit defendant's counsel to argue to the jury the legal effect of the contract. *Beachboard v. Realty Co.*, 671.

§ 31. Peremptory Instructions

Peremptory instruction in favor of the party having burden of proof is proper only when there is no conflict in the evidence and all the evidence tends to support such party's right to relief. *Braswell v. Purser*, 14.

§ 33. Statement of Evidence and Application of Law Thereto in Jury Instructions

Failure of trial judge to charge on the substantial features of the case was prejudicial error even without a prayer for special instructions. *Clay v. Garner*, 510.

Use of the word "victim" by trial judge in wrongful death action was not an impermissible expression of opinion. *Merchants Distributors v. Hutchinson*, 655.

§ 40. Form and Sufficiency of Issues

Plaintiff waived his right to challenge the form of the issue submitted on contributory negligence by failing to object thereto at the trial. *Brant v. Compton*, 184.

UNIFORM COMMERCIAL CODE

§ 79. Public Sale Procedures

Notice of public sale of securities pledged as collateral for six notes substantially complied with requirements of U.C.C. *Graham v. Bank*, 287.

Public sale of collateral by the secured party is conclusively presumed to be commercially reasonable when the secured party has substantially complied with the procedures set forth in the U.C.C. *Ibid.*

UTILITIES COMMISSION

§ 3. Authority of Commission With Respect to Carriers

Utilities Commission had authority to grant contract authority although common carrier authority had been requested in the application. *Utilities Comm. v. McCotter, Inc.*, 475.

§ 4. Authority of Commission With Respect to Electric Companies

Utilities Commission was without authority to order a municipality to cease serving a manufacturer within its corporate limits, to order the power company to cease selling electricity to seven businesses within the municipality, or to order the power company to charge the seven businesses the same rates as the manufacturer pays the municipality. *Utilities Comm. v. Manufacturing Co.*, 335.

§ 6. Hearings and Orders; Rates

The Utilities Commission had authority to enter an interim order allowing a power company's initially requested rate increase to go into effect pending final determination of the case. *Utilities Comm. v. Morgan*, 445.

WORD AND PHRASE INDEX