NORTH CAROLINA COURT OF APPEALS REPORTS

VOLUME 8

SPRING SESSION 1970

RALEIGH

1971

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OF
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*Sworn in office 7 December 1970.

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CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

SPRING SESSION 1970

STATE OF NORTH CAROLINA v. ROBERT BINES AND JASPER LEE BARNER

No. 7010SC106

(Filed 6 May 1970)

1. Criminal Law § 92— consolidation of cases against two defendants

The trial court did not err in consolidating for trial charges of breaking and entering and larceny against two defendants.

2. Burglary and Unlawful Breakings § 5; Larceny § 7— sufficiency of evidence

In this prosecution of two defendants for breaking and entering and larceny, defendants' motions for nonsuit were properly denied where the State's evidence tended to show that a furniture store was broken and entered, that an officer saw one defendant come out of the back door and then re-enter the building, that the officer observed such defendant and another person in the store, that the two persons inside the store left the store by breaking out the front door glass, that merchandise had been moved to a place near the rear door of the store and several small items from the store were found outside, that an automobile belonging to one defendant was parked behind the store and footprints resembling the shoes worn by such defendant were found between the car and store, and that a dog trained for trailing human beings picked up a trail near the building and followed it down a railroad track for about two miles where both defendants were found in an exhausted condition.

3. Criminal Law § 61— casts of footprints — admissibility

In this prosecution of two defendants for breaking and entering and larceny, the trial court did not err in the admission of plaster casts of two sets of footprints found at the rear of the store which was broken into, where two similar sets of tracks were found near a railroad down

which defendants fled from the crime scene, and an officer positively identified one defendant as having been seen at the rear door of the building.

4. Criminal Law § 44— evidence that dog followed trail to defendants

In this prosecution for breaking and entering and larceny, testimony by dog trainer as to the breeding, training, experience and reliability of a particular dog, although not a pure bred dog, rendered competent evidence that the dog followed a trail from the crime scene which led to defendants.

APPEAL by both defendants from *Bailey, J.*, September 1969 Session of WAKE Superior Court.

Defendants were charged in separate but similar bills of indictment containing three counts: (1) breaking and entering the place of business of Garner Wayside Furniture, Ltd., a corporation, located on Highway No. 70 in the Town of Garner; (2) larceny of various articles of merchandise contained in the place of business and described in the bill, after having feloniously broken into the place of business; (3) receiving stolen merchandise.

The third count of receiving stolen merchandise was dismissed by the trial judge at the conclusion of the State's evidence. We, therefore, are not concerned with that count.

The defendants entered pleas of not guilty. The jury returned a verdict of guilty on both counts as to each defendant. The trial judge consolidated the two counts for judgment and imposed a sentence against each defendant of not less than 8 nor more than 10 years in the custody of the Commissioner of the North Carolina Department of Correction. Each defendant appealed.

Attorney General Robert Morgan, Trial Attorney Lester V. Chalmers and Staff Attorney Carlos W. Murray, Jr., for the State.

Vaughan S. Winborne for defendant Bines; Liles and Merriman by William W. Merriman, III, for defendant Barner.

CAMPBELL, J.

Each defendant filed separate assignments of error, some of which were similar and some were applicable only to the individual defendant making the assignment of error.

[1] Both defendants assigned as error the consolidation of cases for trial. In this, there was no error. The crimes for which the defendants were tried are "of the same class . . . and are so connected in time and place that evidence at the trial upon one of the indictments would be competent and admissible at the trial on the others. . . ." *State v. Hamilton,* 264 N.C. 277, 141 S.E. 2d 506 (1965).

[2] Both defendants assign as error the failure of the trial judge to sustain the motion of nonsuit at the close of all of the evidence as to both counts. Such a motion is properly denied where "there is evidence from which a jury could find that the offense charged has been committed and that defendant committed it. . . ." *State v. Goines,* 273 N.C. 509, 160 S.E. 2d 469 (1968). The evidence would sustain the jury finding that Garner Wayside Furniture, Ltd., is a corporation occupying a building on Highway 70 within the town limits of Garner. On Saturday evening, 28 June 1969 at 5:30 p.m., the place of business was closed and all entrances or openings secured. During the evening hours, a town policeman regularly checked the premises. At 3:45 a.m. on 29 June 1969, the building was checked by a town policeman, and everything was found to be in proper order and secure. Fifteen minutes later at 4:00 a.m., the policeman's suspicions having been aroused, he again checked this building and saw an automobile which had not been previously parked behind the furniture store. He saw the defendant Barner come out of the back door and then re-enter the building. This officer went to the back door and observed the defendant Barner, together with "a very large colored male running through the center of the building. They were running towards the front." This officer then called for additional police officers to join him, and while waiting, he kept the rear of the building under surveillance.

When other officers arrived, an inspection of the entire building was made. The glass in the front door was broken out. This glass had not been broken when the building had been inspected at 3:45 a.m. Various items of merchandise as described in the bill had been moved from the place where located when the store had been closed the evening before, and these items of merchandise were found near the rear door of the building. Several small items, including the pipe of the president of the furniture company, which had been located in the desk drawer of the president, were found under a bush. This bush was located in a direct line between the front door and the railroad tracks where two sets of footprints were subsequently found. The automobile with the keys left in the ignition found parked behind the furniture company building belonged to the defendant Barner. Footprints which resembled the shoes worn by the defendant Barner were found between the automobile and the rear door. An officer brought a dog trained for trailing human beings to the furniture store. The dog arrived about 4:25 a.m. The dog was cast in a semicircle near the front of the building. The dog picked up a trail about 50 feet from the front door, and then proceeded to the railroad tracks and down the railroad tracks for about 2 miles where

the defendants were found in an exhausted condition, and "they were extremely wet, almost soaking wet with sweat." This pattern of events allows the reasonable inference that there had been a crime committed and that the defendants were participants in the crime. This was sufficient to permit the case to be submitted to the jury, and the motions for nonsuit were properly denied. *State v. Rowland,* 263 N.C. 353, 139 S.E. 2d 661 (1965).

[3] The defendants objected to the admission in evidence of plaster casts of footprints found at the rear of the store. Officer Lockhart testified,

> ". . . We found two good sets of tracks at the rear door. They came directly from the automobile to the rear door. There was one real big set of tracks. I noticed about the other set, that is the one that was not so big, in the right front, about a quarter of a part of the front sole was missing from the shoe."

He further testified that two similar sets of tracks were found near the railroad about a mile from the store, one set of which had the front portion of its sole missing. These tracks, together with the testimony of the police officer, who positively identified the defendant Barner as having been seen at the rear door of the building, distinguishes the present case from the situation in *State v. Barnes,* 270 N.C. 146, 153 S.E. 2d 868 (1967). In the *Barnes* case there was no evidence other than a footprint linking the defendant to the scene of the crime.

[4] The defendants object to the testimony of the dog trailing. While the dog was not a pure bred dog, the dog trainer testified as to its breeding and the purpose of the crossbreeding. He also testified as to the training and experience of the dog and the reliability of the particular dog. The dog in question, "Smitty," was a three-way cross, being part bloodhound, part black and tan coon hound, and part red bone coon hound. We think the testimony as to the breeding, training and experience, as well as the reliability of this particular dog made the evidence competent. As Justice Sharp said in *State v. Rowland, supra,* Smitty has demonstrably "pedigreed his ancestors."

We have reviewed all of the assignments of error brought forward by either defendant, and we find

No error.

PARKER and HEDRICK, JJ., concur.

HAROLD TICKLE v. STANDARD INSULATING COMPANY AND ATLANTIC MUTUAL INSURANCE COMPANY

No. 7026IC198

(Filed 6 May 1970)

1. Damages § 3; Master and Servant § 56— necessity for expert medical evidence of causation

Where a lay person could have no well-founded knowledge with respect to an illness or injury complained of and could do no more than speculate as to its cause, there can be no recovery therefor without expert medical testimony of causation.

2. Master and Servant § 56; Damages § 3— workmen's compensation — temporary total disability — failure to offer expert medical evidence of causation of injury — sufficiency of evidence of causation

In this proceeding for workmen's compensation benefits for an alleged back injury, the Industrial Commission did not err in making an award to plaintiff for temporary total disability, notwithstanding plaintiff offered no expert medical evidence of diagnosis or causation of the back injury, where plaintiff testified that while he was unloading heavy bundles of cardboard from a truck, two of the bundles unexpectedly stuck together and came off the truck together, that he immediately experienced pain in his side and lower back and fell to the ground, that he was out of work for several months, and plaintiff's doctor testified that he saw plaintiff the day after the accident, that plaintiff had a limited range of motion and had tenderness and pain in his lower back muscles, that after seeing plaintiff at weekly intervals for several months, plaintiff was released from house confinement with the recommendation that he resume light work, plaintiff having introduced evidence from which the trier of facts could draw a reasonable inference that plaintiff's back injury was the proximate result of the accident.

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

Assignment of error is deemed abandoned where it is not brought forward and argued in the brief. Court of Appeals Rule No. 28.

APPEAL by defendants from the North Carolina Industrial Commission opinion and award of 14 November 1969.

Plaintiff claims benefits under the Workmen's Compensation Act for an alleged injury to his back. The deputy commissioner, after hearing the evidence, found facts, made conclusions of law and entered an award for temporary total disability and medical expenses. Defendants appealed to the Full Commission. Finding of fact No. 5 was amended by the Commission and in all other respects the award of the deputy commissioner was affirmed. Defendants appealed.

Fairley, Hamrick, Monteith and Cobb by S. Dean Hamrick for plaintiff appellee.

Robert L. Scott for defendant appellants.

MORRIS, J.

Defendants' first four assignments of error raise a single question on appeal: Whether, absent expert medical testimony as to the diagnosis of plaintiff's back condition or as to any causal relation between that condition and the accident, an award for temporary total disability can be made?

Although defendants have preserved their exception to the finding of fact that "Plaintiff sustained an injury by accident arising out of and in the course of his employment with the defendant employer on September 24, 1968", they do not seriously contend that the occurrence from which plaintiff's injuries resulted was not an accident within the provisions of the Act. In any event, there is sufficient competent evidence in the record to support the finding that an accident occurred. Defendants do seriously contend that no expert medical evidence appears in the record to connect the accident with the injury complained of.

[2] Plaintiff testified that on 24 September 1968, he was employed by Standard Insulating Company and was engaged in unloading bundles of cardboard from a Volkswagon pickup truck. Each bundle was about 4 feet long, 14 inches wide and 5 or 6 inches thick. The truck had been backed up to the door of the warehouse and the tailgate had been lowered. Plaintiff's helper was standing in the doorway of the warehouse and plaintiff was standing on the ground to remove the bundles from the truck. There were 6 bundles on the truck. "A bundle of these cardboard items weighs 70 to 75 pounds. They are held together by two nylon cords or strings. With reference to the end of each bundle the nylon cord is spaced from end to center, divided distance from one end to the other enough to support the weight to pick them up with the cords. The cords are about half way between the center and ends of each bundle. There is one on one side of the bundle and one on the other side. These cords are tied together with one knot and with a loop like a shoestring tied. The knot is on the top or on the bottom of each bundle according to how the bundle is standing up and down because when it is tied you can hold both sides. There are two knots on the top and bottom of each bundle, all tied together." Plaintiff testified that after he let the tailgate down, he picked up the first bundle and set it down in the doorway with a right-left motion with a half step. He repeated this for the second bundle. When he picked up the third one, the fourth bundle was "hung" to it and the two bundles came off at the

same time. At that time plaintiff experienced pain in his side and lower back, which pain went up to the back of his head, his knees gave way, and he "was on the ground for a few minutes". Plaintiff did not work the rest of that day and did not return to work until 7 January 1969. He testified that he did not normally pick up more than one bundle at the time.

The doctor testified that he saw plaintiff the next day, that plaintiff arrived at the clinic in a bent over condition with considerable back pain. Range of motion was markedly limited. There was tenderness in the muscles in his lower back. "On deep palpation of his back there was some considerable pain in these muscles." Tests were made resulting in no suggestion of nerve root impression or nerve root damage. This was confirmed by the fact that plaintiff had good strength and sensation in his lower extremities. X-rays revealed no bone damage. The doctor saw plaintiff at weekly intervals for several months, and on 6 January 1969 released him from house confinement with the recommendation that he resume light type work beginning 7 January. The doctor testified that plaintiff gave a history of "Bending over picking up heavy bundles of cardboard and twisting his back on the previous day."

Defendants urge that plaintiff failed to elicit from the doctor any evidence of diagnosis nor did defendants elicit from him any evidence as to whether the unexpected occurrence of two bundles coming off the stack together could have produced the back condition and that this lack of evidence is fatal to plaintiff's claim.

Defendants take the position that the opinion in *Gillikin v. Burbage,* 263 N.C. 317, 139 S.E. 2d 753 (1965), requires this proof. We do not agree. There plaintiff was injured when she was struck by an automobile door on 12 June 1962. She was a passenger in defendant's automobile. Defendant had stopped the car and defendant had gotten out to go in a store. The engine was still running and the transmission was in gear. Defendant spoke to plaintiff, and plaintiff turned toward defendant. As plaintiff stood listening to defendant, between the opened right door and the door frame, defendant's foot slipped off the clutch. The car lurched forward, and the door came back suddenly against plaintiff's right hip. Some 6 days later she went to a doctor, was admitted to the hospital for 12 days, and a week after her discharge from the hospital was readmitted for 5 days. Some 6 months later it was discovered that plaintiff at that time had a ruptured disc in the interspace between the fourth and fifth lumbar vertebræ. There was no medical evidence that plaintiff's ruptured disc might, with reasonable probability, have resulted from

the accident of 12 June 1962. The Court held that the evidence failed to supply the missing inference of cause and effect. The Court noted that "One of the most difficult problems in legal medicine is the determination of the relationship between an injury or a specific episode and rupture of the intervertebral disc. 1 Lawyer's Medical Cyclopedia § 7.16 (1958 Ed.)"

There is no indication here of disc or nerve involvement. In fact the medical testimony was to the contrary. The evidence was that the onset pain of which plaintiff complained was simultaneous with the accident. Nor do we have before us an award for permanent disability.

[1, 2] We agree that where the injury or illness is such that a lay person could have no well-founded knowledge with respect thereto and could do no more than engage in speculation as to the cause of the condition complained of, then expert medical testimony is necessary, but "There are many instances in which the facts in evidence are such that any layman of average intelligence and experience would know what caused the injuries complained of." *Gillikin v. Burbage, supra; Jordan v. Glickman,* 219 N.C. 388, 14 S.E. 2d 40 (1941). We think the case now before us falls in the latter category, and that plaintiff introduced evidence from which the trier of the facts might draw a reasonable inference that the particular injury of which he complained was the proximate result of the accident. See *Batten v. Duboise,* 6 N.C. App. 445, 169 S.E. 2d 892 (1969). Defendants' assignments of error Nos. 1, 2, 3 and 4 are overruled.

[3] Defendants' remaining assignment of error is to the failure of the Full Commission to rule on motion filed with it by defendants. This assignment of error and the exception on which it is based are not brought forward and argued in defendants' brief and the assignment of error is deemed abandoned. Rule 28, Rules of Practice in the North Carolina Court of Appeals.

Affirmed.

MALLARD, C.J., and VAUGHN, J., concur.

D. J. NAPOLI v. W. L. PHILBRICK AND WIFE, CHRISTINE J. PHILBRICK

No. 7029SC89

(Filed 6 May 1970)

1. Boundaries §§ 8, 9— processioning proceeding — duties of judge hearing case without jury

Where the parties agreed that the only matter in controversy was the true divisional line between two contiguous parcels of land, the action, in effect, became a processioning proceeding, and it was the duty of the judge hearing the case without a jury to determine what constitutes the divisional line, and as trier of the facts, to say where it is.

2. Boundaries § 15— judgment in processioning proceeding — stipulations by plaintiff conceding defendant owns property by senior conveyance

In this processioning proceeding, the trial court did not err in finding that defendants are the owners of the property described in their further answer and defense and cross action and in establishing the divisional line as contended by defendants, notwithstanding two calls in said description may differ from the same two calls in the description in defendant's deed, where the only evidence before the court was the stipulated facts, and the parties stipulated that defendants acquired title to the property claimed by them by deed recorded on a certain date and that the property claimed by plaintiff was conveyed to him in a deed recorded on a subsequent date, plaintiff having stipulated to facts that in effect concede that defendants own, through a senior conveyance, the exact property they claim.

3. Trial § 6— stipulations — method of setting aside

A party to a stipulation who desires to set it aside should seek to do so by some direct proceeding, ordinarily by motion to set aside the stipulation in the court in which the action is pending.

4. Boundaries § 9— processioning proceeding — burden of proof

The burden of proof rests upon plaintiff in a processioning proceeding to establish the true location of the disputed boundary line, and if plaintiff is unable to show by the greater weight of the evidence the location of the line at a point more favorable to him, the issue should be answered in accord with the contentions of defendants.

APPEAL by plaintiff from *Froneberger, J.*, 18 August 1969 Session of HENDERSON County Superior Court.

Plaintiff and defendants are contiguous landowners in the Town of Laurel Park, Henderson County, their lands having a single common boundary extending some 125 feet. They derive title to their respective properties from a common grantor. Plaintiff purchased his property and recorded his deed in June of 1961 and the defendants recorded the deed to their property in December of 1956.

Plaintiff instituted this action on 14 July 1967 alleging that defendants are in the wrongful possession of a strip of land seven feet wide running along the common boundary line. In his complaint plaintiff asked that he be declared owner of the seven-foot strip of land; that the defendants be ordered to remove a portion of their house and other improvements located thereon; and that plaintiff be awarded actual and punitive damages. Defendants answered and denied plaintiff's ownership of the strip of land in question. They alleged in their further answer that the land in dispute is owned by them through seven years adverse possession under color of title; and further, that the fact the description in their deed does not encompass the disputed strip of land resulted from a scrivener's omission which was known and accepted by plaintiff at the time he acquired his property.

When the cause came on for trial the parties entered into the following stipulations:

"In this cause, it is agreed a jury trial is waived and that the matter in controversy shall be submitted to the presiding judge, on these agreed facts who shall find the facts and make his conclusions of law and render judgment thereon;

It is agreed that the plaintiff and defendants own adjacent property in the Town of Laurel Park in Henderson County, North Carolina, and that the only matter in controversy between the parties is the divisional line of said properties;

Further, it is agreed that there is only an area of 7 feet wide and 125 feet long involved in the controversy; that the 7 foot area, as well as other property owned by plaintiff and defendants, is shown on a map prepared from an actual survey by Don Hill, County Surveyor, on August 18, 1967, and the map may be used by the Court as evidence;

That the heavy dark colored line indicates the divisional line in controversy; defendants claiming the dark line is correct and plaintiff claims the green line is correct.

That the lands claimed by the plaintiff are described in paragraph 3 of the complaint and the lands claimed by the defendants are described in paragraph 1 of the Further Answer and Defense and Cross Action of defendants' Answer and the court may refer to the calls therein for such information as may be appropriate, but it is stipulated and agreed that no part of said properties are involved in the controversy, except the 7 feet area aforementioned.

Further, it is agreed that the defendants acquired title to the property claimed by them in a deed dated 14th September 1956 from Irene W. Rowlands to W. L. Philbrick and wife, Christine J. Philbrick, recorded 17 December 1956 in Deed Book 356, Page 383 of the Henderson County Deed Records and the plaintiff acquired title to his property from Irene W. Rowlands by Deed dated June 12, 1961, and recorded June 1961 in Deed Book 393, Page 565 of the Henderson County Registry."

Upon the stipulated facts, the trial judge found that defendants are the owners of the property described in their Further Answer and Defense and Cross Action and established the divisional line as contended by defendants. Plaintiff appealed.

Van Winkle, Buck, Wall, Starnes & Hyde by Herbert L. Hyde for plaintiff appellant.

Redden, Redden & Redden by Monroe M. Redden for defendant appellees.

GRAHAM, J.

[1] Since the parties agreed that the only matter in controversy was the true divisional line between the two contiguous parcels of land, this action, in effect, became a processioning proceeding. *Harrill v. Taylor,* 247 N.C. 748, 102 S.E. 2d 223; *Welborn v. Lumber Co.,* 238 N.C. 238, 77 S.E. 2d 612; *Goodwin v. Greene,* 237 N.C. 244, 74 S.E. 2d 630; *Clegg v. Canaday,* 217 N.C. 433, 8 S.E. 2d 246. It was therefore the duty of the judge to determine what constitutes the divisional line, and also as the trier of the facts, to say where it is. *Coley v. Telephone Co.,* 267 N.C. 701, 149 S.E. 2d 14; *Jenkins v. Trantham,* 244 N.C. 422, 94 S.E. 2d 311; *McCanless v. Ballard,* 222 N.C. 701, 24 S.E. 2d 525.

[2] Plaintiff contends the trial judge erred in his findings relating to the description of the property owned by defendants in that two calls in the said description differ from the same two calls in the description which appears in defendants' deed. It is uncontroverted that the strip of land in controversy is encompassed within the description of the property found by the court to be owned by the defendants. It therefore follows that unless the court erred in making this finding, the judgment entered correctly located the divisional line as the line contended by defendants.

Nowhere in the record does it appear that either defendants' or plaintiff's deed was offered in evidence or that there was any evi-

dence, other than that appearing in the stipulations, to show the description of the property owned by the parties. In fact, plaintiff concedes in his brief that the *only* evidence before the court was the stipulated facts. The stipulations provide in part:

> "That the lands claimed . . . by the defendants are described in paragraph 1 of the Further Answer and Defense and Cross Action of defendants' Answer and the court may refer to the calls therein for such information as may be appropriate, . . . Further, it is agreed that the defendants acquired title to the property claimed by them [in their Further Answer and Defense and Cross Action] in a deed dated 14 September 1956 . . . recorded 17 December 1956. . . ."

In finding that defendants own the property described in their Further Answer and Defense and Cross Action and reciting the exact description contained therein, the court in effect adopted the stipulated facts set forth above. The stipulations support the court's finding. Since, also according to stipulated facts, the property claimed by plaintiff was conveyed to him in a deed that was recorded subsequent to the recordation of defendants' deed, the court correctly relied upon the description of the property found to be owned by defendants. "A description contained in a junior conveyance cannot be used to locate the lines called for in a prior conveyance." *Carney v. Edwards,* 256 N.C. 20, 25, 122 S.E. 2d 786.

[3] It may be that plaintiff inadvertently stipulated to facts that in effect concede that defendants own, through a senior conveyance, the exact property they claim. However, plaintiff has made no effort to seek relief from the stipulations. In *R. R. Co. v. Horton,* 3 N.C. App. 383, 389, 165 S.E. 2d 6, we find the following:

> " 'A party to a stipulation who desires to have it set aside should seek to do so by some direct proceeding, and, ordinarily, such relief may or should be sought by a motion to set aside the stipulation in the court in which the action is pending, on notice to the opposite party.' 83 C.J.S., Stipulations, § 36, p. 93. 'Application to set aside a stipulation must be seasonably made; delay in asking for relief may defeat the right thereto.' 83 C.J.S., Stipulations, § 36, p. 94."

[4] The burden of proof rested on plaintiff to establish the true location of the disputed boundary line. *Coley v. Telephone Co., supra; Plemmons v. Cutshall,* 234 N.C. 506, 67 S.E. 2d 501. " 'If the plaintiffs are unable to show by the greater weight of evidence the location of the true dividing line at a point more favorable to them than the line as contended by the defendants, the jury should answer the

issue in accord with the contentions of the defendants.'" *Coley v. Telephone Co., supra,* at p. 702, quoting from *Cornelison v. Hammond,* 225 N.C. 535, 35 S.E. 2d 633, and cases cited. The record before us indicates that plaintiff failed to carry the burden of proof placed upon him and the findings, conclusions and judgment of the trial court are in all respects proper.

Affirmed.

BROCK and BRITT, JJ., concur.

KENNETH R. DOWNS, ADMINISTRATOR OF THE ESTATE OF LAURA MILDRED CUPPLES, DECEASED, v. JOHN CHRISTOPHER WATSON AND WATT LEE PARKER

No. 7026SC177

(Filed 6 May 1970)

1. Trial § 21— nonsuit — consideration of evidence

Upon motion for judgment of nonsuit the evidence of plaintiff must be taken as true and must be considered in the light most favorable to him, resolving all contradictions therein in his favor and giving him the benefit of every inference in his favor which can reasonably be drawn from it.

2. Automobiles § 83— pedestrian's contributory negligence — intersection — unmarked crosswalk

Plaintiff's evidence that his intestate was fatally struck by defendant's automobile while the intestate was attempting to cross a "Y" intersection at a point other than a marked or unmarked crosswalk, *held* to disclose the intestate's contributory negligence as a matter of law; and defendant's motion for nonsuit was properly granted.

3. Automobiles § 40— unmarked crosswalk defined

The term "unmarked crosswalk at an intersection," as used in G.S. 20-173(a) and G.S. 20-174(a), means that area within an intersection which also lies within the lateral boundaries of a sidewalk projected across the intersection.

4. Automobiles § 40— intersection — duty of pedestrian at point other than crosswalk

Plaintiff's intestate who attempted to cross a "Y" intersection at a point other than within a marked or an unmarked crosswalk had the duty to yield the right-of-way to all vehicles upon the highway. G.S. 20-174(a).

APPEAL by plaintiff from *Bryson, J.,* November 1969 Schedule A Session, MECKLENBURG Superior Court.

This is a civil action for damages and wrongful death sustained by plaintiff's intestate due to personal injuries resulting in death arising out of the alleged negligence of the defendant, John Christopher Watson, imputed to the defendant, Watt Lee Parker, on 29 December 1967, when the automobile being operated by defendant Watson struck plaintiff's intestate, Laura Mildred Cupples, as she was crossing Randolph Road at its intersection with Crescent Avenue in the City of Charlotte, North Carolina.

Plaintiff's evidence tends to show that on 29 December 1967 at approximately 9:15 p.m. defendant Watson was alone and was operating the family automobile in a westerly direction on Randolph Road; Randolph Road being a four lane highway with two lanes going west and two lanes going east. He was in the left or southernmost lane for westbound traffic and was traveling about 35 miles per hour, the maximum legal speed limit at this point on Randolph Road. He did not slacken his speed as he approached the intersection of Randolph Road with Crescent Avenue although he was familiar with the intersection. Defendant Watson testified that when he saw Mrs. Cupples she was moving from his left to his right in a northerly direction into his lane of travel. Defendant Watson did not sound his horn but he undertook evasive action by turning sharply to his left. His foot missed the brake and hit his accelerator instead. The right front portion of the automobile struck Mrs. Cupples.

The evidence further tends to show that Crescent Avenue, which runs generally northwest and southeast, dead ends into Randolph Road forming a "Y" intersection near where the collision occurred. There are sidewalks on each side of Randolph Road and on each side of Crescent Avenue and a concrete island lies between Randolph Road and Crescent Avenue. There is a stop sign on the west end of the concrete island for traffic entering Randolph Road from Crescent Avenue and also a stop sign to the east of the concrete island for traffic using the short cut from Crescent Avenue into Randolph Road. There were no marked crosswalks on Randolph Road.

Officer Joe M. Pender of the Charlotte Police Department investigated the collision and testified that he observed Mrs. Cupples lying just north of the line dividing the lanes for eastbound traffic on Randolph Road. He also observed debris, consisting of dirt and mud and one of Mrs. Cupples' shoes, in the southernmost lane for westbound traffic on Randolph Road. Randolph Road was 38 feet and 11 inches wide from the concrete island to its northern curb. The debris was located 12 feet and 7 inches from the northern curb and 5 feet and 5 inches from the center line dividing the eastbound and

westbound traffic. Immediately in front of the debris Officer Pender testified he found a semi-circle of skid marks leading in a southwesterly direction for a distance of 87 feet and 7 inches over to where an automobile parked on Crescent Avenue was struck. Mrs. Cupples was lying 24 feet and 10 inches from the northern curb of Randolph Road and 72 feet and 1 inch from the debris.

Plaintiff's evidence further shows that Randolph Road at the time of the collision was dry, level and straight and there was nothing to block the view of westbound traffic on Randolph Road from the traffic island on the Crescent Avenue intersection for a distance of 300 feet. While the collision occurred after nightfall, the Crescent Avenue and Randolph Road intersection was well-lighted by four street lights.

At the close of plaintiff's evidence judgment of involuntary nonsuit was entered. Plaintiff appealed.

Osborne & Griffin, by Wallace S. Osborne, for appellant.

Carpenter, Golding, Crews & Meekins, by John G. Golding, for appellees.

BROCK, J.

Appellant's sole assignment of error is that the trial court erred in granting defendants' motion for nonsuit made at the close of plaintiff's evidence.

[1] "It is elementary that upon a motion for judgment of nonsuit the evidence of the plaintiff must be taken to be true and must be considered in the light most favorable to him, resolving all contradictions therein in his favor, and giving him the benefit of every inference in his favor which can reasonably be drawn from it. (Citation omitted.) . . . A judgment of nonsuit on the ground of plaintiff's contributory negligence can be granted only when the plaintiff's evidence, considered in accordance with the above rule, so clearly establishes his own negligence as one of the proximate causes of his injury that no other reasonable inference or conclusion can be drawn therefrom. (Citations omitted.) Conversely, if the plaintiff's own evidence does admit of no other reasonable conclusion, the defendant is entitled to have his motion for judgment of nonsuit granted and it is error to deny it." *Anderson v. Carter*, 272 N.C. 426, 158 S.E. 2d 607.

G.S. 20-173(a) provides:

"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. . . ."

G.S. 20-174(a) provides:

"Every pedestrian crossing a roadway at a point other than within a marked crosswalk or within an unmarked crosswalk at an intersection shall yield the right-of-way to all vehicles upon the roadway."

[2] The plaintiff's evidence does not disclose the existence of a marked crosswalk extending across Randolph Road at its intersection with Crescent Avenue. It is therefore necessary to determine whether plaintiff's intestate was within an unmarked crosswalk when she was struck by the automobile being operated by defendant Watson.

[3] The term "unmarked crosswalk at an intersection", as used in G.S. 20-173(a) and G.S. 20-174(a), was construed in *Anderson v. Carter, supra,* a case involving a "T" intersection, to mean that area within an intersection which also lies within the lateral boundaries of a sidewalk projected across the intersection. Plaintiff urgently contends that this rule should be literally applied to the case at bar and that therefore plaintiff's intestate was in an unmarked crosswalk at the time she was struck by defendant's vehicle. This contention is untenable. In the present case Crescent Avenue merges with Randolph Road forming what is commonly called a "Y" intersection. Plaintiff's intestate was crossing the street in the area of the vertex of the "Y" intersection and under the evidence in this case, which is illustrated by the photographs and the diagram, there is no way that plaintiff's intestate could have been within an unmarked crosswalk.

[2, 4] Plaintiff's intestate, having attempted to cross Randolph Road at a point other than within a marked or an unmarked crosswalk, she had the duty to yield the right-of-way to all vehicles upon the highway. Without regard to defendants' negligence, plaintiff's evidence leads inescapably to the conclusion that plaintiff's intestate did not use the care for her own safety that an ordinarily prudent person in the same circumstances would have used, and that her failure so to do was one of the proximate causes of her injuries. The judgment of nonsuit was proper.

Affirmed.

BRITT and GRAHAM, JJ., concur.

STATE OF NORTH CAROLINA v. ROBERT LEE DUNBAR

— AND —

STATE OF NORTH CAROLINA v. GEORGE EDWARD PHARR, JR.

No. 7026SC146

(Filed 6 May 1970)

1. Criminal Law § 99— court's examination of witness

The trial judge can ask questions of a witness in order to obtain a proper understanding and clarification of the witness' testimony.

2. Criminal Law § 169— exclusion of evidence — review

The exclusion of evidence cannot be reviewed on appeal when the record does not disclose what the excluded evidence would have been.

3. Criminal Law § 87— leading questions — discretion of court

The presiding judge has wide discretion in permitting or restricting leading questions.

4. Criminal Law § 99— remark of court to counsel — repetitious examination by counsel

Admonition from the trial court to defense counsel, "let's don't go over the same thing over and over; once is enough," was not prejudicial where the record disclosed that the witness under examination by counsel had repeated the same testimony several times.

5. Criminal Law § 117— scrutiny of accomplice's testimony — instructions

Instructions to scrutinize the testimony of an alleged accomplice are not required when no request therefor has been made.

APPEAL by defendants from *Falls, J.*, 6 October 1969, Schedule "C" Criminal Session, MECKLENBURG Superior Court.

The defendants were charged in a proper bill of indictment with the felony of robbery by use of firearms. The first witness for the State, Charles C. Austin, testified in substance as follows: On 3 May 1969 he was employed as assistant manager of the Little General Store on Statesville Avenue in Charlotte. At about 11:05 p.m. on that date the defendant George Edward Pharr came to the store, pointed a sawed-off shotgun at his throat, forced him to remove some $438.00 from the cash register and place it on the counter. One Robert E. Lockhart was already in the store when Pharr arrived. Pharr told Lockhart to take the money and leave. Pharr then forced Austin to lie down on the floor and went out the door. Thinking that Pharr had gone Austin raised his head. He then saw Pharr on the outside pointing the gun at him. Pharr fired through the plate glass window. Several minutes later Austin got up and called the police.

The State then called Robert E. Lockhart who testified in substance as follows: On the date of the robbery he and Pharr were living in the house of Margaret Correlos. On 3 May 1969 Robert Lee Dunbar came to this house and honked his horn. The three left in an automobile driven by Dunbar. They discussed robbing the Little General Store. Pharr gave him a .38 caliber pistol. When they arrived at the store, Dunbar drove the automobile around the corner. Pharr told Lockhart to go inside, which he did. Pharr then came in with the shotgun and ordered Austin to give him the money from the cash register. Pharr told him to pick up the money and put it in a bag. After doing this he went outside where Dunbar was waiting in the automobile. He heard two shots. When Pharr came to the automobile, he stated that he had fired because "the man wouldn't lay down." With Dunbar driving, the three then returned to the house where Pharr and Lockhart lived. Dunbar and Pharr counted out the money, gave Lockhart $40.00 and divided the remainder.

Robert Dunbar, testifying in his own behalf, stated that he knew nothing about the robbery and that he did not see either Pharr or Lockhart on 3 May 1969. He further testified that his only conviction of a criminal offense was for carrying a concealed weapon. George Edward Pharr, testifying in his own behalf, also denied any knowledge of the robbery. He stated that he did not know Robert Lee Dunbar; that he had known Lockhart about a month but had never roomed with him. He has been convicted of forcible trespass, robbery and assault with a deadly weapon.

One Jimmy Carter testified as a witness for the defendant Pharr as follows: That he had always known defendant as "George Foxie" and that the two of them were at the Union Grill in Marshville at the time of the alleged robbery.

The jury returned verdicts of guilty as charged as to each defendant. A judgment imposing an active sentence of not less than twenty-three (23) nor more than twenty-eight (28) years was entered in the case against Dunbar. Pharr received an active sentence of not less than twenty-seven (27) nor more than thirty (30) years. Both defendants appeal.

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

J. C. Sedberry for defendant appellant Dunbar.

William G. Robinson for defendant appellant Pharr.

VAUGHN, J.

[1] Both of the defendants are indigent and are represented on this appeal by their court-appointed attorneys. Separate briefs have been filed on behalf of each defendant. We will first discuss the assignments of error brought forward only by defendant Pharr. Assignments of Error Nos. 2, 3, 7, 8, 9, 10 and 12 all relate to questions propounded by the court to witnesses. We have carefully examined each of these and find the assignments of error to be without merit. In each instance it is clear that the questions were designed to obtain a proper understanding of the testimony. It is well settled in this State that the trial judge can ask questions of a witness in order to obtain a proper understanding and clarification of the witness' testimony. *State v. Strickland,* 254 N.C. 658, 119 S.E. 2d 781.

[2] On cross-examination defendant's counsel asked the witness Austin: "Now, what was the discussion you had with Mr. Painter at that time?" The court sustained the State's objection. The record does not disclose what the reply of the witness would have been; consequently, we do not know whether or not the ruling was prejudicial to the defendant, nor does the record show the purpose for which the question was propounded. The burden is on the appellant to show prejudicial error. As a general rule, the exclusion of evidence cannot be reviewed on appeal when the record does not disclose what the excluded evidence would have been, so that the court can determine whether or not its exclusion was prejudicial. *State v. Poolos,* 241 N.C. 382, 85 S.E. 2d 342; *State v. Patton,* 2 N.C. App. 605, 163 S.E. 2d 542. Assignments of Error Nos. 4 and 5 are overruled.

[3] The witness Lockhart testified, "I saw Mr. Pharr and Mr. Dunbar over there at the house of Margaret Correlos." The solicitor then asked the following question: "Were you there at the Correlos home and did Mr. Pharr and Mr. Dunbar come to that address or just how did you happen to get up with them?" Defendant Pharr's objection to the question on the ground that it was leading was overruled. The witness replied, "Mr. Pharr stayed there, Mr. Robert didn't." Our courts have almost invariably held that the presiding judge has wide discretion in permitting or restricting leading questions. The question and answer elicited were clearly not prejudicial to the defendant. *State v. Johnson,* 272 N.C. 239, 158 S.E. 2d 95. Assignment of Error No. 6 is overruled.

[4] On one occasion the court told defendant's counsel, "Let's don't go over the same thing over and over. Once is enough." Assignments of Error Nos. 14 and 15 based on defendant Pharr's exception to this statement by the court are overruled. Although the

questions by defendant's counsel are not in the record, the narrative of the evidence discloses that the witness had just repeated the same testimony several times in succession. Under these circumstances the admonition from the court was clearly proper.

[5] Both defendants bring forward Assignment of Error No. 25 which asserts that the court failed to comply with G.S. 1-180. Defendants contend that the court did not instruct the jury as to the weight and credibility of the testimony of the witness Lockhart. A party desiring further elaboration on a particular point, or of his contention, or a charge on a subordinate feature of the case must aptly tender his request for special instructions. 3 Strong, N.C. Index 2d, Criminal Law, § 113, p. 13. Instructions to scrutinize the testimony of an alleged accomplice are not required when, as here, no request therefor has been made. *State v. Roux,* 266 N.C. 555, 146 S.E. 2d 654. This assignment of error is overruled.

Defendant Pharr's Assignments of Error Nos. 18 and 23 and defendant Dunbar's Assignments of Error Nos. 18, 19, 20 and 21 involve alleged errors in the judge's instructions to the jury. We have carefully examined the entire charge, with particular reference to the exceptions, and find that it adequately charges the law on every material aspect of the case arising on the evidence and applies the law fairly to the facts in evidence. All assignments of error to the charge are overruled.

The defendants were ably represented by counsel. The jury, under application of settled principles of law, resolved the issues of fact against the defendants. In the entire trial we find no prejudicial error.

No error.

MALLARD, C.J., and MORRIS, J., concur.

DELBERT RAY ANTHONY v. MAVIN VIRGIE ANTHONY

No. 7025DC150

(Filed 6 May 1970)

1. Pleadings § 26— demurrer to cross action

A demurrer to a cross action must be overruled if the allegations of the answer will entitle the defendant to any affirmative relief.

2. Divorce and Alimony §§ 6, 16— alimony without divorce — cross action — adultery

In the wife's cross action for alimony without divorce, an allegation that her husband had committed adultery is sufficient to withstand demurrer. G.S. 50-16.2(1).

3. Divorce and Alimony § 2— judgment of absolute divorce — erroneous recital

In a judgment awarding the husband an absolute divorce, a recital that no answer has been filed by the wife and that the time for filing answer has elapsed and no extension of time has been requested or granted, *held* erroneous, since the wife's answer, further answer, defense and cross action appeared in the record and were never stricken by the court or withdrawn by the wife.

APPEAL by defendant from *Whitener, District Judge,* October 1969 Session of BURKE County General Court of Justice, District Court Division.

This action was commenced by summons dated and served 25 January 1969. The complaint filed by Delbert R. Anthony (Anthony) on that date seeks an absolute divorce, on the grounds of one year separation, from Mavin V. Anthony (Mrs. Anthony). Mrs. Anthony answered, denying the material allegations of the complaint. As a further answer, defense and cross action, she alleged that she is unable to work because of a "nervous condition" and

"That on or about the 17th day of December, 1962, and prior thereto, the plaintiff herein did continually drink intoxicating beverages and regularly became intoxicated and did use alcohol in excess and did as a result thereof, curse, abuse and harass the defendant herein at all hours of the day and night, and did continually and often commit adultery with Minnie Pearl Fredale and other persons unknown to this defendant, and was otherwise guilty of such cruel treatment toward his wife as to constitute an abandonment of her, and did, on the 12th day of September, 1962, pack his clothing and abandon this defendant and did leave their home and habitat; that the plaintiff herein did curse, beat and abuse this answering defendant to such an extent and did offer such other indignities to this defendant as to render her condition intolerable and life burdensome;

"5. That after the abandonment of the defendant herein by plaintiff, that the plaintiff did conduct himself in such a manner that he was convicted of a crime and sentenced to the North Carolina State Prison Department, and was released therefrom on or about the 20th day of January, 1969; and that the plaintiff herein has failed and refused absolutely to offer any support of any kind or nature to this dependent spouse in order that she

might properly support herself and the children born of this marriage; . . . ."

Mrs. Anthony thereupon prayed for alimony *pendente lite*, attorney's fees, alimony without divorce and support for the four children of the marriage.

The plaintiff, Anthony, demurred to the cross action after all the evidence was presented. The demurrer was first denied and then sustained. The trial court then allowed an absolute divorce as prayed for by Anthony and entered the following judgment:

"The above captioned matter coming on for hearing and being heard before the undersigned Judge Presiding of the 25th Judicial District Court, said hearing being held in Morganton, Burke County, North Carolina, and it now appearing to the court that summons in the above captioned matter was issued by the Clerk of Burke Superior Court on the 25th day of January, 1969, and that personal service of the said summons was had by the Sheriff's Department of Burke County, North Carolina, on the 25th day of January, 1969, and that no answer or other pleading has been filed by the defendant and that the time for filing answer has elapsed and that no extension of time has been requested or granted by the court. It further appearing to the court that the court has jurisdiction over both the parties and the subject matter herein. It further now appearing to the court that neither the defendant nor the plaintiff has requested a trial by jury; therefore, pursuant to G.S. 50-10, as amended and other statutes and case law, the court proceeded to answer the issues appearing in the record as follows:

"1. Has the plaintiff been a citizen and resident of North Carolina for more than six months immediately prior to the commencement of this action, as alleged in the complaint?

"ANSWER: Yes

"2. Were the parties hereto lawfully married as alleged in the complaint?

"ANSWER: Yes

"3. Have the parties hereto lived separate and apart for longer than one year immediately prior to the commencement of this action, as alleged in the complaint?

"ANSWER: Yes

"It further appearing to the court that there was born to this marriage four children, two (2) of whom are still minors, David

Anthony and Charles Anthony; that it further appearing to the court that the plaintiff is able-bodied and is self-employed and is able to contribute to the support of said minor children, David Anthony and Charles Anthony; it further appearing unto the court that the minor children, David Anthony and Charles Anthony, are living with the defendant-mother.

"It is therefore, considered, ordered and adjudged that the plaintiff is awarded an absolute divorce from the defendant and that the bonds of matrimony heretofore existing be and the same are hereby dissolved. It is further ordered that the plaintiff pay the sum of Thirty Dollars ($30.00) per week for the support and maintenance of his minor children, David Anthony and Charles Anthony, and that the first payment be made on Friday, October 24, 1969; it is further ordered that the plaintiff pay the cost of this action, as taxed by the Clerk of this Court.

"This the 21st day of October, 1969.

"/s/ Mary G. Whitener
Judge Presiding"

Mrs. Anthony appeals to this Court, assigning as error the failure of the trial court to allow certain types of cross-examination, and the sustaining by the trial court of the demurrer to the further answer, defense and cross action.

Byrd, Byrd and Ervin, by John W. Ervin, Jr., and Joe K. Byrd, for plaintiff appellee.

Simpson and Martin, by Wayne W. Martin and Dan R. Simpson, for defendant appellant.

HEDRICK, J.

[1] The first group of assignments of error in this case deal with the trial judge's sustaining a demurrer to the further answer and defense and cross action which was interposed at the conclusion of all evidence. A demurrer to a cross action must be overruled if the allegations of the answer will entitle the defendant to any affirmative relief. *Ayers v. Ayers*, 269 N.C. 443, 152 S.E. 2d 468 (1967).

The further answer and defense and cross action alleges:

"That on or about the 17th day of December, 1962, and prior thereto, the plaintiff . . . did continually and often commit adultery with Minnie Pearl Fredale and other persons unknown to this defendant."

G.S. 50-16.2 provides, in part:

"A dependent spouse is entitled to an order for alimony when:

"(1) The supporting spouse has committed adultery."

Judge Whitener ruled:

"The court is going to reverse its ruling and sustain the demurrer of the plaintiff to the further answer and cross action of the defendant. The demurrer having been made to the action for alimony without divorce brought by the defendant in the cross action is sustained."

We hold that the allegation in the further answer and defense and cross action that the plaintiff, husband, had committed adultery is sufficient to withstand a demurrer, in view of G.S. 50-16.2(1). Mrs. Anthony's further answer, defense and cross action for alimony without divorce could not be dismissed since it could withstand a demurrer through the statement of at least one good cause of action. *Ayers v. Ayers, supra.* It follows that the order sustaining the demurrer must be set aside. In addition to praying for alimony without divorce, the defendant in her answer sought also to have the plaintiff's action for absolute divorce dismissed.

Judge Whitener's judgment recites that ". . . no answer has been filed by the defendant and that the time for filing answer has elapsed and that no extension of time has been requested or granted by the court." This is clearly inappropriate in the instant case since the defendant's answer, further answer, defense and cross action appears in the record and was never stricken by the court or withdrawn by the defendant. We must therefore assume, that after sustaining the demurrer, Judge Whitener erroneously failed to consider the defendant's pleadings in any respect. The defendant was entitled to have her answer, further answer, defense and cross action considered before the court proceeded to answer the issues and enter a judgment.

Since the court had jurisdiction of the minor children and of the plaintiff and defendant in this action, the order providing that the plaintiff (father) pay $30.00 per week for their support is not disturbed.

For the reasons stated, the order sustaining the demurrer to the defendant's further answer, defense and cross action is reversed and the judgment awarding the plaintiff an absolute divorce is reversed.

Reversed.

MORRIS and PARKER, JJ., concur.

IN THE MATTER OF CUSTODY OF GLENN M. POOLE, JR., AND MARY ELLEN POOLE, MINOR CHILDREN OF GLENN M. POOLE AND NANCY WHITE POOLE

No. 7010DC7

(Filed 6 May 1970)

1. Divorce and Alimony § 24— child custody order — modification

Orders awarding custody of a child may be modified by a court when it has been shown that there has been a substantial change of circumstances affecting the welfare of the child.

2. Divorce and Alimony § 24— modification of child custody order — change of condition

Where there is no evidence that the fitness or unfitness of either party has changed, the trial court may not modify a prior order awarding custody unless some other sufficient change of condition is shown.

3. Divorce and Alimony § 24— modification of child custody order — sufficiency of findings

Trial court's findings *held* not to support modification of child custody order which found the wife to be a fit and proper person to have the custody of the children of the marriage, where the only change of condition shown is that the wife has been adjudged in contempt for violating a court order which prohibited her from allowing a named male to associate with the children and there is no finding that the association with the male person was immoral or detrimental to the children's welfare.

APPEAL by petitioner, Nancy W. Poole, (Mother) from *Ransdell, J.*, 5 May 1969 Session, District Court of WAKE County.

This action was originated by a petition filed in the Wake County Domestic Relations Court on 4 June 1968 by the mother seeking custody of the children of her marriage with Glenn M. Poole, Sr., (Father). The children were Mary Ellen Poole, age 5, and Glenn Marshall Poole, Jr., age 7.

By order of 27 August 1968, both father and mother were found to be fit and proper persons to have the custody of the children. Nevertheless, the custody of both children was awarded to the mother with certain visitation rights on the part of the father, and with the right of the father to have the children with him for two months during the summer holidays, and at certain other holiday periods. The father was ordered to pay for the support of the children, and it was specifically ordered that "John W. Gregory, III not be permitted to visit or come into the home of said Nancy White Poole at any time, and that said John W. Gregory, III not be permitted to associate with said children."

The father gave notice of appeal from this order but did not perfect it.

Subsequently, the father filed a motion for reconsideration, and the District Court having been established, the matter was heard by Judge Ransdell in December 1968. By order of 13 December 1968, Judge Ransdell awarded the custody to the mother with visitation rights by the father. The father was ordered to pay for the support of the children, and the same condition was entered with regard to John W. Gregory, III.

On 28 March 1969, the father again made a motion in the cause for a new hearing. The record discloses that a hearing was held on 5 May 1969, and at the conclusion of the hearing, the judge made the following entry:

> "Let the record show after a complete and thorough hearing in this case, with the exception of the six year old child which the court declined to allow to testify, the court is of the opinion that the mother of these children has wilfully and intentionally and completely ignored the order of this court, and that the court further is of the opinion that she has no intention, at all, of complying with the order of this court in any respect;
>
> "That her association with John Gregory, III has been wilfully, intentionally, and deliberately in violation of the order of this court entered into the 13th day of December 1968.
>
> "That is all the judgment I am going to render right now.
>
> * * *
>
> "* * * I am thinking about asking the welfare — I don't think either one is complying with the order of the court at all — either one.
>
> * * *
>
> "I am not going to make any order until I get more information."

The record does not disclose what other information, if any, the Court obtained. The record discloses that in May 1969, shortly after the above hearing, the mother went to the State of Arkansas where her father was seriously ill. She took the two children with her, and has never returned to the State of North Carolina.

Thereafter, under date of 3 June 1969, the following paper was filed:

"*JUDGMENT* (ORDER) (Filed 6/3/69)

"This matter coming on to be heard and being heard by Honorable N. F. Ransdell, Judge Presiding over District Court Division, term beginning May 5, 1969, and the above mother and father of the minor children being present, represented by counsel, and both parties having presented evidence relating to the custody of said children; and the court finding as a fact as follows:

"1. That in a previous hearing before this undersigned judge on or about December 13, 1968, judgment was entered providing, among other things, '* * * that John W. Gregory, III not be permitted to visit or come into the home of said Nancy White Poole at any time, and that said John W. Gregory, III not be permitted to associate with said children.'

"2. That the said Nancy White Poole has wilfully, intentionally, and heedlessly knowingly violated the direct orders of this court with respect to the said judgment dated December 13, 1968, in that she did permit the said John W. Gregory, III to visit or come into the home of said Nancy White Poole and did permit him to associate with the said minor children.

"3. That Glenn M. Poole, father of said children, is a fit and proper person to have custody of Glenn M. Poole, Jr. and Mary Ellen Poole, and that the welfare and interests of said children would be best promoted by awarding their custody to their father.

"4. That the finding of fact that Nancy White Poole had wilfully and intentionally violated the provisions of said judgment of the court, was pronounced by the undersigned judge presiding at the hearing on May 8, 1969, at which time the said Nancy White Poole was present in court.

"5. That the said Nancy White Poole is not a fit and proper person to have custody of the said minor children, but is entitled to reasonable visitation rights.

"6. That after the hearing in court on May 8, 1969, and prior to the signing of this judgment, it has come to the attention of the court from statements of counsel that the said Nancy White Poole has left the State with said children and has not returned to this State.

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

"(a) That the custody of Glenn M. Poole, Jr. and Mary Ellen Poole be and is hereby awarded to Glenn M. Poole, Sr.

"(b) That the said Nancy White Poole is hereby ordered and directed to return the children to the jurisdiction of this State and to this court.

"(c) That the said Nancy White Poole is hereby found to be in contempt of this court, but the matter of punishment or disposition as to Nancy White Poole is held open pending her return to this jurisdiction.

"(d) That the costs of this action shall be taxed by the Clerk against Glenn M. Poole, Sr.

"This 3 day of June, 1969.

"s/ N. F. Ransdell
Judge Presiding"

Vaughan S. Winborne for Nancy White Poole, petitioner appellant.

Allen W. Brown for Glenn M. Poole, Sr., respondent appellee.

CAMPBELL, J.

[1, 2] Orders awarding custody of children may be modified by a court when it has been shown that there has been a substantial "change of circumstances affecting the welfare of the child." *Crosby v. Crosby*, 272 N.C. 235, 158 S.E. 2d 77 (1967). If the parent awarded custody of children were subsequently to become unfit, it would be possible for the trial court, upon proper findings, to grant custody to a fit person. Where there is no evidence that the fitness or unfitness of either party has changed, the trial court may not modify a prior order awarding custody unless some other sufficient change of condition is shown. *Stanback v. Stanback*, 266 N.C. 72, 145 S.E. 2d 332 (1965).

[3] We are of the opinion that the findings of the trial judge in the instant case do not support modification of the initial custody order which found her to be fit to have custody. The only change shown here is that Nancy has been adjudged in contempt for violating an order of the court regarding her association with one John W. Gregory, III. There is no finding that the association with Gregory was immoral or that it was detrimental to the children's welfare. We do not feel that the citation of Nancy for contempt in the instant case, without more, is a sufficient change of condition to require a finding that "Nancy White Poole is not a fit and proper

person to have custody * * *" of the children involved herein. *Stanback v. Stanback, supra; Neighbors v. Neighbors,* 236 N.C. 531, 73 S.E. 2d 153 (1952).

The welfare of the children is the determining factor in the custody proceedings and the award of custody based on that factor will be upheld when supported by competent evidence. *In Re Custody of Ross,* 1 N.C. App. 393, 161 S.E. 2d 623 (1968); cert. den., 274 N.C. 274.

Reversed.

PARKER and HEDRICK, JJ., concur.

O. P. FOX AND WIFE, IDA FOX v. ROBERT E. MILLER AND WIFE, JUSTINA MILLER

No. 7025DC18

(Filed 6 May 1970)

1. Appeal and Error § 57— exception to judgment — question on appeal

An exception to a judgment rendered in a trial by the court, without exception to the evidence presented or the findings of fact made by the court, presents the sole question of whether the facts found support the judgment.

2. Appeal and Error § 57— appeal as exception to judgment

An appeal itself constitutes an exception to the judgment and presents the question of whether the facts found support the judgment.

3. Trial § 58— trial by court without jury — failure to find the material facts

In this action to remove cloud from title tried by the district court without a jury, the judgment entered by the court contains no findings of fact upon which the court could base its conclusions of law as required by [former] G.S. 1-185, the judgment having merely set forth as findings of fact the contentions of the parties and a review of the evidence, and the cause must be remanded to the district court.

APPEAL from *Snyder, District Judge,* June 1969 Session CALDWELL County District Court.

This is a civil action instituted by plaintiffs, O. P. Fox and wife, Ida Fox, to remove a cloud from plaintiffs' title to an 8.5 acre tract

of land in Caldwell County. Plaintiffs claim title under a deed from R. M. Coffey arising out of a chain of title leading to a common grantor. Plaintiffs alleged that a cloud on the title arose under a deed from Ernest Pitts and wife to defendants for the 8.5 acre tract and that the deed is invalid because the grantors had no title to convey.

By consent of the parties, the case was tried before the judge without a jury. At the conclusion of the trial a judgment was entered on 11 July 1969 as follows:

"JUDGMENT

* * *

"1. Both plaintiffs and defendants claimed to own the aforesaid 8½ acre parcel of land, the plaintiffs by a deed from R. M. Coffey dated February 15, 1962, recorded in Book No. 423, at Page 541 in the Registry of Caldwell County. The defendants claimed title to the said 8½ acre tract of land by deed from Ernest Pitts and wife, Beulah Pitts, dated November 27, 1967, recorded in Book 577 at pages 422 and 423, Caldwell County Registry.

"2. The defendant claimed adverse possession under color of title for some 16 years. The evidence before this court consisted of the conveyances in the chains of title of the parties hereto; the testimony of O. P. Fox and John Pitts for plaintiff; of G. R. Oxentine, Minnie Pitts and Ernest Pitts for the defendants. Since there were no official surveys or maps of the lands, drawings made by the attorneys were allowed to be used to illustrate their arguments, but were specified not to be evidence because there was no assurance of their accuracy.

"3. The evidence shows that the common source of title of both parties hereto as to the property in question is derived from John Oxentine and wife, Harriet Oxentine, who owned the lands on both sides of New Year's Creek.

"4. The plaintiffs offered in evidence the following documents in support of their claim:

"(a) Deed by R. M. Coffey, (Widower) to O. P. Fox and wife, Ida Fox, dated February 15, 1962, recorded in Book 423 at Page 541, Caldwell County Registry.

"(b) Deed by Dalton Pitts to R. M. Coffey, dated February 17, 1951, recorded in Book 271 at page 32, Caldwell County Registry.

"(c) Deed by Arl Pitts and wife, to Dalton Pitts, dated January 21, 1950, recorded in Book 249 at page 567, Caldwell County Registry.

"(d) Deed by Florence Pitts Coffey and husband, Collis Coffey, to Arl Pitts and wife, Gladys Pitts, dated April 6, 1949, recorded in Book 249 at Page 421, Caldwell County Registry.

"(e) Deed by G. R. Oxentine, et al, to Roy Pitts and wife, Florence Pitts, dated December 2, 1936, recorded in Book 146 at Page 247, Caldwell County Registry.

"5. The defendants offered in evidence the following documents in support of their claim:

"(a) Deed by Ernest Pitts and wife, to Robert Miller and wife, Justina Miller, dated November 27, 1967, recorded in Book 557 at page 422, Caldwell County Registry.

"(b) Deed by G. R. Oxentine and wife, Mattie Oxentine to Ernest Pitts and wife, dated September 8, 1953, recorded in Book 285 at Page 544, Caldwell County Registry.

"6. The defendants offered testimony tending to show that they and their predecessors in title had owned, occupied, cultivated, pastured, fenced and used the 8½ acre tract of land openly, notoriously and adversely under known and visible boundaries and under color of title for more than 8 years next preceding the institution of this action.

"7. It was stipulated and agreed by the parties and their attorneys and this court that all rights of the parties necessary and proper to preserve their rights of appeal, such as objections, exceptions, motions, etc., were deemed to have been timely and properly made and reserved unto them.

"WHEREFORE, this court concludes as matters of law based upon the above findings of fact that:

"1. The plaintiffs have good and sufficient title to the Oxentine-Pitts lands described in their conveyances which lie West of New Year's Creek.

"2. The plaintiffs do not have any valid claim to any of said lands lying East of New Year's Creek.

"3. The defendants, Robert E. Miller and wife, Justina Miller, have good and sufficient title to the Oxentine-Pitts lands lying on the East side of New Year's Creek which are described in deed from G. R. Oxentine and wife, to Ernest Pitts, dated

September 8, 1953, duly recorded in Book 285, Page 544, Caldwell County Registry, by virtue of adverse possession under color of title for more than 8 years.

"4. The plaintiffs do not have any valid claim whatsoever to any of the lands described in the conveyances to the defendants.

"5. The title and claims of the defendants do not constitute any cloud upon title of the plaintiffs.

"IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that:

"1. The plaintiffs have no claim or title to lands on the East side of New Year's Creek, or to the 8½ acre tract described in deed dated November 27, 1967, recorded in Book 557 at Page 422, Caldwell County Registry.

"2. The claims of the defendants are superior to the claims of the plaintiffs as to the lands on the East side of New Year's Creek.

"3. The title and claims of the defendants do not constitute any cloud upon the title of the plaintiffs.

"4. The costs of this action be taxed against the plaintiffs.

"Entered this 11th day of July, 1969.

"/s/ Keith S. Snyder
Judge Presiding"

From this judgment, the plaintiffs appealed to the North Carolina Court of Appeals.

Wilson and Palmer, by Hugh M. Wilson, for the plaintiff appellants.

L. H. Wall, attorney for the defendant appellee.

HEDRICK, J.

[1, 2] The appellants bring forward the sole question of whether the judgment entered by the court made sufficient findings of fact upon which to base the conclusions of law and sustain the judgment entered. An exception to a judgment rendered in a trial by the court, without exception to the evidence presented or the findings of fact made by the court, presents the sole question of whether the facts found support the judgment. *Best v. Garris*, 211 N.C. 305, 190 S.E. 221 (1937). Even in the absence of exceptions to the findings of fact, the appeal itself constitutes an exception to the judgment and

presents the question of whether the facts found support the judgment. 1 Strong, North Carolina Index 2d, Appeal and Error, § 57.

G.S. 1-185, which was in effect at the time this case was decided and which has been replaced by G.S. 1A-1, Rule 52, Rules of Civil Procedure, required that "Upon trial of an issue of fact by the court, its decision shall be given in writing, and shall contain a statement of the facts found, and the conclusions of law separately." Under this statute there were three things which the judge was required to do when jury trial was waived: (1) He had to find the facts on all issues of fact joined on the pleadings; (2) he had to declare the conclusions of law which arose upon the facts found; and (3) he had to enter judgment accordingly. *Woodard v. Mordecai,* 234 N.C. 463, 67 S.E. 2d 639 (1951).

[3] The judgment entered by the court below in the present case contains no findings of fact upon which the judge could base his conclusions of law. The judgment merely sets forth, as findings of fact, the contentions of the parties and attempts to review the evidence offered at the trial. We are of the opinion that the court below has not sufficiently complied with the requirements of G.S. 1-185 in that the court's decision does not contain a statement of the facts found. "Where a case is left by consent to be tried both as to the facts and the law by the court, and it fails to find the material facts, the case may be remanded in order that such facts may be so found. *Knott v. Taylor,* 96 N.C. 553; *Trust Co. v. Transit Lines,* 198 N.C. 675." *Shore v. Bank,* 207 N.C. 798, 178 S.E. 572 (1935).

In the absence of sufficient and definite findings of fact to support the judgment, the judgment is vacated and the case is remanded to the District Court of Caldwell County for further hearing, findings, conclusions and decision.

Vacated and remanded.

BRITT and PARKER, JJ., concur.

STATE OF NORTH CAROLINA v. JAMES EDWARD WOOD

— AND —

STATE OF NORTH CAROLINA v. DONALD WRAY WOOD

No. 7027SC66

(Filed 6 May 1970)

Criminal Law § 84— motion to suppress evidence — search and seizure — voir dire

Where defendants made a motion to suppress evidence of cigarettes found in their car by a search and seizure without a warrant, the trial court erred in failing to conduct a voir dire in the absence of the jury to determine the legality of the search and seizure and to make findings of fact on this question.

APPEAL by defendants from *Falls, J.*, 21 October 1969 Session, CLEVELAND Superior Court.

In separate but virtually identical bills of indictment returned at the April 1969 Session of Cleveland Superior Court, defendants were charged with (1) storebreaking and (2) felonious larceny on 19 February 1969. On 8 July 1969, defendants appeared before Hasty, J., and after being informed of the charges against them, the nature of the charges and statutory punishment therefor, and their right to be represented by counsel, defendants expressed their desires to be tried without legal counsel and executed waivers of their rights pertaining thereto.

When the cases came on for trial, the defendants advised the trial judge that they desired to serve as their own counsel. They pleaded not guilty, the jury found them guilty as charged, and the court imposed active prison sentences aggregating 20 years on each defendant. Defendants appealed and are represented here by court-appointed counsel.

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

N. Dixon Lackey, Jr., for defendant appellants.

BRITT, J.

Defendants assign as error the failure of the trial judge to conduct a voir dire in the absence of the jury to determine the legality and admissibility of testimony relating to 39 cartons of cigarettes found in an automobile operated and occupied by defendants at the time of their arrest and to make findings of fact on this question.

The record reveals that after the jury was selected and impaneled, the trial judge in the absence of the jury heard several motions presented by defendant James Wood. One of the motions was to the effect that evidence pertaining to the 39 cartons of cigarettes be suppressed for that said evidence resulted from a search of the automobile occupied by defendants without a search warrant, in violation of their constitutional rights. The trial judge declined to rule on the motion at that time but stated, "I will have to cross that bridge when I reach it."

The State proceeded to present its evidence including testimony of Harold Glass, one of the owners of the store alleged to have been broken and entered, of David Corn and Tom McDevitt, members of the Kings Mountain Police Department, and of Deputy Sheriff Palmer Cannon. Following the cross-examination of Mr. Corn regarding a search warrant, the record discloses the following:

"AT THIS POINT IN THE TRIAL, the following exchange occurred between the Judge, the defendant James Edward Wood and the witness in the presence of the jury:

'DEFENDANT JAMES EDWARD WOOD: That's all of this witness, but I would like to make a motion to the Court at this time.

THE COURT: Well, just a minute (to witness). What, if anything, did you find with the search warrant?

A. We didn't serve the search warrant.

THE COURT: I didn't ask you that. I asked you what you found searching the car after you got the search warrant?

A. Thirty-nine cartons of cigarettes — 37 full cartons.

THE COURT: You said you saw the cigarettes in the car as it was parked on the side of the road?

A. As I checked it, yes, sir.

THE COURT: And at the Police Station, you saw them in the car?

A. Yes, sir.

THE COURT: You also testified, as I recall it, that you found a lug wrench and screwdriver underneath them?

A. Yes, sir. They were on the floorboard, underneath the box.

THE COURT: You couldn't see them from outside, because they were under the box?

A. No, sir; you couldn't see them.

THE COURT: I'll strike the lug wrench and screwdriver from the evidence. The jury will not consider them, but will consider the cigarettes.'"

The assignment of error is well taken. In *State v. Pike,* 273 N.C. 102, 159 S.E. 2d 334 (1968), in an opinion by Branch, J., we find the following:

"In the case of *State v. Myers,* 266 N.C. 581, 146 S.E. 2d 674, a motion was made to suppress evidence obtained by a search warrant on the ground of insufficiency of the warrant. The Court, finding the warrant illegal, *inter alia,* made this pertinent statement:

'In this case, as a matter of procedure, we see no reason why the trial court, in its discretion and on defendant's motion to suppress the evidence, could not conduct a preliminary inquiry relating to the legality of the search in the same manner as the court does in determining the voluntariness of a confession.'

In passing upon whether confessions of defendants in criminal cases are voluntary and admissible in evidence, this Court has approved the following rule:

'When the State proposes to offer in evidence the defendant's confession or admission, and the defendant objects, the proper procedure is for the trial judge to excuse the jury and, in its absence, hear the evidence, *both that of the State and that of the defendant,* upon the question of the voluntariness of the statement. In the light of such evidence and of its observation of the demeanor of the witnesses, the judge must resolve the question of whether the defendant, if he made the statement, made it voluntarily and with understanding. *State v. Barnes, supra; State v. Outing, supra; State v. Rogers, supra.* The trial judge should make findings of fact with reference to this question and incorporate those findings in the record. Such findings of fact, so made by the trial judge, are conclusive if they are supported by competent evidence in the record. No reviewing court may properly set aside or modify those findings if so supported by competent evidence in the record. *State v. Barnes, supra; State v. Chamberlain, supra; State v. Outing, supra; State v. Rogers, supra.*' (Emphasis ours.) *State v. Gray,* 268 N.C. 69, 150 S.E. 2d 1.

> We see no reason why the procedure on motion to suppress evidence because of illegal search and seizure should not be the same as the inquiry by the court into the voluntariness of a confession."

Although our Supreme Court in *State v. Myers, supra,* indicated that the trial court "in its *discretion* and on defendant's motion to suppress the evidence" (emphasis ours) *could* conduct a preliminary inquiry relating to the legality of the search in the same manner as the court does in determining the voluntariness of a confession, we interpret its opinion in *State v. Pike, supra,* to say that this *should* be done; this Court so held in *State v. Fowler,* 3 N.C. App. 17, 164 S.E. 2d 14 (1968). Defendants herein are entitled to a new trial.

Defendants assign as error the failure of the *trial* court to properly inform the defendants of their right to have counsel appointed for them and to determine if defendants intelligently and understandingly waived such appointment. Since we are ordering a new trial on the assignment of error above discussed, we deem it unnecessary to pass upon and discuss this assignment of error. Suffice to say, before the defendants are retried, we think the superior court would be well advised to (1) advise each defendant that he is entitled to counsel, (2) ascertain if each defendant is indigent and unable to employ counsel, and (3) appoint counsel for each defendant found to be indigent unless the right to counsel is intelligently and understandingly waived. *State v. Morris,* 275 N.C. 50, 165 S.E. 2d 245.

For the reasons stated, there must be a

New trial.

BROCK and GRAHAM, JJ., concur.

STATE OF NORTH CAROLINA v. REGINALD JACK DIXON AND NATHANIEL D. DAVIS

No. 7026SC207

(Filed 6 May 1970)

1. Unlawful Assembly; Indictment and Warrant § 17— variance between warrant and proof

In a prosecution for the common law offense of going armed with unusual and dangerous weapons to the terror of the people, there was no

fatal variance between the warrants and the proof on the ground that the warrants charged that defendants acted in the company of eight other persons but the proof failed to show the presence of two of the named "other persons" at the time and place of the offense, since the naming of the eight persons in the warrants was mere surplusage and could be disregarded.

2. Criminal Law §§ 89, 95; Witnesses § 5— corroborative testimony — necessity for voir dire

Under the established procedure in this State, the trial judge is not required to conduct a voir dire examination of a corroborating witness to determine whether or not the witness' proffered testimony will in fact corroborate previous witnesses.

3. Criminal Law § 147.5— prerogative of Court of Appeals

It is not the prerogative of the Court of Appeals to overrule a procedure that has been repeatedly approved by the Supreme Court of this State throughout the years.

4. Criminal Law § 89— corroborative testimony — variances

Where proper instructions are given, slight variances in corroborating testimony do not render such testimony inadmissible.

5. Criminal Law § 113— instruction as to guilt of joint defendants

Trial judge's charge in joint trial of two defendants *held* not susceptible to the construction that a finding of guilt as to one defendant would support a conviction of both.

APPEAL by defendants from *Snepp, J.*, 17 November 1969 Schedule "B" Criminal Session of MECKLENBURG County Superior Court.

Defendants were tried and convicted in the District Court of Mecklenburg County on warrants charging them with the common law offense of going armed with unusual and dangerous weapons to the terror of the people. From judgments imposing active prison sentences of 18 months defendants appealed to the Superior Court where the jury returned verdicts of guilty as to each defendant. The Superior Court judge also imposed active prison sentences of 18 months and defendants appealed.

Robert Morgan, Attorney General, by Eugene A. Smith, Assistant Attorney General, and James E. Magner, Staff Attorney, for the State.

George S. Daly, Jr., for defendant appellants.

GRAHAM, J.

Defendants make no contentions respecting the sufficiency of the proof offered to sustain convictions for the common law offense charged. We therefore do not set forth the facts relied upon by the

State. Suffice to say that the facts and charges here are amazingly similar to those considered by the Supreme Court in *State v. Dawson,* 272 N.C. 535, 159 S.E. 2d 1.

[1] Defendants do contend, however, that judgments of nonsuit should have been entered on the grounds that there was a fatal variance between the warrants and the proof. This contention is without merit.

The warrants charged that the defendants acted in the company of eight other persons. A list of eight persons was attached to the warrants. No proof was offered to show the presence of two of the "other persons" named as being present at the time and place the offenses were committed.

The defendants were not charged with conspiracy and it was unnecessary for the warrants to charge or for the State to prove that defendants were in the company of anyone when the offenses were committed. See *State v. Huntley,* 25 N.C. 418. The naming in the warrants of the eight persons allegedly accompanying defendants was mere surplusage. If an averment in an indictment is not necessary in charging the offense, it may be disregarded. *State v. Stallings,* 267 N.C. 405, 148 S.E. 2d 252.

It cannot here be seriously contended that the State's failure to offer proof as to the identity of each of the individuals who allegedly accompanied defendants tended to "ensnare" defendants or deprive them of an opportunity to adequately present their defense (see *State v. Wilson,* 264 N.C. 373, 141 S.E. 2d 801; *State v. Whittemore,* 255 N.C. 583, 122 S.E. 2d 396); or, that defendants have been placed in peril of subsequently being prosecuted for the same offense. *State v. Best,* 5 N.C. App. 379, 168 S.E. 2d 433.

[2] Defendants next assign as error the court's failure to order a *voir dire* examination of a police officer, a witness for the State, before allowing him to give corroborative testimony. When the witness was asked by the solicitor what certain previous witnesses had told him, defendants objected and the court immediately instructed the jury as follows:

> "Ladies and gentlemen of the jury, any statement made to Officer Hearn by the previous witnesses may be considered by you for one purpose only. You may consider it in corroboration of the testimony of the other witnesses, if you find that it does, in fact, corroborate them."

[3, 4] Defendants concede that the procedure followed and the instructions given were proper under the rules now prevailing in this

State. They argue, however, that this Court should formulate a "prophylactic rule" requiring that a *voir dire* examination be conducted to determine in advance whether or not the corroborative testimony being offered does in fact corroborate previous witnesses. We do not deem it the prerogative of this Court to overrule a procedure that has been repeatedly approved by the Supreme Court of this State throughout the years. "When objection is made and the court properly restricts the evidence to the purpose for which competent, defendant cannot complain of any prejudicial effect." 2 Strong, N.C. Index 2d, Criminal Law, § 95 and cases therein cited. Furthermore, it is essentially the duty of a jury to determine whether or not the testimony of one witness corroborates that of another. *State v. Case,* 253 N.C. 130, 116 S.E. 2d 429; *Lassiter v. R. R.,* 171 N.C. 283, 88 S.E. 335. And where proper instructions are given, slight variances in corroborating testimony do not render such testimony inadmissible. *State v. Crawford,* 3 N.C. App. 337, 164 S.E. 2d 625.

A review of the testimony here in question indicates that it did in fact substantially corroborate that of the previous witnesses. To the extent that it may not have been corroborative we do not have reason to believe that it was considered by the jury for any purpose. This assignment of error is overruled.

[5] Defendants' final assignment of error is to a portion of the jury charge wherein they contend it was made to appear that the guilt of both defendants was dependent upon the guilt of either. Reading the portion of the instructions excepted to in the context of the entire charge we fail to find that the jury could have been in any way misled to the prejudice of either defendant. In the portion of the charge complained of the trial judge was giving general instructions as to the presumption of innocence that surrounds any defendant charged with a crime and the burden placed on the State to prove guilt beyond a reasonable doubt in order to overcome that presumption. At least three times in his charge the trial judge clearly instructed the jury that the question of the guilt of each defendant was an individual question. Nowhere in the charge do we find language that could imply to the jury that a finding of guilt as to one defendant would support a conviction of both.

In the entire trial we find no prejudicial error.

No error.

BROCK and BRITT, JJ., concur.

STATE OF NORTH CAROLINA v. JOHN MARSHALL HULLENDER, JR.

No. 7027SC90

(Filed 6 May 1970)

1. Constitutional Law § 36; Larceny § 10— punishment for misdemeanor larceny — cruel and unusual punishment

Sentence of 18 to 24 months imposed upon defendant's plea of guilty of larceny of property of the value of not more than $200 does not constitute cruel and unusual punishment, the offense being a misdemeanor punishable under G.S. 14-3(a) by fine, imprisonment for a term not exceeding two years, or both, in the discretion of the court. G.S. 14-72(a).

2. Criminal Law § 138— severity of sentence — discretion of court

Within the limits of the sentence permitted by law, the character and extent of the punishment to be imposed is a matter for the sound discretion of the court, and may be reviewed by the appellate court only in case of manifest and gross abuse.

3. Criminal Law § 138— severity of sentence — plea of guilty or nolo contendere — factors which court may consider

In making its determination of the punishment to be imposed after a plea of guilty or *nolo contendere*, the trial court is not confined to evidence relating to the offense charged, but may look anywhere, within reasonable limits, for other facts calculated to enable it to act wisely in fixing punishment; hence, the court may inquire into such matters as the age, character, education, environment, habits, mentality, propensities and record of the defendant.

4. Criminal Law § 138— active sentence for defendant, suspended sentence for codefendant

The trial court did not err in imposing an active prison sentence on defendant after his plea of guilty of misdemeanor larceny while imposing a suspended sentence on a codefendant who pleaded guilty to the same offense.

APPEAL by defendant from *Hasty, J.*, 6 October 1969 Session of GASTON Superior Court.

Defendant was indicted for armed robbery, the bill of indictment charging that the offense occurred on 23 August 1969 and that defendant took $30.00 from the person of his victim. He pleaded guilty to misdemeanor larceny and the State accepted his plea. Judgment was imposed sentencing defendant to prison for a term of not less than 18 nor more than 24 months. The court recommended defendant be granted work release privileges if and when in the opinion of the Commissioner of the Department of Correction his correctional progress should warrant. Defendant appealed.

Attorney General Robert Morgan and Staff Attorney Carlos W. Murray, Jr., for the State.

L. B. Hollowell, Jr., for defendant appellant.

PARKER, J.

Defendant makes two assignments of error: first, that his constitutional rights were violated in that the sentence imposed constituted cruel and unusual punishment, and second, that the court erred in imposing an active prison sentence upon him while imposing a suspended sentence upon a codefendant. There is no merit to either assignment.

Before accepting defendant's plea, the trial court made due inquiry and determined that the plea was freely, understandingly and voluntarily made. Before imposing sentence, the court heard the testimony of the prosecuting witness which tended to show defendant's guilt of a more serious offense than that to which he pleaded guilty.

[1] Defendant was indicted for the crime of armed robbery, a felony punishable by imprisonment for not less than five nor more than thirty years. G.S. 14-87. "Robbery, a common-law offense not defined by statute in North Carolina, is merely an aggravated form of larceny." *State v. Smith,* 268 N.C. 167, 150 S.E. 2d 194. Larceny from the person, without regard to the value of the property in question, is a felony. G.S. 14-72(b)(1). Here, the State accepted defendant's plea of guilty to the lesser included offense of larceny of property of the value of not more than $200.00. Under G.S. 14-72(a) this offense is a misdemeanor punishable under G.S. 14-3(a), by fine, by imprisonment for a term not exceeding two years, or by both, in the discretion of the court. The sentence imposed on defendant was within the limit authorized by the statute. "When punishment does not exceed the limits fixed by statute it cannot be classified as cruel and unusual in a constitutional sense (citing cases), unless the punishment provisions of the statute itself are unconstitutional." *State v. Rogers,* 275 N.C. 411, 168 S.E. 2d 345. The punishment provisions of G.S. 14-3(a) under which defendant was sentenced are not unconstitutional.

[2, 3] Within the limits of the sentence permitted by law, the character and extent of the punishment to be imposed is a matter for the sound discretion of the court, and may be reviewed by the appellate court only in case of manifest and gross abuse. *State v. Sudderth,* 184 N.C. 753, 114 S.E. 828. In making its determination of what punishment should be imposed after a plea of guilty or *nolo*

contendere, the trial 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. Hence, it may inquire into such matters as the age, the character, the education, the environment, the habits, the mentality, the propensities, and the record of the person about to be sentenced." *State v. Cooper*, 238 N.C. 241, 77 S.E. 2d 695. Obviously these factors will be different for different defendants and there is no requirement that the same punishment must be imposed on codefendants who plead guilty to the same offense.

[4] Before imposing sentence upon defendant and his codefendant in the present case, the trial court heard the testimony of the prosecuting witness as to the part each defendant played in committing the offense with which they were charged. The court also heard defendant's admission that he had served a previous prison sentence from which he had only recently been released. In the sentence which the trial court imposed upon defendant there was clearly no abuse of discretion, and the sentence will not be reviewed on appeal.

Defendant was represented at his arraignment and sentencing and upon this appeal by counsel provided for him at public expense. The record would indicate that his counsel served him well. He has no just cause to complain of the sentence imposed, and the judgment appealed from is

Affirmed.

BRITT and HEDRICK, JJ., concur.

AMERICAN INSTITUTE OF MARKETING SYSTEMS, INC. v. WILLARD REALTY COMPANY INC. OF RALEIGH

No. 7010DC187

(Filed 6 May 1970)

1. Process § 12; Judgments § 51— action to enforce foreign judgment against corporation — contract naming agent to accept service in other state — validity of service on agent

In this action to enforce a judgment obtained in another state by plaintiff against defendant North Carolina corporation, provision of a con-

tract between the parties entered in the other state naming a person in that state to serve as defendant's agent "for the receipt of any legal documents including process as may be required under this Agreement or the enforcement thereof" *is held* sufficient to give the courts of the other state jurisdiction over the person of defendant in an action on the contract by service of process on the agent named in the contract, absent a showing by defendant that it had no actual notice of the suit.

2. Courts § 2; Judgments § 51— presumption of jurisdiction

Jurisdiction will be presumed until the contrary is shown.

APPEAL by defendant from *Barnette, District Judge,* 13 November 1969 Session, WAKE District Court.

This is an action on a judgment obtained by plaintiff, American Institute of Marketing Systems, Inc. (AIMS), against defendant in a magistrate's court in the State of Missouri. Defendant filed answer in Wake District Court denying the indebtedness and alleging that the judgment of the Missouri court was not valid for that it had no jurisdiction over defendant.

Jury trial was waived and plaintiff introduced into evidence a duly exemplified copy of the transcript of proceedings in the Missouri court. The transcript revealed that summons was served by leaving a copy "at the regular business office of the within named appointed agent, George M. Kinder"; that plaintiff's attorney appeared at the time and place designated in the summons but defendant made no appearance; and that plaintiff was entitled to recover $1,369.00 plus court costs of defendant. Defendant offered evidence that included a written contract between plaintiff and defendant which was the basis for the Missouri lawsuit. The contract is dated 12 March 1966, provides among other things that plaintiff is a Missouri corporation, designates plaintiff as "Aims" and defendant as "Broker" and includes in paragraph 5f the following:

> "Aims and Broker mutually agree that Mr. George M. Kinder, located at Route 3 Box 25, U.S. Hwy. 40, in Chesterfield, St. Louis County, Missouri, shall serve Aims as its nominee for the receipt of materials under paragraph 5. sub-paragraph a. above and shall serve Broker as Broker's Agent for the receipt of any legal documents including process as may be required under this Agreement or the enforcement thereof."

District Court Judge Barnette found facts as contended by plaintiff, concluded that service of process on Kinder as appointed agent of defendant was valid. Vesting the Missouri court with personal jurisdiction over defendant, and entered judgment in favor of plaintiff for the amount prayed.

Defendant appealed, assigning error.

Jordan, Morris & Hoke by Charles B. Morris, Jr., for plaintiff appellee.

Boyce, Mitchell, Burns & Smith by Eugene Boyce for defendant appellant.

BRITT, J.

[1] The main question for our consideration is whether contract provision 5f naming George M. Kinder to "serve Broker as Broker's Agent for the receipt of any legal documents including process as may be required under this Agreement or the enforcement thereof" is a sufficiently clear and definite announcement to defendant that in entering such a contract he consented to a method by which he might be sued in Missouri.

The Supreme Court of Missouri in the case of *State ex rel AIMS v. Cloyd,* 433 S.W. 2d 559 (Mo. 1968), pointed out that the Missouri Civil Rule 54.06 allows service "by delivering a copy of the summons and of the petition to an agent authorized by appointment or required by law to receive service of process." The question before that court was the validity of a contractual provision (appearing in an AIMS form contract and containing the language found in clause 5f in the instant case) to support service of process; that is, whether the contractual provision purporting to establish agency brought the case within Missouri Civil Rule 54.06. The Missouri court considered the case of *National Equipment Rental, Ltd. v. Szukhent,* 375 U.S. 311, 11 L. Ed. 2d 354, 84 S. Ct. 411 (1964), as authority which "strongly supports the contention of relator that the service in question was valid."

A discussion of the law on sufficiency of service on foreign corporations found in 36 Am. Jur. 2d, Foreign Corporations, § 261, p. 265, concludes: "Whatever mode of service may be employed, and whether it is in conformity with a statute or not, in order to confer jurisdiction, it must meet the requirements of due process of law, and its sufficiency is therefore a federal question which must be determined by the state courts in harmony with the decisions of the United States Supreme Court."

In *Szukhent, supra,* the U. S. Supreme Court considered whether the "agent" established by a contractual provision was "an agent authorized by appointment * * * to receive service of process" within Rule 4(d)(1), Federal Rules of Civil Procedure, so as to sub-

ject the defendants to the jurisdiction of the federal court in New York. In that case, the pertinent contract clause provided that the Michigan lessee of certain farm equipment "hereby designates Florence Weinberg, 47-21 Forty-first Street, Long Island City, N. Y., as agent for the purpose of accepting service of any process within the State of New York." The lessee was "not acquainted with Florence Weinberg." Upon proper motion, the district court quashed service of the summons and complaint on the grounds that as the lease agreement had not explicitly required Florence Weinberg to notify the defendants, there was a "failure of the agency to achieve intrinsic and continuing reality." The Court of Appeals affirmed, 311 F. 2d 79, and the U. S. Supreme Court granted certiorari, 372 U.S. 974, 10 L. Ed. 2d 141, 83 S. Ct. 1110. The Supreme Court, in a 5-4 decision, held that Florence Weinberg was "an agent authorized by appointment * * * to receive service of process" and accordingly reversed the judgment. (See strong dissenting opinion by Justice Black.)

The instant case presents a federal question which must be determined in harmony with the decisions of the U. S. Supreme Court and its decision in *Szukhent, supra,* favors plaintiff. That decision does say: "We need not and do not in this case reach the situation where no personal notice has been given to the defendant. * * * The case before us is therefore quite different from cases where there was no actual notice * * *. A different case would be presented if Florence Weinberg had not given prompt notice to the respondents, for then the claim might well be made that her failure to do so had operated to invalidate the agency."

[2] However, the language from *Szukhent* last quoted does not help defendant here as jurisdiction will be presumed until the contrary is shown. *Levin v. Gladstein,* 142 N.C. 482, 55 S.E. 371 (1906). Defendant was entitled to actual notice when action against it was instituted in Missouri to the end that defendant might appear and have its "day in court." But, the burden was on defendant to show that it (defendant) was not given such notice if that were true; it made no such showing or contention in the trial in this jurisdiction.

For the reasons stated, the judgment appealed from must be

Affirmed.

BROCK and GRAHAM, JJ., concur.

STATE HIGHWAY COMMISSION v. WILLIAM THOMAS REEVES AND WIFE, MILDRED REEVES

No. 7030SC206

(Filed 6 May 1970)

1. Eminent Domain § 6— evidence of value — nonexistent lots — undeveloped property

In the condemnation of undeveloped property that was suitable for business or residential subdivision, it was error to permit the landowner's witnesses to attach a specific value to nonexistent lots on the property.

2. Eminent Domain § 5; Trial § 33— just compensation — improper instructions

In a highway condemnation proceeding, the trial court charged the jury that "just compensation is said to be, members of the jury, that you should take the value of the property left, and put it on top of that money, until you brought it up where it was before the property was taken." *Held:* The instruction was erroneous, and the Court of Appeals cannot assume that the jury followed a correct instruction on just compensation in another portion of the charge. G.S. 136-112(1).

APPEAL by plaintiff from *McLean, J.*, 15 September 1969 Session of HAYWOOD County Superior Court.

This is a condemnation proceeding under Article 9 of Chapter 136 of the General Statutes of North Carolina. Plaintiff is taking 4.24 acres, in addition to an existing 1.16 acre right of way, of a 5.92 acre tract belonging to defendants, leaving defendants a total of .52 acres. The tract is located between Waynesville and Clyde, North Carolina, near the intersection of N.C. 209 and U.S. 19-23 and the portion taken is to be used for the straightening and widening of U.S. 19-23 west of Clyde, North Carolina. Plaintiff deposited $19,200 as the estimated compensation for the land. In their answer, defendants asked for $75,000 as a fair and reasonable market value of the land taken. The jury awarded defendants $78,000 and, after interest was computed by the court, the total amount awarded to defendants was $85,938. Plaintiff appealed.

Attorney General Robert Morgan by Trial Attorney Guy A. Hamlin for plaintiff appellant.

Frank D. Ferguson, Jr., for defendant appellees.

MORRIS, J.

[1] Plaintiff's assignments of error Nos. 1, 4 and 6 concern, wholly or in part, the admission of testimony relating to how witnesses for

plaintiff arrived at values of the property. Both parties produced evidence that the land was desirable for the purposes of business or residential subdivision or both. However, upon questioning by defendants' counsel six of defendants' witnesses were permitted and one witness for the plaintiff required to attach a specific value to nonexistent lots on the property. This was error. *Highway Commission v. Conrad,* 263 N.C. 394, 139 S.E. 2d 553 (1965); *Barnes v. Highway Commission,* 250 N.C. 378, 109 S.E. 2d 219 (1959).

In *Conrad* and *Barnes* the land was undeveloped, though there were existing subdivisions in the nearby vicinity. The acreage in *Barnes* had two paved roads on it, one constructed by the city of Winston-Salem and one constructed on a private easement. In the case before us there is evidence that, though in a desirable location, the land was being used only as a pasture at the time of taking with some businesses located in the vicinity. In *Conrad* a map of a proposed subdivision was not permitted into evidence, for factual reasons, where in *Barnes* a map of a proposed subdivision was admitted into evidence. However, in both cases the Court held that such maps were admissible to illustrate and explain testimony of witnesses but not as substantive evidence. In the trial of the case before us a map of the property and an aerial photograph were introduced into evidence. Neither portrayed any proposed subdivision into lots. Both *Conrad* and *Barnes* specifically held that it was error to permit testimony which attached a specific value to an imaginary lot. As was said in *Conrad:*

> "The ruling of the court was to the effect that a designated number of lots multiplied by a price per lot is not a proper basis for determining value of undeveloped land which is suitable for subdivision. The ruling is correct."

Further:

> "The fair market value of undeveloped land immediately before condemnation is not a speculative value based on an imaginary subdivision and sales in lots to many purchasers. It is the fair market value of the land as a whole in its then state according to the purpose or purposes to which it is best adapted and in accordance to its best and highest capabilities. It is not proper for a jury to consider an undeveloped tract of land as though a subdivision thereon is an accomplished fact. Such undeveloped property may not be valued on a per lot basis." Citing *Barnes* and other cases.

The following language appears in *Barnes:*

> "It is proper to show that a particular tract of land is suitable and available for division into lots and is valuable for that purpose, but it is not proper to show the number and value of lots as separated parcels in an imaginary subdivision thereof. In other words, it is not proper for the jury in these cases to consider an undeveloped tract of land as though a subdivision thereon is an accomplished fact. Such undeveloped property may not be valued on a per lot basis. The cost factor is too speculative."

It is further stated in *Barnes* that:

> "It is manifest that the court was correct in excluding testimony as to value of the land based on supposed subdivisions and the sale of lots at an estimated price per lot after deducting an estimated cost per lot for development. Such a method of valuation is too speculative and remote."

The admission of testimony placing a specific value on nonexistent lots was prejudicial error and entitles plaintiff to a new trial.

[2] Plaintiff's assignment of error No. 5 is an exception to the following portion of the court's charge on just compensation: "Now, just compensation is said to be, Members of the Jury, that you should take the value of the property left, and put it on top of that money, until you brought it up where it was before the property was taken." Plaintiff contends that this instruction is unclear, confusing and does not follow the statutory provisions for determining just compensation. We agree. In the next paragraph of his charge the court properly instructed the jury in conformity with G.S. 136-112(1) which provides, "Where only a part of a tract is taken, the measure of damages for said taking shall be the difference between the fair market value of the entire tract immediately prior to said taking and the fair market value of the remainder immediately after said taking, with consideration being given to any special or general benefits resulting from the utilization of the part taken for highway purposes." Similar instructions which conformed to the statutory provisions have been approved in *Highway Commission v. Hettiger,* 271 N.C. 152, 155 S.E. 2d 469 (1967), and *Highway Commission v. Gasperson,* 268 N.C. 453, 150 S.E. 2d 860 (1966). We cannot assume that the jury followed the correct instruction and was not confused by the erroneous portion. See *Hardee v. York,* 262 N.C. 237, 136 S.E. 2d 582 (1964).

Other errors assigned are not likely to occur upon a new trial, and we do not discuss them.

New trial.

MALLARD, C.J., and VAUGHN, J., concur.

NANCY H. McWHIRTER v. KENNETH R. DOWNS, EXECUTOR OF THE ESTATE OF W. H. McWHIRTER, DECEASED; NANCY MARYLAN McWHIRTER; AND GERALDINE M. McWHIRTER

No. 7026SC36

(Filed 6 May 1970)

1. Appeal and Error § 28— findings to which no exception is made

Findings of fact to which no exception has been made are deemed supported by the evidence.

2. Wills § 28— intent of testator

The intent of the testator is to be gathered from a consideration of a will from its four corners.

3. Wills §§ 43.5, 73— action to recover bequest — identity of person named as donee

In this action to recover a bequest allegedly made to plaintiff under a will, the trial court properly concluded that plaintiff is not the person named in the item of the will in question, where another item of the will clearly identifies the person in the disputed item as being a member of a particular class — nieces and nephews of testator or his deceased wife — and the court found that plaintiff is not within that class.

4. Costs § 3— action to recover bequest — fee for plaintiff's attorney as part of defendant's costs

In this action against an executor to recover a bequest allegedly made to plaintiff wherein it was determined that plaintiff is not the person intended by testator as donee of the bequest in controversy and adjudged that she recover nothing of defendant, the trial court had discretionary authority under G.S. 6-21 to tax a reasonable attorney's fee for plaintiff's attorney as a part of the costs to be paid by defendant executor.

APPEAL by plaintiff and defendants Downs and Geraldine M. McWhirter from *Falls, J.*, 8 September 1969 Schedule "C" Session of MECKLENBURG County Superior Court.

This action was instituted by plaintiff on 27 September 1968 to recover a $2,000 bequest made to one Nancy H. McWhirter under

the Last Will and Testament of W. H. McWhirter. The defendant Executor filed answer alleging that plaintiff has always been known by the name of "Charlene" and denying that she is the Nancy H. McWhirter named as a donee in the will. The Executor further alleged that the bequest in controversy had been paid to a niece of the testator, Nancy Marylan McWhirter, and upon his motion Nancy Marylan McWhirter and the residuary legatee, Geraldine M. McWhirter, were ordered joined as additional defendants.

The parties waived trial by jury and the evidence was heard by the court. At the conclusion of plaintiff's evidence the court made findings of fact favorable to defendants, concluded that plaintiff is not the person intended by the deceased testator as donee of the bequest in controversy and adjudged that she recover nothing of defendants. The court provided in the judgment that $700 be allowed as a reasonable attorney's fee for plaintiff's attorney and ordered said amount assessed as part of the costs and paid by defendant Executor from the funds in the estate. Plaintiff appeals from that portion of the judgment adverse to her and the Executor and residuary legatee appealed from the court's award of counsel fees to plaintiff's attorney.

H. Parks Helms for plaintiff appellant-appellee.

William H. Booe for defendant appellees-appellants.

GRAHAM, J.

Plaintiff is the wife of a nephew of W. H. McWhirter who died on 10 December 1967 in Mecklenburg County. His will, which has been duly filed and probated in Mecklenburg County, provides in Items Eight, Nine and Ten as follows:

"ITEM EIGHT

I will, devise and bequeath to Mary Lee Cory the sum of TWO THOUSAND AND NO/100 ($2,000.00) DOLLARS.

ITEM NINE

I will, devise and bequeath to Nancy H. McWhirter the sum of TWO THOUSAND AND NO/100 ($2,000.00) DOLLARS.

ITEM TEN

I will, devise and bequeath to my nieces and nephews and to my deceased wife, Nancy H. McWhirter's, nieces and nephews with the exception of Mary Lee Cory and Nancy H. McWhirter foregoing named the sum of ONE THOUSAND AND NO/100 ($1,000.00) each."

PLAINTIFF'S APPEAL

Plaintiff's sole assignment of error is to the conclusion of the court that she is not the Nancy H. McWhirter whom the testator intended as the donee under Item Nine of his Last Will and Testament. The trial court made only the following three findings of fact:

"1. The plaintiff, Nancy H. McWhirter, is not a niece nor a nephew of the deceased testator, W. H. McWhirter;

2. The plaintiff is not a niece nor a nephew of Nancy H. McWhirter, the deceased wife of the deceased testator, W. H. McWhirter; and

3. The plaintiff is not the person whom the deceased testator intended as the donee under Item Nine of his Last Will and Testament."

[1] While finding number 3 is not denominated as such, it is obviously a conclusion drawn by the court from the facts. In our opinion it is supported by the first two findings which are not excepted to and are therefore deemed by us to be supported by the evidence. 1 Strong, N.C. Index 2d, Appeal and Error, § 28, and cases therein cited.

[2, 3] It is elementary that the intent of a testator is to be gathered from a consideration of a will from its four corners. *McCain v. Womble,* 265 N.C. 640, 144 S.E. 2d 857, and cases therein cited. Item Ten of the will clearly identifies the Nancy H. McWhirter named in Item Nine as being a member of a particular class — that is, nieces and nephews of the testator or his deceased wife. The court's first two findings to the effect plaintiff is not within that class support the conclusion made that plaintiff is not the Nancy H. McWhirter named in Item Nine as a donee and the further conclusion that plaintiff is not entitled to recover in this action. Plaintiff's assignment of error is overruled.

DEFENDANT'S APPEAL

[4] As a basis for their appeal, defendants contend that the court is without authority to award plaintiff's counsel an attorney's fee. We do not agree. G.S. 6-21 provides in part as follows: "Costs in the following matters shall be taxed against either party, or apportioned among the parties, in the discretion of the court: . . . (2) Caveats to wills and any action or proceeding which may require the construction of any will or trust agreement, or fix the rights and duties of parties thereunder; . . . The word 'costs' as the same appears and is used in this section shall be construed to include reasonable attorneys' fees in such amounts as the court shall in its discretion determine and allow; . . ."

It is our opinion and we so hold that the language quoted above is sufficient to vest in the trial court the discretionary authority to tax reasonable attorney's fees as a part of the costs to be paid by the Executor. No question has been raised regarding the reasonableness of the attorney's fee here involved.

Plaintiff's appeal affirmed.

Defendants' appeal affirmed.

BROCK and BRITT, JJ., concur.

STATE OF NORTH CAROLINA v. LUCILE TIPTON (#69-829)

No. 7028SC220

(Filed 6 May 1970)

1. Criminal Law § 166— abandonment of assignment of error

Assignment of error not brought forward in the brief is deemed abandoned. Court of Appeals Rule No. 28.

2. Criminal Law § 89; Evidence § 15— lack of positiveness in testimony — admissibility

The trial court did not err in the admission of testimony that the witness "thought" defendant came in a night club "around" 12:30 or 1:00, the lack of definiteness and positiveness in the testimony affecting only the credibility of the witness, of which the jury is the sole judge.

3. Criminal Law §§ 87, 175— allowance of leading questions

In this prosecution for assault with intent to kill inflicting serious injury not resulting in death, no abuse of discretion or prejudice has been shown in the court's allowance of leading questions by the solicitor.

4. Criminal Law § 112— instructions — presumption of innocence

The trial court did not err in failing to add to the charge on the presumption of innocence an instruction that such presumption remains with defendant throughout the trial absent a request by defendant for such further instruction.

5. Criminal Law § 112— instructions — failure to define reasonable doubt

The trial court did not err in failing to define reasonable doubt absent a request by defendant.

APPEAL by defendant from *Snepp, J.*, 11 November 1969 Session of BUNCOMBE County Superior Court.

Defendant was tried under a valid bill of indictment charging her with assault with a deadly weapon with intent to kill inflicting serious injury not resulting in death. She was convicted of assault with a deadly weapon per se, inflicting serious injury and sentenced to five years in the Women's Division of the State Prison.

The evidence for the State tends to show that the prosecuting witness and her husband were dancing at a night club in Asheville and that the defendant came by and grabbed the "privates" of the husband of the prosecuting witness. After a verbal exchange with the defendant, the prosecuting witness and her husband returned to their table. About an hour later, the prosecuting witness and her husband were going to get some potato chips and went past the defendant's table, where another verbal exchange took place. The prosecuting witness testified: "The first thing I knew, I felt a lick in my left side down below my rib cage." Another witness testified that he did not know the defendant but that he had seen the prosecuting witness and her husband in the night club before and had spoken to the husband before. He further testified that on the occasion in question, he saw the defendant stab the prosecuting witness with a knife about "9 or 10 inches long and it looked like a fish scaling knife; . . . I would say the blade was four or five inches long."

The evidence for the defendant placed her at the night club on the night in question, but she denied the stabbing and testified that she left before the prosecuting witness. Defendant had court-appointed counsel for trial, but retained private counsel to prosecute her appeal. She was permitted to appeal in forma pauperis.

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

Horton and Horton by Shelby E. Horton for defendant appellant.

MORRIS, J.

[1] Defendant's brief contains no statement of facts as required by Rules 27½ and 28 of the Rules of Practice in the Court of Appeals of North Carolina, nor does defendant bring forward assignment of error No. 3 in her brief. We, therefore, deem it abandoned. Rule 28, Rules of Practice in the Court of Appeals of North Carolina.

[2, 3] By assignments of error Nos. 1, 2 and 4 defendant contends that the court erred in "allowing leading and/or speculative and/or prejudicial questions to be asked of interested witnesses." Defendant excepted to the court's permitting a witness to testify that "I think she (defendant) came in around 12:30 or 1:00." This exception is without merit. Even though the witness used the words "think" and "around", the lack of definiteness and positiveness in her testimony could only affect her credibility, and of this the jury is the sole judge. *State v. Ham,* 224 N.C. 128, 29 S.E. 2d 449 (1944). Defendant's other two assignments of error are bottomed on the court's permitting leading questions. The permitting of leading questions is within the discretion of the trial judge, especially in cases requiring evidence of the type which arose in this case, and will not be reviewed on appeal in the absence of a showing of abuse of that discretion. *State v. Pearson,* 258 N.C. 188, 128 S.E. 2d 251 (1962), and cases there cited. Defendant has shown no prejudice nor abuse nor do we perceive any. Assignments of error Nos. 1, 2 and 4 are overruled.

[4] By assignment of error No. 5 defendant asserts that the court committed reversible error in failing to add to his charge on presumption of innocence an instruction that such presumption remains with the defendant throughout the trial. It is not error to fail to charge on presumption of innocence. *State v. Perry,* 226 N.C. 530, 39 S.E. 2d 460 (1946). "The presumption of innocence is a subordinate feature of the cause and if the defendants desired an amplification of the charge in this respect, they should have so requested at the time." *State v. Perry, supra,* 534. This assignment of error is not sustained.

[5] Defendant contends by assignment of error No. 6 that it was error for the court to fail to define reasonable doubt. The case of *Williams v. U. S.,* 271 F. 2d 703 (4th Cir. 1959), the only case cited in defendant's brief, is not persuasive authority for her position in view of the long established rule in this State that the court is not required to define the term reasonable doubt in the absence of a request. See 3 Strong, N.C. Index 2d, Criminal Law, § 112, footnote 88 and 1969 supplement thereto. The record shows no request by defendant for such a definition.

No error.

PARKER and VAUGHN, JJ., concur.

NORTH CAROLINA STATE HIGHWAY COMMISSION v. BELLVIE McDONALD; JUANITA EVANS FERGUSON AND HUSBAND, HARRY FERGUSON; FAIRY MARTIN AND WIFE, LYLE MARTIN; NAWASSEE DICKEY MILLER AND HUSBAND, JACK S. MILLER; JOHN L. DICKEY AND WIFE, GWEN DICKEY; AHNAWAKE DICKEY BULL AND HUSBAND, CHARLES BULL; AND MRS. G. WILLIAM DICKEY

No. 7030SC180

(Filed 6 May 1970)

Eminent Domain § 6— value of nearby property — cross-examination of witness

Although it was error in a highway condemnation proceeding to permit landowner's counsel to cross-examine the Commission's witness as to whether the witness knew that a named individual had sold twenty acres of his property for $12,000, there being no actual proof of the sales price, such error was not prejudicial where the named individual thereafter testified, without objection, that he had contracted to sell 76½ acres of his property for $12,000.

APPEAL by plaintiff from *McLean, J.*, 27 October 1969 Special Civil Session of CHEROKEE Superior Court.

This is a civil action brought by plaintiff for the condemnation of a portion of a tract of land owned by defendants. The only issue at trial was the amount defendants were entitled to recover of plaintiff as just compensation for the appropriation of a portion of their property for highway purposes on 30 November 1967. The jury returned a verdict of $20,000 and from judgment entered on the verdict plaintiff appealed.

Attorney General Robert Morgan, Deputy Attorney General Harrison Lewis and Trial Attorney Guy A. Hamlin for the State.

C. E. Hyde and Leonard W. Lloyd for defendant appellees.

BRITT, J.

Plaintiff's sole assignment of error relates to the cross-examination of plaintiff's witness, Mark Elliott, by defendants' counsel. The questions, answers and rulings of the court complained of are set forth in the record as follows:

"MR. HYDE: Do you know of any recent sales, do you know about the sales that Mr. Jones made of the land, yesterday —

MR. HAMLIN: Objection. After the take.

THE COURT: Overruled. Exception. Now members of the jury, as to what happened yesterday: you will not consider that

as bearing upon the fair market value of this property; you may consider it as bearing upon the weight and credit you'll give to the testimony of this witness.

EXCEPTION NO. 1

MR. HYDE: Do you know about that sale?

ANSWER: I heard him talking about it, but I couldn't quote any of the figures.

MR. HYDE: I'll ask you, to refresh your recollection: if he didn't give $12,000.00 for 20 acres of land in Talulla Gap —

MR. HAMLIN: Objection.

THE COURT: Overruled.

EXCEPTION NO. 2

ANSWER: I couldn't say.

MR. HYDE: — and if it wasn't as steep as a horse's face?

ANSWER: I heard him say it was steep, but I couldn't verify the figures."

Plaintiff contends that the type of cross-examination quoted above was held erroneous in *Carver v. Lykes*, 262 N.C. 345, 137 S.E. 2d 139 (1964). In that opinion, written by Sharp, J., we find the following:

"* * * [T]he judge heard no evidence in the absence of the jury or otherwise made any attempt to determine whether there was a sufficient similarity between the properties to render such evidence competent. So far as the record discloses, proximity of location and the Power Company's requirement of the properties constituted the only similarity between defendant's land and those with which he attempted to compare its value. Furthermore, it was also error to permit the cross-examination of plaintiff by such questions as 'Do you know he (Moody) sold two acres to Carolina Power and Light Company for $1,375.00 an acre?' The 'utmost freedom of cross-examination' to test a witness' knowledge of values, mentioned in *Barnes v. Highway Commission, supra,* does not mean that counsel may ask the witness if he doesn't know that a certain individual sold his property for a stated sum with no proof of the actual sales price other than the implication in his question. *Bennett v. R. R.*, 170 N.C. 389, 87 S.E. 133, 16D L.R.A. 1074. * * *"

Although we adhere to the principles of law set forth in *Carver v. Lykes, supra,* and hold that the cross-examination of the witness

Elliott above quoted constituted error, for the reasons hereinafter stated we do not believe such error was sufficiently prejudicial to warrant a new trial.

After Mr. Elliott testified, plaintiff called Sam W. Jones as its witness to testify as to the value of the subject property immediately before and immediately after the taking. Plaintiff concedes that Sam W. Jones is the same "Mr. Jones" referred to in the cross-examination complained of. On cross-examination, witness Jones, without objection, testified to the following:

> "I contracted to sell some property, mountain land. I actually haven't sold it yet, but I hope it's in the process. The consideration in that transaction is seventy-six and a half acres, $12,000.00. The property is just about as rough as I've ever seen. I have not bought or sold any property down there in the vicinity of the subject property."

As was said in *Carver v. Lykes, supra,* "[t]he admission of this evidence without objection rendered harmless the previously admitted evidence of similar import over objection." *Price v. Whisnant,* 232 N.C. 653, 62 S.E. 2d 56 (1950). Furthermore, the cross-examination of Jones disclosed that the tract of land he was in process of selling contained 76½ acres rather than 20 acres as indicated in the cross-examination of Elliott. This had the effect of further minimizing the error.

No error.

BROCK and GRAHAM, JJ., concur.

GLADYS S. FETHERBAY, EFFIE S. JONES, DARLIS S. BLANKENSHIP AND GARLAND R. SMITH, SURVIVORS OF DAVID DURHAM SMITH, DECEASED, EMPLOYEE, PLAINTIFFS v. SHARPE MOTOR LINES, EMPLOYER; AND LIBERTY MUTUAL INSURANCE COMPANY, CARRIER AND/OR JACK HAWN D/B/A CALDWELL TRUCK RENTAL COMPANY, EMPLOYER; AND PHOENIX OF HARTFORD INSURANCE COMPANY, CARRIER, DEFENDANTS

No. 7025IC234

(Filed 6 May 1970)

1. Appeal and Error § 39; Master and Servant § 97— appeal from order of Industrial Commission — time of docketing — priority of rules

An appeal to the Court of Appeals from an order of the Industrial Commission is subject to dismissal for failure of the claimants to docket the record on appeal within the time allowed by Rule 5, notwithstanding the claimants have complied with G.S. 97-86 relating to appeals from the Commission, since the provisions of the Rule relating to the time of docketing will prevail over conflicting provisions in G.S. 97-86. Rules of Practice in the Court of Appeals Nos. 5 and 17.

2. Appeal and Error § 1— rules of appellate practice and procedure — authority of Supreme Court

The Supreme Court of North Carolina is given exclusive authority to make rules of procedure and practice for the appellate division of the General Court of Justice, which division consists of the Supreme Court and the Court of Appeals. N. C. Constitution, Art. IV, § 11 and Art. IV, § 5: G.S. 7A-5.

3. Appeal and Error § 44— failure to file brief on time — dismissal of appeal

An appeal is subject to dismissal for failure of claimants to file their brief within the time allowed by the Rules of the Court of Appeals. Rule No. 28.

APPEAL by claimant from an Opinion and Award of the North Carolina Industrial Commission, filed 7 November 1969, denying claim for death benefits filed by the next of kin of David Durham Smith, deceased employee, who died 22 June 1968 of asphyxiation due to smoke inhalation and extensive burns. The smoke inhalation and extensive burns were suffered as a result of a fire in the cab of a tractor-trailer truck which deceased had been driving. At the time of the fire, deceased was sleeping in the sleeper bunk of the cab while the tractor-trailer truck was parked for the night in the parking lot of Scotty's Truck Terminal, Elizabeth, New Jersey.

Deputy Commissioner Leake heard the evidence and found therefrom that "[t]he death of the deceased was not an injury by accident arising out of and in the course of his employment with the defendant employer within the meaning of the North Carolina Workmen's Compensation Act but it resulted from the intoxicated condition of the deceased." Upon appeal the Full Commission overruled all exceptions and adopted as its own the Opinion and Award of Deputy Commissioner Leake denying the claim for death benefits. Claimants appeal to the Court of Appeals.

Simpson & Martin, by Wayne W. Martin, for claimants.

Wardlow, Knox, Caudle & Wade, by Richard E. Wardlow, for defendants.

BROCK, J.

[1] The Opinion and Award from which this appeal was taken was filed 7 November 1969. According to Rule 5, Rules of Practice in the Court of Appeals of North Carolina, the record on appeal must be docketed within ninety days after the date of the judgment, order, decree, or determination appealed from; unless, for good cause shown, the trial tribunal (which is the North Carolina Industrial Commission in this case) extends the time for docketing the record on appeal (not exceeding sixty days). There is no order of the trial tribunal extending the time within which this record on appeal could be docketed. Accordingly the record on appeal should have been docketed in this Court on or before 5 February 1970; it was docketed here 3 March 1970.

On 23 February 1970 defendants filed a motion under Rule 17, Rules of Practice, *supra,* to docket and dismiss for failure of claimants to docket the record on appeal within the time provided by Rule 5, *supra.* On 3 March 1970 claimants filed an answer to the motion to docket and dismiss, and this Court in conference on 3 March 1970 entered an Order that "a ruling on this motion [the motion by defendants to docket and dismiss] is deferred until after the oral argument." Oral arguments on the appeal were heard 7 April 1970.

In their answer to defendants' motion to docket and dismiss, claimants assert that they have complied with G.S. 97-86 in perfecting their appeal; and it appears that they have. Nevertheless, Rule 5 of The Rules of Practice in the Court of Appeals was adopted by the Supreme Court of North Carolina on 25 September 1967, and from that date governs the time within which a record on appeal must be docketed in The Court of Appeals.

[2] By Article IV, Section 11, of the Constitution of North Carolina, effective 30 November 1962, the Supreme Court of North Carolina is given "exclusive authority to make rules of procedure and practice for the appellate division." The appellate division of the General Court of Justice of North Carolina consists of the Supreme Court and the Court of Appeals. N. C. Const., Art. IV, § 5; G.S. 7A-5. The time within which a record on appeal is to be docketed in the appellate division is governed by rules of procedure and practice in the appellate division. Therefore, the extent to which G.S. 97-86 is in conflict with the Rules of Practice in the Court of Appeals, the Rules of Practice will prevail.

[1] Claimants having failed to docket their record on appeal in this Court within the time prescribed by Rule 5, *supra;* and defendants having properly filed a motion to docket and dismiss under Rule 17, *supra,* the motion should be allowed and the appeal dismissed.

[3] In addition to failure to docket the record on appeal within the proper time, claimants' brief was not filed until 2 April 1970, only 5 days before the oral arguments; it should have been filed by noon 17 March 1970. In accordance with Rule 28, Rules of Practice in the Court of Appeals, upon the opening of the call of the Twenty-Fifth District on 7 April 1970, defendants filed motion to dismiss the appeal for failure of claimants to timely file their brief. This motion to dismiss should be allowed.

Since we have already reviewed the entire record on appeal and the briefs of the parties, we observe that the parties have been afforded a plenary hearing of their evidence and contentions; the Industrial Commission has made full and adequate findings to support its conclusions; and it appears the case has been fairly decided.

Appeal dismissed.

BRITT and GRAHAM, JJ., concur.

FRANCES W. BLAIR v. LARRY DONALD BLAIR

No. 7026DC107

(Filed 6 May 1970)

Divorce and Alimony §§ 18, 22; Contempt of Court § 7— enforcement of support order — contempt — fees to wife's counsel — dependent spouse

Authority of the district court to punish as for contempt includes the authority to require a husband to pay reasonable counsel fees to his wife's counsel as a condition to his being purged of wilful contempt in not complying with a child support order entered pursuant to G.S. 50-13.1, notwithstanding the child support order also provided that the wife was not a dependent spouse. G.S. 50-13.1, G.S. 50-13.4(f)(9), G.S. 50-16.3, G.S. 50-16.4.

APPEAL by defendant from order of *Abernathy, District Judge,* entered at the 12 November 1969 Session of MECKLENBURG District Court.

On 11 August 1969, plaintiff wife instituted action against defendant husband for temporary and permanent alimony and for custody and support of the minor child of the parties. On 4 September 1969, an order was entered by Abernathy, District Judge, (evidently by consent) awarding plaintiff custody of the child and providing that defendant pay plaintiff $100.00 per month for support of the child and that defendant convey or cause to be conveyed to plaintiff title to a 1965 Chevrolet and certain other personal property; the order provided that plaintiff was not entitled to alimony.

On 16 September 1969, an order to show cause was issued against defendant and on 25 September 1969, following a hearing at which defendant did not appear, an order was entered by Judge Abernathy finding defendant in wilful contempt of court for failure to make support payments and convey title to the automobile as required by the 4 September 1969 order. The sheriff was directed to take the defendant into custody and hold him until he purged himself of contempt.

On 12 November 1969, Judge Abernathy entered a further order in which, *inter alia,* he recited a history of the case, and found that defendant had satisfied plaintiff regarding the automobile and had brought his support payments up to date; he further found that plaintiff is entitled to an award for legal services rendered subsequent to 4 September 1969 and that $50.00 is a reasonable award for said services. The order provided that defendant should pay said amount of $50.00 to plaintiff's counsel for legal services rendered subsequent to 4 September 1969, said sum to be paid on or before 10 January 1970. It further provided that the former order requiring the sheriff to take the defendant into custody be vacated and that defendant "shall be considered to have purged himself of contempt of this court."

Defendant excepted to that portion of the 12 November 1969 order requiring him to pay plaintiff's attorneys $50.00 for legal services rendered subsequent to 4 September 1969 and appealed to this Court.

No counsel contra.

Gene H. Kendall for defendant appellant.

BRITT, J.

Defendant contends that this is an action under G.S. 50-16 and that in the absence of allegations and proof that plaintiff wife is the

dependent spouse the requirement in the order appealed from that defendant pay plaintiff's counsel for services rendered subsequent to 4 September 1969 is invalid. We disagree with this contention primarily for the reason that the action is supported by statutes other than G.S. 50-16; in fact, that statute was repealed by Chapter 1152 of the 1967 Session Laws.

In her complaint plaintiff prayed for alimony, temporary and permanent, without divorce as authorized by G.S. 50-16.1, et seq., and for custody and support of the minor child born to the marriage as authorized by G.S. 50-13.1, et seq.; she alleged sufficient facts to support the relief sought. G.S. 50-13.5(a) provides that "[t]he procedure in actions for custody and support of minor children shall be as in civil actions * * *"; G.S. 50-13.5(b)(3) provides that an action for custody and support may be joined with an action for alimony without divorce. The effect of the 4 September 1969 order was to grant plaintiff no alimony under G.S. 50-16.1, et seq., but to grant her custody and support for the child under G.S. 50-13.1, et seq.

It is true, as defendant argues, that G.S. 50-16.4 authorizes the court, upon application of a dependent spouse entitled to alimony pendente lite pursuant to G.S. 50-16.3, to enter an order for reasonable counsel fees for the benefit of the dependent spouse to be paid by the supporting spouse; but G.S. 50-13.4(f)(9) provides that "[t]he wilful disobedience of an order for the payment of child support shall be punishable as for contempt as provided by G.S. 5-8 and G.S. 5-9."

The court is vested with broad power when it is authorized to punish "as for contempt." *Rose's Stores v. Tarrytown Center*, 270 N.C. 206, 154 S.E. 2d 313 (1967); *Blue Jeans Corp. v. Clothing Workers of America*, 4 N.C. App. 245, 166 S.E. 2d 698 (1969), affirmed by Supreme Court in 275 N.C. 503, 169 S.E. 2d 867 (1969). We hold that this power includes the authority for a district court judge to require one whom he has found in wilful contempt of court for failure to comply with a child support order entered pursuant to G.S. 50-13.1, et seq., to pay reasonable counsel fees to opposing counsel as a condition to being purged of contempt. In the order appealed from, the district court judge did not exceed that authority, therefore, the order is

Affirmed.

BROCK and GRAHAM, JJ., concur.

STATE OF NORTH CAROLINA v. WILFRED BOCAGE, JR.

No. 7026SC189

(Filed 6 May 1970)

1. Criminal Law § 155.5— appeal — time of docketing record on appeal

Defendant's appeal to the Court of Appeals is subject to dismissal for failure to docket the record on appeal within the time allowed by the Rules. Rules of Practice in the Court of Appeals Nos. 5 and 48.

2. Larceny § 7— larceny of automobile — sufficiency of evidence

Evidence of defendant's guilt of the felonious larceny of a Buick automobile from the lot of an automobile dealer, *held* sufficient to be submitted to the jury, notwithstanding defendant testified that he intended to bring the car back to the dealer and buy it.

APPEAL by defendant from *Godwin, S.J.*, 16 September 1969 Schedule "D" Criminal Session, MECKLENBURG Superior Court.

Defendant was charged in a bill of indictment with the felony of larceny of an automobile of the value of thirteen hundred dollars ($1300.00). Defendant pleaded not guilty. The jury found him guilty as charged. From a judgment imposing a prison sentence of not less than five (5) nor more than seven (7) years, the defendant appealed to the Court of Appeals. Upon this appeal he is represented by his court-appointed counsel.

Attorney General Robert Morgan by Assistant Attorney General William W. Melvin and Staff Attorney T. Buie Costen for the State.

William D. McNaull, Jr., and John G. Walker for defendant appellant.

VAUGHN, J.

[1] The date of the judgment appealed from is 17 September 1969. The record on appeal was not docketed in this Court until 2 February 1970. Therefore, this appeal may be dismissed under Rule 48 of the Rules of Practice in the Court of Appeals for failure to comply with Rule 5. We have, however, considered the appeal on its merits.

[2] Evidence for the State tended to show the following: On the morning of 26 July 1969 defendant expressed an interest in a 1963 Buick which was on the sales lot of Thomas Cadillac, Inc. in Charlotte. The car had a fair market value of thirteen hundred dollars ($1300.00). He was advised by the sales manager that he could not

drive the car unless a salesman was in the car with him. Defendant left the premises. He later returned at a time when the sales manager was not present. He drove the 1963 Buick away from the premises without permission. The lot attendant thinking that defendant had been authorized to take the car, made no effort to stop him. About 2:30 a.m. on the morning of 27 July 1969, Patrolman Edwards of the Charlotte Police Department observed defendant come out of a pool room and get in the Buick automobile which was the one previously described to him as having been stolen. He followed the vehicle until it stopped at the end of a dead end street. Defendant was driving and several other people were in the vehicle. Defendant displayed a California driver's license. When asked for the vehicle registration card, defendant stated that he did not have one and that he did not know to whom the car belonged.

The defendant testified, in part as follows. He asked one of the salesmen about trying out the car but that the salesman told him he was too busy to talk with him. After waiting a few minutes he drove the car away and "that was it." He intended to buy the car. He intended to bring it back. He came to Charlotte from California where he had been convicted of second degree burglary. He has also been convicted of "joy riding." "I was riding in a car that a fellow stoled."

Evidence of defendant's guilt was plenary. Defendant's assignments of error based on the court's refusal to enter judgment as of nonsuit and to set aside the verdict are overruled. Assignments of Error 1, 2 and 4 relate to alleged errors in the admission of the following into evidence: evidence as to the time the car was discovered to have been stolen; whether the State's witness had any knowledge as to any of the salesmen having granted defendant permission to use the vehicle, and testimony as to the number on the license plate at the time the defendant was arrested. The defendant's exceptions to this evidence were properly overruled and the assignments of error based thereon are without merit.

Assignments of Error Nos. 5, 6 and 7 are directed at alleged errors in the judge's instructions to the jury. We have carefully considered these assignments of error and find them to be without merit.

In the entire trial we find

No error.

MALLARD, C.J., and MORRIS, J., concur.

STATE OF NORTH CAROLINA v. BERNARD GAITEN

No. 7026SC222

(Filed 6 May 1970)

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

Assignments of error not set out in the brief are deemed abandoned. Court of Appeals Rule No. 28.

2. Criminal Law § 88; Witnesses § 8— cross-examination — refusal to allow court reporter to read testimony given on direct examination

In this prosecution for common law robbery, the trial court did not err in refusing to allow the court reporter to read to the jury certain portions of the testimony of the prosecuting witness after the witness denied on cross-examination that he had testified to a certain fact, and counsel asked the court reporter to find the testimony and read it back.

APPEAL by defendant from *Beal, J.*, 17 November 1969, Schedule D Session, MECKLENBURG Superior Court.

Defendant was charged in a bill of indictment with the offense of common law robbery from the person of Henry James Reeves on 7 July 1969. Upon his plea of not guilty defendant was tried by jury which found him guilty as charged. From the verdict and judgment of imprisonment for a term of five years defendant appealed.

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

Hicks and Harris, by Richard F. Harris, III, for defendant.

BROCK, J.

[1] Defendant's exceptions grouped under his assignments of error Nos. 3, 4, 5, and 8 are not set out in his brief; therefore, they are deemed abandoned by him. Rule 28, Rules of Practice in the Court of Appeals of North Carolina.

Assignments of error Nos. 1, 2, and 6 relate to exceptions taken to the admission and exclusion of evidence. These assignments of error present no new or unusual question and we see no useful purpose in a detailed discussion. It is sufficient to say that we find no prejudicial error in the rulings of the trial judge which are challenged by these assignments of error, and they are, therefore, overruled.

[2] Assignment of error No. 7 is to the refusal of the trial judge to allow the court reporter to read to the jury certain portions of the testimony of the prosecuting witness. During defendant's cross-

examination of the prosecuting witness, defense counsel asked the witness if he had not testified to a certain fact on direct examination; when the witness denied that he had, counsel asked the court reporter to find the testimony and read it back. The trial judge intervened and advised counsel that he should proceed with the cross-examination. We agree with the trial judge's action upon this matter. This assignment of error is overruled.

Assignments of error Nos. 9, 10, 11, 12, and 13 are to portions of the trial judge's charge to the jury. When the charge is considered as a whole, which must be done in order to gather its meaning as conveyed to the jury, we find no prejudicial error.

No error.

BRITT and GRAHAM, JJ., concur.

STATE OF NORTH CAROLINA v. WALLACE E. FOSTER

No. 7026SC176

(Filed 6 May 1970)

1. Escape § 1— work release prisoner — wilful failure to return — sufficiency of evidence

In this prosecution for escape by a prisoner on work release, evidence that defendant was transported to his job by prison bus on 16 November 1968, that he did not meet the bus that afternoon as he was supposed to do and did not return to the custody of the Department of Correction until July 1969, when he was returned from another state, *is held* sufficient to show that defendant failed to return to the appointed place and at the appointed time and, absent explanation, that such failure was wilful within the meaning of G.S. 148-45(b).

2. Criminal Law § 97— introduction of additional evidence by State — discretion of court

In this escape prosecution, the trial court did not abuse its discretion in permitting the State to introduce additional testimony after the State had rested and defendant had put on his evidence.

3. Criminal Law § 112— failure to define reasonable doubt — absence of request

In the absence of a request the trial court is not obligated to define reasonable doubt.

STATE *v.* FOSTER

APPEAL by defendant from *Falls, J.*, 30 October 1969 "C" Session of MECKLENBURG Superior Court.

Defendant was charged in a valid bill of indictment with escape under G.S. 148-45(b). The evidence for the State tended to show that at the time of the escape defendant was assigned to Camp Green in Mecklenburg County and was participating in a work release program. He left Camp Green on 16 November 1968, with other prisoners by prison bus and was transported to his job. He did not meet the prison bus that afternoon as he was supposed to do and was not returned to the custody of the North Carolina Department of Correction until July 1969, when he was returned from South Carolina.

Defendant appealed from the imposition of a two-year sentence based on the jury's verdict of guilty.

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

Hamel and Cannon by William F. Hamel for defendant appellant.

MORRIS, J.

Defendant was charged under G.S. 148-45(b) which provides that any prisoner on the work release program "who shall fail to return to the custody of the North Carolina Department of Correction, shall be guilty of the crime of escape and subject to the provisions of subsection (a) of this section and shall be deemed an escapee." The statute further provides: "For the purpose of this subsection, escape is defined to include, but is not restricted to, wilful failure to return to an appointed place and at an appointed time as ordered."

[1] Defendant's first assignment of error raises the contention that it was error for the court to refuse defendant's motion for nonsuit, because the State failed to introduce evidence that he wilfully failed to return to custody. This contention is without merit and is overruled.

The evidence in this case that defendant, who was in prison and was on work release, left on 16 November 1968 and was "returned" from South Carolina in July 1969 is ample to show that he failed to return to the appointed place and at the appointed time. Moreover, absent explanation, this evidence was sufficient to show that such failure to return was wilful.

[2] By assignment of error No. 2 defendant contends that the court erred in permitting the State "to present further direct evidence dis-

guised as rebuttal evidence after the State had rested." Defendant concedes that such action is within the discretion of the trial judge but contends that it is an abuse of that discretion to permit further direct evidence, under the guise of rebuttal, for the purpose of curing defects. The evidence was allowed after defendant had put on his evidence. No objection was made at the trial. The trial judge may in his discretion, reopen the case and admit additional testimony after the conclusion of the evidence and even, when the ends of justice require it, after argument of counsel or after the jury has retired. *State v. Perry,* 231 N.C. 467, 57 S.E. 2d 774 (1950); Stansbury, N.C. Evidence 2d (1963), Witnesses, § 24 at p. 44. This assignment of error is overruled.

[3] Defendant's third and last assignment of error is bottomed on the court's failure to define reasonable doubt clearly. However, defendant attempts to raise this objection on appeal without having tendered a request for specific instructions at the trial. In the absence of a request, the court is not obligated to define reasonable doubt. *State v. Hall,* 267 N.C. 90, 147 S.E. 2d 548 (1966).

No error.

MALLARD, C.J., and VAUGHN, J., concur.

WILLIAM HENRY BANKS v. MAUDE OWENS BANKS

No. 701DC171

(Filed 6 May 1970)

Divorce and Alimony § 16— cross-claim for alimony — abandonment — instructions — burden of proof

In this action by plaintiff husband for absolute divorce on the ground of one year's separation wherein defendant wife cross-claimed for alimony on the ground of constructive abandonment by the husband, the trial court erred in giving the jury an instruction which in effect placed the burden of proof on the issue of abandonment on plaintiff husband, the burden of proof on that issue being on the wife.

APPEAL by plaintiff from *Blythe, District Judge,* 10 October 1969 Session of PASQUOTANK District Court.

Plaintiff husband filed complaint seeking an absolute divorce on the ground of one year's separation. Defendant answered and filed

cross action for alimony, alleging that plaintiff had maliciously turned her out of doors and had constructively abandoned her. There was no conflict in the evidence that the parties were married on 20 May 1946 and thereafter lived together until 11 August 1967, when defendant left their home in North Carolina and went to live in New York, and that they remained continuously separate and apart thereafter. The jury answered issues as to the marriage, the residence of the plaintiff, and the separation, in favor of the plaintiff, and answered fourth and fifth issues as follows:

"4. Did the plaintiff wrongfully and unlawfully abandon the defendant as alleged in the answer?

"ANSWER: Yes.

"5. Has the plaintiff committed the designated grounds for alimony?

"ANSWER: Yes."

Judgment was entered dismissing plaintiff's action for absolute divorce and awarding defendant permanent alimony and counsel fees. Plaintiff appealed, assigning errors.

Twiford & Abbott, by William Brumsey, III, for plaintiff appellant.

Worth & Beaman, by Grafton G. Beaman, for defendant appellee.

PARKER, J.

When first charging the jury upon the fourth issue, the court properly placed the burden of proof on the defendant. Later in the charge the court instructed the jury:

"Now, ladies and gentlemen of the jury, if you should find that the conduct of the husband was such as would cause his wife to leave, if she was treated with such indignities or abusement that would make it justifiable then, of course, you would answer this issue yes, *but if you find that, from the evidence and the greater weight thereof, that the husband, in this instance Mr. Banks, did no act or mistreated his wife to the extent that she was justified in leaving, then you would answer that issue no.*" (Emphasis added.)

The effect of the last quoted portion of the charge was to place the burden of proof as to the fourth issue upon the plaintiff. In so doing the court committed error. Litigants have a substantial right in having the burden of proof properly placed, for upon it many cases are

made to turn. *Williams v. Insurance Co.*, 212 N.C. 516, 193 S.E. 728. Erroneous or conflicting instructions thereon must be held for prejudicial error. *Barber v. Heeden*, 265 N.C. 682, 144 S.E. 2d 886.

Appellant noted exceptions and assigned errors to other portions of the charge. Some of these assignments appear to have merit. We also note that the meaning of the fifth issue as submitted to the jury is obscure. In addition, although the matter is not discussed in appellant's brief and for that reason we do not pass upon it, on the record before us it is questionable if defendant's evidence was sufficient to warrant submission of the fourth and fifth issues to the jury. However, we refrain from discussing other errors in the trial since in any event, for the error noted above, there must be a

New trial.

CAMPBELL and VAUGHN, JJ., concur.

JAMES CROCKETT, MRS. VIRGINIA DAVIS, MISS MADIE SIMPSON, ALONZO HART, JAMES RANDOLPH, THOMAS McCASKILL, MINNA REID AND THOMAS BANKS, TRUSTEES OF CLINTON CHAPEL A.M.E. ZION CHURCH v. HATTIE LOWRY

No. 7026DC227

(Filed 6 May 1970)

1. Courts § 14— perfection of appeal from magistrate — authority of magistrate to require appeal bond

In this small claim action tried before a magistrate, defendant perfected her appeal from the magistrate to the district court when she gave notice of appeal in open court and the same was thereafter noted in writing by the magistrate upon the judgment, and the magistrate was without authority to require an "appeal bond" as a condition precedent to an appeal from a judgment rendered by him; consequently, the district court erred in dismissing defendant's appeal for failure to post appeal bond of $100 set by the magistrate. G.S. 7A-228.

2. Ejectment § 8— action for possession of realty — defense bond

Defense bond required by G.S. 1-111 is not an "appeal bond" but is a bond which can be required before defendant is allowed to plead to the complaint.

3. Ejectment § 8— action for possession of realty — failure to file defense bond — judgment for plaintiff

When an answer has been filed in an action for possession of real property without the bond required by G.S. 1-111 and has remained on file without objection, it is improper for the trial judge to strike the answer and render judgment for plaintiff without notice to show cause or without giving defendant the opportunity to file a defense bond.

4. Ejectment § 8— action for possession of realty — failure to file defense bond — waiver of objection

The requirement that defendant execute and file a defense bond in an action for possession of real property may be waived unless seasonably insisted upon by plaintiff.

APPEAL by defendant from *Abernathy, District Judge,* 28 November 1969 Session of MECKLENBURG County District Court.

This is a small claim action demanding summary ejectment which was assigned to L. Carl Cook, Magistrate. Complaint was filed on 28 October 1969, and answer was filed on 7 November 1969. On 10 November 1969, judgment was entered in favor of plaintiff. Defendant, in open court, gave notice of appeal for trial *de novo* in the district court and demanded trial by jury. The magistrate noted the appeal on the judgment and added thereto "appeal bond $100.00."

On 21 November 1969 plaintiff filed a motion in the district court asking that defendant's appeal be dismissed and the judgment of the magistrate be made final by reason of the failure of defendant to post the "required appeal bond," alleging that the time for posting such bond had expired. On 28 November 1969, Abernathy, District Judge, signed an order dismissing defendant's appeal, finding as of fact that the defendant had failed to post the "required appeal bond" and that the time for "perfecting the defendant's appeal has expired." The record on appeal is silent as to whether defendant had proper notice of the motion and hearing thereon. On 4 December 1969 defendant moved, in open court, to vacate the order signed by Judge Abernathy. From denial of this motion and the order dismissing her appeal to the district court, the defendant appeals.

Cole and Chesson by Calvin W. Chesson for plaintiff appellees.

Gail Barber, Martin Miller and Thomas Wyche for defendant appellant.

VAUGHN, J.

[1] The defendant perfected her appeal to the district court when she gave notice of appeal in open court and the same was thereafter

noted in writing by the magistrate upon the judgment. G.S. 7A-228. *Porter v. Cahill,* 1 N.C. App. 579, 162 S.E. 2d 128. We find no authority for a magistrate to require an "appeal bond" as a condition precedent to an appeal from a judgment rendered by him.

[2-4] It should be noted that we are not concerned here with the bond to suspend execution authorized by G.S. 42-34 which was required by the magistrate. Nor does the so-called "appeal bond" purport to be the defense bond required by G.S. 1-111. Such a bond is not an "appeal bond." It is a bond which could have been required before the defendant was allowed to plead to the complaint. Even in cases coming within the purview of G.S. 1-111, when an answer has been filed without any bond and has remained on file without objection, it would be improper for the trial judge to strike the answer and render judgment for plaintiff without notice to show cause or without giving the defendant the opportunity to file a defense bond. The requirement that the defendant must execute and file a defense bond may be waived, unless seasonably insisted upon by the plaintiff. *Gates v. McDonald,* 1 N.C. App. 587, 162 S.E. 2d 143. The judgment dismissing defendant's appeal is

Reversed.

MALLARD, C.J., and MORRIS, J., concur.

STATE OF NORTH CAROLINA v. HERMAN EUGENE TURNER

No. 7029SC67

(Filed 6 May 1970)

1. Criminal Law § 31— judicial notice — municipal corporation

The Court of Appeals takes judicial notice of the fact that the City of Hendersonville is a municipal corporation by virtue of Ch. 352, 1913 Private Laws of North Carolina.

2. Larceny § 4; Indictment and Warrant § 11— sufficiency of indictment — ownership of stolen property — municipal corporation

Indictment charging defendant with larceny of a truck which was the property of "one City of Hendersonville, North Carolina" sufficiently alleges that the owner of the stolen property is a legal entity capable of owning property, the words "City of Hendersonville" denoting a municipal corporate entity, and municipal corporations being authorized by G.S. 160-2(4) to purchase and hold personal property.

APPEAL by defendant from *Beal, S.J.*, 15 September 1969 Special Criminal Session of HENDERSON County Superior Court.

Defendant was charged in a bill of indictment with the larceny of a described Ford truck of the value of $2,000. The indictment alleged that the truck was the property of "one City of Hendersonville, North Carolina." When the case was called for trial the defendant tendered a plea of guilty to the lesser included offense of larceny of property of less than $200 in value. The plea was accepted after the trial court ascertained, upon ample evidence, that it was freely, understandingly and voluntarily entered.

From judgment imposing an active prison sentence defendant appealed.

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

Prince, Youngblood, Massagee & Groce by Edwin R. Groce for defendant appellant.

GRAHAM, J.

[2] Defendant contends that the indictment is fatally defective in that it fails to allege that the owner of the property allegedly stolen is either a natural person or a legal entity capable of owning property. This contention is without merit. Chapter 352 of the 1913 Private Laws of North Carolina provides in Section 1, at page 1044, as follows:

> "That the name of the town of Hendersonville, in Henderson County, be changed to The City of Hendersonville, which shall be a municipal corporation, . . ."

In Section 2, beginning on page 1044, it is provided:

> "The city of Hendersonville shall have all of the rights, privileges, powers, immunities, and liabilities which are conferred upon or are incident to incorporated cities and towns by virtue of the law of the land, . . ."

In Section 52, at page 1056, it is further provided:

> "This act [establishing Hendersonville a municipal corporation] shall be deemed a *public act*, and judicial notice shall be taken thereof by the courts without the same being pleaded or read in evidence." (Emphasis added).

[1] It is well established that judicial notice will be taken of public laws of this State, Stansbury, N.C. Evidence 2d, § 12. We there-

fore take judicial notice of the fact that the City of Hendersonville is a municipal corporation. *Cf. Winborne, Utilities Comr., v. Mackey,* 206 N.C. 554, 174 S.E. 577.

[2] This case differs substantially from *State v. Thornton,* 251 N.C. 658, 111 S.E. 2d 901, and *State v. Thompson,* 6 N.C. App. 64, 169 S.E. 2d 241, which are relied upon by defendant. Neither the indictment in *Thornton* nor the warrant in *Thompson* contained any words importing that the owner of the property involved was a corporation. Here, the words "City of Hendersonville" denote a municipal corporate entity. Municipal corporations are expressly authorized to purchase and hold personal property. G.S. 160-2(4).

Since, in our opinion, the indictment in question was valid in all respects it is unnecessary that we consider the State's contention that even if the bill of indictment was improper, jurisdiction was nevertheless acquired over the defendant when he tendered a plea of guilty to a lesser included offense.

No error.

BROCK and BRITT, JJ., concur.

DANIEL J. CRAVEN v. JOEL DIMMETTE, LUTHER OEHLBECK, ROBERT L. ROGERS, D/B/A THE SPORTS CENTER

No. 7025DC256

(Filed 6 May 1970)

Appeal and Error §§ 39, 40— failure to docket record in apt time — failure to include judgment in record

Appeal is dismissed for failure to docket the record on appeal within the time, as extended by the trial court, allowed by Rule 5 and for failure to include the judgment appealed from in the record on appeal as required by Rule 19(a). Court of Appeals Rule No. 48.

APPEAL by plaintiff from *Vernon, District Judge,* November 1969 Session, CALDWELL District Court.

This is a civil action for damages for breach of warranty in the sale of a boat by defendants to plaintiff. The case was before this Court at the 1969 Spring Session at which time we held that the trial court erred at its February 1969 Civil Session in entering judg-

ment of nonsuit at close of plaintiff's evidence. Our opinion is reported in 5 N.C. App. 617, 169 S.E. 2d 129.

The record before us discloses that following presentation of all evidence at the retrial, defendants' motion for nonsuit was allowed and that plaintiff appealed.

Ted S. Douglas for plaintiff appellant.

Townsend & Todd by James Todd, Jr., for defendant appellees.

BRITT, J.

Defendants have filed a motion to dismiss plaintiff's appeal for that plaintiff failed to docket his case on appeal within the time allowed by Rule 5 of the Court of Appeals. Said rule provides that if the record on appeal is not docketed within ninety days after the date of the judgment, order, decree, or determination appealed from, the case may be dismissed, provided, the trial tribunal may, for good cause, extend the time not exceeding sixty days, for docketing the record on appeal.

The record before us contains no judgment except the judgment dated 5 February 1969 which was considered on the former appeal. Rule 19(a) of our rules provides, *inter alia,* that "the order, judgment, decree, or determination appealed from shall be included in the record on appeal in all cases." The statement of case on appeal reveals that the case was retried in district court on 6 November 1969 and the record contains an order by the trial judge dated 6 February 1970 providing that "plaintiff shall have an additional forty days within which to docket the case on appeal in the Court of Appeals, up to and including the fourth day of March, 1970." The record on appeal was filed in this Court on 9 March 1970.

For failure to comply with the rules of this Court, plaintiff's appeal is dismissed. Rule 48, Rules of Practice in the Court of Appeals of North Carolina.

Appeal dismissed.

BROCK and GRAHAM, JJ., concur.

STATE OF NORTH CAROLINA v. CHARLES EDWARD SMITH

No. 7026SC175

(Filed 6 May 1970)

Homicide § 28— instruction on self-defense — apparent necessity

An instruction on self-defense that defendant could use no more force than was reasonably necessary to repel an assault is erroneous, the correct rule being that defendant could use such force as was reasonably necessary or apparently necessary.

APPEAL by defendant from *Falls, J.*, 1 December 1969 Schedule "C" Criminal Session of Superior Court held in MECKLENBURG County.

The defendant, Charles Edward Smith, was charged in a bill of indictment with murder in the first degree of Robert Samuel Mobley. He was tried upon the charge of murder in the second degree. The jury found him guilty of manslaughter. From a judgment of imprisonment for a term of twenty years, the defendant appealed to the Court of Appeals.

Attorney General Morgan and Staff Attorney Blackburn for the State.

Lacy W. Blue for defendant appellant.

MALLARD, C.J.

The defendant's only assignment of error is to the following portion of the charge:

> "When you come to consider his plea of self-defense, you should ask yourself these questions: (1) At the time of the firing of the fatal shot that took the life of the deceased, Robert Mobley, was the defendant at the place where he had the right to be? (2) Was he himself without fault in bringing on or entering into the encounter or difficulty with the deceased? (3) Was he unlawfully or feloniously assaulted by the deceased? (4) Did he believe and have reasonable grounds to believe that he was about to suffer death or great bodily harm at the hands of the deceased? (5) Did he act with ordinary firmness under the circumstances as they reasonably appeared to him and under the belief that it was necessary to kill the deceased in order to save his own life or to protect his person from enormous bodily harm? (6) Did he use no more force than was reasonably necessary to repel the assault which he contends the deceased was making upon him at the time the fatal shot was fired?

> If you are satisfied from the evidence in this case offered by the defendant or from the evidence offered — No, strike that out. Let me start over.
>
> If you are satisfied from the evidence offered by the defendant or from the evidence offered against him from all of the evidence and circumstances in the case that the truth requires an affirmative answer to these six questions, that is, that they should all be answered yes, then it would be your duty to acquit the defendant."

The defendant contends, and we agree, that the court committed error in instructing the jury as set forth in question (6) above. This instruction is erroneous in that it failed to present to the jury the question of whether the necessity for the use of force by the defendant in self-defense was real or apparent. The correct rule is that the defendant could use such force as was reasonably necessary *or apparently necessary. State v. Ealy,* 7 N.C. App. 42, 171 S.E. 2d 24 (1969). The question of apparent necessity is discussed by Justice Branch in *State v. Jennings,* 276 N.C. 157, 171 S.E. 2d 447 (1970).

> "There is a marked distinction between an actual necessity for killing and a reasonable apprehension of losing life or receiving great bodily harm. The plea of self-defense rests upon necessity, real or apparent." *State v. Goode,* 249 N.C. 632, 107 S.E. 2d 70 (1959).

For error in the instructions, the defendant is awarded a new trial.

New trial.

MORRIS and VAUGHN, JJ., concur.

STATE OF NORTH CAROLINA v. JOHNNY COOPER AND BOBBY LOVELACE

No. 7029SC43

(Filed 6 May 1970)

Assault and Battery §§ 5, 15— felonious assault — instructions — intent to kill — intent to inflict bodily harm

In this prosecution for assault with a deadly weapon with intent to kill inflicting serious injury not resulting in death, an instruction which would permit the jury to find an intent to kill if defendants intended either to kill or to inflict great bodily harm constitutes prejudicial error, since a jury finding that defendants intended only to inflict great bodily harm would be insufficient to sustain a conviction for felonious assault.

ON *certiorari* from *McLean, J.*, 19 May 1969 Session of RUTHERFORD Superior Court.

Defendants were convicted of felonious assault. They were tried upon a bill of indictment which charged that they ". . . did, unlawfully, wilfully and feloniously assault Rex Lee with a certain deadly weapon, to wit: a knife with the felonious intent to kill and murder the said Rex Lee inflicting serious injuries, not resulting in death . . . ." From judgment imposing active prison sentences of ten years, both defendants appeal.

Attorney General Robert Morgan by Deputy Attorney General Harrison Lewis and Trial Attorney I. B. Hudson, Jr., for the State.

George R. Morrow for defendant appellant Cooper.

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

VAUGHN, J.

The sole assignment of error brought forward by the defendants is to the following portions of the charge wherein the court defined intent to kill.

> ". . . So I charge you an intent to kill is the intent which exists in the mind of a person at the time he commits the assault or criminal act intentionally and without justification or excuse to kill his victim *or to inflict great bodily harm.*" (Emphasis ours)

This instruction contains the identical prejudicial error found in *State v. Parker,* 272 N.C. 142, 157 S.E. 2d 666; *State v. Ferguson,* 261 N.C. 558, 135 S.E. 2d 626; and *State v. Muskelly,* 6 N.C. App. 174, 169 S.E. 2d 530. It would allow the jury to find an intent to

kill if the defendants intended either to kill or to inflict great bodily harm. If the jury found only an intent to inflict great bodily harm, this would be insufficient to sustain the felony charge since the intent to kill is an essential element of such charge. *State v. Ferguson, supra.*

For errors in the charge each defendant is entitled to a New trial.

MALLARD, C.J., and MORRIS, J., concur.

STATE OF NORTH CAROLINA v. JAMES R. CHISHOLM

No. 7026SC145

(Filed 6 May 1970)

1. Larceny § 8— doctrine of recent possession — instructions — burden of proof

In this prosecution for automobile larceny, the trial court committed prejudicial error in giving an instruction susceptible to the interpretation that defendant had the burden of rebutting the presumption of guilt raised by his possession of the recently stolen automobile, and in failing to instruct the jury that the presumption which arises from defendant's possession of the recently stolen property is to be considered merely as an evidential fact, along with other evidence in the case, in determining whether the State has carried the burden of satisfying the jury beyond a reasonable doubt of defendant's guilt.

2. Criminal Law § 166— abandonment of assignments of error

Assignments of error not brought forward and argued in the brief are deemed abandoned. Court of Appeals Rule No. 28.

APPEAL by defendant from *Beal, S.J.*, 20 October 1969, Special Criminal Session, Superior Court of MECKLENBURG County.

Defendant was charged in an indictment proper in form with the larceny of an automobile having a value of $300. The jury returned a verdict of guilty, and defendant appeals from the judgment entered.

Attorney General Robert Morgan by Assistant Attorney General William W. Melvin and Staff Attorney T. Buie Costen for the State.

Peter H. Gerns for defendant appellant.

MORRIS, J.

Defendant excepts to and assigns as error certain portions of the charge of the court with respect to the doctrine of recent possession.

[1] The instruction complained of cannot be distinguished from the one disapproved in *State v. Hayes,* 273 N.C. 712, 161 S.E. 2d 185 (1968). There the Court held the instruction to be not only confusing but susceptible of the interpretation by the jury that the defendant had the burden of rebutting the presumption of guilt raised by his possession of the recently stolen automobile. The jury was not clearly instructed that the presumption which arises from the defendant's possession of the recently stolen property "is to be considered by the jury merely as an evidential fact, along with the other evidence in the case, in determining whether the State has carried the burden of satisfying the jury beyond a reasonable doubt of the defendant's guilt," *State v. Hayes, supra,* citing *State v. Baker,* 213 N.C. 524, 196 S.E. 829 (1938), and does not place upon defendant the burden of rebutting the presumption.

[2] This instruction constituted prejudicial error and entitles defendant to a new trial. Although defendant excepted to and assigned as error the denial of his motion as for nonsuit at the close of the State's evidence and renewed at the close of all the evidence, he did not bring these exceptions forward in his brief and they are deemed abandoned. Rule 28, Rules of Practice in the Court of Appeals of North Carolina. Although we do not discuss this assignment of error, we have examined the record and are of the opinion that the evidence for the State was more than ample for submission to the jury. Because there must be a new trial we do not discuss other assignments of error which are not likely to recur.

New trial.

MALLARD, C.J., and VAUGHN, J., concur.

STATE OF NORTH CAROLINA v. MARGARET M. MILLER

No. 7026SC190

(Filed 6 May 1970)

Homicide §§ 21, 26— second degree murder — sufficiency of evidence — instructions

In this prosecution for second degree murder, the evidence was sufficient for submission of the case to the jury and the instructions were more favorable to defendant than is required.

APPEAL by defendant from *Anglin, J.*, 27 October 1969, Schedule B Session, MECKLENBURG Superior Court.

Defendant was charged in a bill of indictment with the murder of Lester Burke Miller, her husband, on 26 August 1969 without premeditation and deliberation. Upon her plea of not guilty she was tried by jury which found her guilty of voluntary manslaughter. From the verdict and judgment of confinement defendant appealed.

Attorney General Morgan, by Trial Attorney Webb, for the State.

W. Herbert Brown, Jr., for the defendant.

BROCK, J.

We have carefully examined defendant's assignment of error to the refusal of the trial judge to grant her motion for nonsuit and in our opinion there was more than ample evidence to justify submitting the case to the jury. Also we have carefully considered defendant's assignments of error to the trial judge's instructions to the jury and in our opinion the instructions were more favorable to defendant than is required. Defendant had a fair and impartial trial, free from prejudicial error.

No error.

BRITT and GRAHAM, JJ., concur.

STATE OF NORTH CAROLINA v. BOBBY JOHN PERRY

— AND —

STATE OF NORTH CAROLINA v. JOHN GIBBY

Nos. 7027SC253 AND 7027SC254

(Filed 6 May 1970)

1. Criminal Law § 92— consolidation of cases — contention that each defendant had long record

Prosecutions against two defendants were properly consolidated for trial, notwithstanding defendants' argument that the consolidation was erroneous in that each of them had a long criminal record which would have likely prejudiced the other.

2. Burglary and Unlawful Breakings § 6— felonious breaking and entering — 1969 amendment — instructions on pre-1969 law

In a felonious breaking and entering prosecution under G.S. 14-54 as amended in 1969, defendants were prejudiced when the trial court (1) read to the jury G.S. 14-54 as it existed prior to the 1969 amendment and (2) instructed the jury that to convict defendants of felonious breaking and entering they must find that the building was broken into or entered with the intent to commit the felony of larceny or other infamous crime therein.

APPEAL by defendants from *Falls, J.*, 9 January 1970 Session GASTON Superior Court.

Defendants were charged, under G.S. 14-54 as amended by the 1969 Legislature, with felonious breaking and entering, the offense having occurred on 16 October 1969. The defendants were tried together, each having court-appointed counsel. Upon a verdict of guilty as to each defendant and entry of judgments upon the verdicts, each defendant appealed. Although identical, a separate record and brief was filed for each defendant by their court-appointed counsel. On motion of the State, the cases were consolidated for the filing of brief by the State and for argument.

Attorney General Robert Morgan by Staff Attorney T. Buie Costen for the State.

L. B. Hollowell, Jr., for defendant appellant, Bobby John Perry.

Tim L. Harris, for defendant appellant, John Gibby.

MORRIS, J.

[1] Defendant's by their assignment of error No. 1, contend that the trial court committed prejudicial error in allowing the State's motion to consolidate these cases for trial. Defendants concede that

G.S. 15-152 expressly authorizes the trial judge to consolidate for trial two or more indictments in which the defendants are charged with crimes of the same class, which are so connected in time or place that evidence at the trial of one of the indictments will be competent and admissible at the trial of the others. Defendants further concede that these indictments were within the purview of the statute. They contend, however, that consolidation here constituted an abuse of discretion because each defendant had a long criminal record which would be likely to militate against the other to his prejudice. Defendants cite no authority for this position. We found no error in consolidation in *State v. Mourning,* 4 N.C. App. 569, 167 S.E. 2d 501 (1969), where the identical question was raised, nor do we find error here. This assignment of error is overruled.

Defendants' contentions in assignments of error Nos. 2, 3, 4, 5 and 6 are without merit and are overruled.

[2] The remaining assignments of error are directed to the charge of the court. We agree with defendants that prejudicial error appears in the charge entitling them to a new trial. Defendants were charged under G.S. 14-54 which was amended by the 1969 Legislature to read as follows:

> "(a) Any person who breaks or enters any building with intent to commit any felony or larceny therein is guilty of a felony and is punishable under G.S. 14-2.
>
> (b) Any person who wrongfully breaks or enters any building is guilty of a misdemeanor and is punishable under G.S. 14-3(a).
>
> (c) As used in this section, 'building' shall be construed to include any dwelling, dwelling house, uninhabited house, building under construction, building within the curtilage of a dwelling house, and any other structure designed to house or secure within it any activity or property."

In its charge to the jury the court read G.S. 14-54 prior to its amendment and instructed the jury that to convict for felonious breaking and entering they must find "that the building was broken into or entered with the intent to commit the felony of larceny or other infamous crime therein" and that in order to convict for a misdemeanor they must find that the breaking or entering "was done without the intent to commit the felony of larceny or other infamous crime." These instructions were repeated throughout the charge.

While the result of inadvertence on the part of the trial judge, we think the error sufficiently prejudicial to require a new trial.

New trial.

PARKER and VAUGHN, JJ., concur.

STATE OF NORTH CAROLINA v. JAMES HUFFMAN AND RODGER SPARGO

NOS. 7026SC226 AND 7026SC237

(Filed 6 May 1970)

1. Criminal Law § 113— joint trial of defendants — multiple offenses — instructions on guilt

In a trial of two defendants jointly charged with the offenses of (1) felonious breaking and entering and (2) felonious larceny, each defendant, upon his plea of not guilty, was entitled to an instruction on his guilt or innocence of each offense charged in the indictment; and the failure of the trial court to instruct the jury with respect to these options entitles the defendants to a new trial.

2. Criminal Law § 32— plea of not guilty — presumption of innocence — burden of proof

A defendant's plea of not guilty raises the presumption of his innocence of each offense charged in the bill of indictment, and the burden is on the State to satisfy the jury by competent evidence and beyond a reasonable doubt of defendant's guilt of each offense charged.

3. Criminal Law § 32— plea of not guilty — credibility of evidence

Where there is no admission by defendant and no presumption against him is raised, his plea of not guilty challenges the credibility of the evidence, even if uncontradicted.

4. Criminal Law § 154— appeals from joint trial — one record on appeal

Where defendants are charged in the same bill of indictment and are tried together, one record on appeal will suffice. Rule of Practice in the Court of Appeals No. 19(b).

APPEAL by defendants from *Falls, J.*, 20 October 1969 Session of MECKLENBURG Superior Court.

In an indictment proper in form, defendants were charged with (1) breaking and entering a store building on 25 July 1969 with intent to steal property therefrom and (2) the larceny of fourteen cases of beer valued at $84.00 from said building after breaking and entering the same.

Upon arraignment defendants pleaded not guilty. The State's primary evidence was provided by the owner of the premises alleged to have been burglarized and by one Sharon Stanton, a purported accomplice. Defendants did not testify but offered evidence tending to show alibi and to contradict testimony provided by Sharon Stanton.

The jury found each defendant guilty of breaking and entering and larceny as charged in the bill of indictment. From an active prison sentence of 8-10 years on the breaking and entering count and a 10 years' prison sentence on the larceny count to begin at expiration of sentence on the breaking and entering count but suspended on certain conditions, imposed on each defendant, both defendants appealed.

Attorney General Robert Morgan and Staff Attorney Mrs. Christine Y. Denson for the State.

William D. McNaull, Jr., for defendant appellant Huffman.

Wallace C. Tyser, Jr., for defendant appellant Spargo.

BRITT, J.

[1] Defendants assign as error the following portions of the trial judge's instructions to the jury:

> "Now, members of the jury, if you find from the evidence in this case and beyond a reasonable doubt that the defendants broke or entered the establishment known as Hazel's Place with the felonious intent to commit the crime of larceny therein, then it would be your duty to return a verdict of guilty as charged in the bill of indictment.
>
> If the State has failed to so satisfy you, it would be your duty to return a verdict of not guilty. Or, if upon a fair and impartial consideration of all the facts and circumstances in the case, you have a reasonable doubt as to the guilt of either or both of these defendants, then it would be your duty to give each of the defendants a benefit of such doubt and to acquit either or both of them.
>
> * * *
>
> To summarize, you may find the defendant James Huffman guilty as charged in the bill of indictment or you may find him not guilty. You may find the defendant Rodger Spargo guilty as charged in the bill of indictment or you may find him not guilty."

[2, 3] The assignment of error is sustained. The defendants were jointly charged in one bill of indictment but with two separate offenses: (1) felonious breaking and entering and (2) felonious larceny. Following conviction by the jury as charged, each defendant was given a substantial sentence on each offense. Upon his plea of not guilty to the bill of indictment, each defendant was presumed to be innocent of *each* offense and the burden was on the State to satisfy the jury by competent evidence and beyond a reasonable doubt of the guilt of *each* defendant of *each* offense with which he stood charged. 2 Strong, N.C. Index 2d, Criminal Law, § 32, pp. 528, 529. Where there is no admission by a defendant and no presumption against him is raised, his plea of not guilty challenges the credibility of the evidence, even if uncontradicted. *State v. Stone,* 224 N.C. 848, 32 S.E. 2d 651.

[1] By their pleas of not guilty to the bill of indictment, each defendant was entitled to have the jury say if he was guilty or not guilty of felonious breaking and entering, and if he was guilty or not guilty of felonious larceny. For failure of the court to instruct the jury with respect to these options, there must be a new trial. We do not discuss the other questions raised in defendants' briefs as they probably will not arise upon a retrial.

[4] We note that although defendants were charged in the same bill of indictment and were tried together, their counsel caused separate records on appeal to be prepared, filed and printed at State expense. We disapprove of this unnecessary waste of public funds. Under our Rule 19(b), one record would have been sufficient.

New trial.

BROCK and GRAHAM, JJ., concur.

STATE OF NORTH CAROLINA v. FOREST EDWARD TAYLOR

— AND —

STATE OF NORTH CAROLINA v. ROGER DALE CHAPMAN

— AND —

STATE OF NORTH CAROLINA v. CHARLES ABERNETHY

Nos. 7025SC210, 7025SC257 AND 7025SC258

(Filed 6 May 1970)

1. Criminal Law § 33— evidence of motive — admissibility — use of stolen goods

In a prosecution of two defendants for the felonies of breaking and entering a drugstore and of the larceny of goods therefrom, opinion testimony by an expert witness, a licensed pharmacist, that the insulin syringes stolen from the drugstore could be used to administer the narcotic drugs that were also stolen, *held* admissible to show the motive of defendants in committing the crime, especially where an alleged accomplice also testified that after defendants returned from the drugstore they began "taking stuff with a needle."

2. Criminal Law § 117— instructions on accomplice's testimony

Instructions to scrutinize the testimony of an alleged accomplice are not required when no request therefore has been made.

ON *certiorari* from *Beal, S.J.*, 17 March 1969 Session of CATAWBA Superior Court.

Each of the defendants was charged in separate bills of indictment, proper in form, with feloniously breaking and entering Newton Rexall Drug of Newton, North Carolina, and stealing property therefrom with a value of more than $200.00, the crimes having occurred on 25 June 1968. Each defendant through his court-appointed attorney pled not guilty. The jury returned, as to each defendant, a verdict of guilty of breaking and entering and larceny. Defendants Abernethy and Chapman received sentences of ten (10) years on each count to run consecutively. Defendant Taylor received ten (10) years for breaking and entering, seven (7) years for larceny. The transcript of the trial not having been completed in time for the defendants to perfect their appeals, petitions for certiorari were allowed by this Court.

Attorney General Robert Morgan by Staff Attorney James L. Blackburn and Staff Attorney Russell G. Walker, Jr., for the State.

James M. Gaither, Jr., and J. Carroll Abernethy, Jr., for defendant appellant Taylor.

Jesse C. Sigmon, Jr., for defendant appellant Chapman.

William H. Chamblee for defendant appellant Abernethy.

VAUGHN, J.

The defendants have filed separate records and briefs through their court-appointed counsel. Consolidation upon appeal was allowed upon motion by the State before oral arguments. The assignments of error and arguments in support thereof are the same for each defendant.

[1] The defendants contend that the trial court committed error in admitting opinion evidence from Billy Smyre, a witness for the State, to the effect that the stolen insulin syringes could be used to administer narcotic drugs also allegedly stolen. Smyre testified that among the missing items were three insulin syringes, 126 tablets of codeine phosphate ATD half grain, 55 tablets of codeine HT one grain, 359 tablets of codeine sulfate one quarter grain, 223 tablets of codeine sulfate one-half grain, and 25 tablets of codeine sulfate one grain. The witness further testified that in 1963 he was licensed by the State of North Carolina as a pharmacist, having received a pharmaceutical degree from the University of North Carolina. The court found the witness to be an expert in the practice of pharmacy. The defendants objected to each question asked seeking the witness' opinion.

The defendants contend that the opinion testimony was irrelevant to the charges of breaking and entering and larceny and as such it merely aroused the passions and prejudices of the jury. We are unable to agree with this contention. It is our opinion that such evidence was relevant to show motive of the defendants for committing the crimes charged. The existence of a motive is a circumstance tending to make it more probable that the person accused committed the act; therefore, evidence of motive is always admissible where the doing of the act is in dispute. *State v. Church*, 231 N.C. 39, 55 S.E. 2d 792. "It is not only competent, but very often important, in strengthening the evidence for the prosecution." *State v. Lawrence*, 196 N.C. 562, 146 S.E. 395. Evidence tending to show that the property stolen could be used in concert for a single purpose is relevant in establishing a motive for the commission of the crime. Moreover, Alda Rudisill, an alleged accomplice to the crimes and a witness for the State, testified that after the defendants returned from the Rexall Drug Store, the defendants Abernethy and Taylor "were taking stuff with a needle," that both were using a syringe and injecting a liquid into their arms.

[2] The defendants further assign as error the failure of the court to instruct the jury that the testimony of Alda Rudisill, the accomplice, should be scrutinized closely. In the absence of a request,

the court is not required to charge on the credibility of a witness. 3 Strong, N.C. Index 2d, Criminal Law, § 117, p. 24. Instructions to scrutinize the testimony of an alleged accomplice are not required when, as here, no request therefore has been made. *State v. Roux,* 266 N.C. 555, 146 S.E. 2d 654; *State v. Bailey,* 254 N.C. 380, 119 S.E. 2d 165. This assignment of error is overruled.

The defendants received a fair and impartial trial. In the entire trial we find no error.

No error.

MORRIS and PARKER, JJ., concur.

JOHN D. HISCOX v. DON B. SHEA AND WIFE, RUTH SHEA

No. 7030SC22

(Filed 6 May 1970)

1. Attachment § 9— dissolution of attachment — findings of fact

On appeal to the superior court from an order of the clerk dissolving an attachment, failure of the judge to make findings of fact in his order which vacated and overruled the clerk's order was erroneous; and the case must be remanded. G.S. 1-440.36.

2. Attachment §§ 1, 9; Courts § 6— dissolution of attachment — concurrent jurisdiction of clerk and judge

On motion to dissolve an attachment, the judge of superior court has concurrent jurisdiction with the clerk of superior court to determine the matter; and consequently the judge is not limited to determining whether or not there was competent evidence to support the findings of the clerk but he can consider the evidence *de novo* and hear evidence not before the clerk.

APPEAL by defendants from order of *Bryson, J.,* dated 6 September 1969, in Chambers in SWAIN County.

Plaintiff instituted a civil action in Macon County on 26 June 1969 seeking $8,000 in damages for an alleged breach by defendants of a contract to purchase 8.2 acres of land from plaintiff. An order of attachment based on plaintiff's affidavit was issued ancillary to the action and certain of defendants' property was attached.

On 7 July 1969 defendants moved before the clerk and pursuant to G.S. 1-440.36 that the order of attachment be dissolved. The mo-

tion was heard on 4 August 1969 and based upon appropriate findings and conclusions the clerk ordered the attachment dissolved. Plaintiff appealed to the judge of superior court. On 6 September 1969 a hearing was held before the Resident Superior Court Judge for the Thirtieth Judicial District in Chambers at Bryson City. The judge entered a summary order vacating the clerk's order and defendants appealed.

Van Winkle, Buck, Wall, Starnes and Hyde by Herbert L. Hyde for defendant appellants.

No appearance of counsel for plaintiff.

GRAHAM, J.

G.S. 1-440.36 provides as follows:

"(a) At any time before judgment in the principal action, a defendant whose property has been attached may specially or generally appear and move, either before the clerk or the judge, to dissolve the order of attachment.

(b) When the defect alleged as grounds for the motion appears upon the face of the record, no issues of fact arise, and the motion is heard and determined upon the record.

(c) When the defect alleged does not appear upon the face of the record, the motion is heard and determined upon the affidavits filed by the plaintiff and the defendant, unless prior to the actual commencement of the hearing, a jury trial is demanded in writing by the plaintiff or the defendant. *Either the clerk or the judge hearing and determining the motion to dissolve the order of attachment shall find the facts upon which his ruling thereon is based. . . .*" (Emphasis added).

[1] Both the hearing before the clerk and the subsequent hearing before the judge were upon affidavits. Facts alleged in the affidavits were sufficient to support findings favorable to either the plaintiff or the defendants with respect to issues of fact raised by the motion. The judge made no findings as required by G.S. 1-440.36(c) and as requested by defendants but simply stated in his order that after considering the affidavits and pleadings in the file the court was of the opinion that the order of the clerk should be vacated and overruled.

[2] It is impossible for us to tell from the order on what theory the judge was proceeding in overruling the clerk's order. In our opinion the clerk's findings were supported by competent evidence

and they support his conclusion that no valid grounds existed for the order of attachment. However, the judge had concurrent jurisdiction with the clerk to determine the matter. Consequently, the judge was not limited to determining whether or not there was competent evidence to support the findings of the clerk but could consider the evidence *de novo* and hear evidence not before the clerk. *Cody v. Hovey,* 219 N.C. 369, 14 S.E. 2d 30; 1 McIntosh, N.C. Practice and Procedure 2d, § 164. We assume the court considered the evidence *de novo* and determined the facts to be different from those found by the clerk. But the judge's findings are not set forth in his order or otherwise made a part of the record and this case must therefore be remanded.

Remanded.

BROCK and BRITT, JJ., concur.

PINE BURR GOLF, INC. v. GEORGE W. POOLE AND WIFE, BELLE POOLE

No. 7011DC13

(Filed 6 May 1970)

1. Trespass § 5— wrongful cutting of timber — denial of ownership — pleadings

In an action to recover double damages under G.S. 1-539.1 for the wrongful cutting of timber, wherein plaintiff alleged ownership of the tract on which the timber stood and particularly described it by metes and bounds, a mere allegation in defendants' answer denying that plaintiff owned any land "claimed by these defendants" *is held* insufficient to place in issue the ownership of the tract described by plaintiff; consequently, it was error to submit the issue of ownership to the jury.

2. Trial § 40; Pleadings § 37— determination of issues

The pleadings determine the issues, and the trial must be limited to the matters put in dispute by the pleadings.

APPEAL by plaintiff from *Morgan, District Judge,* 5 May 1969 Session of HARNETT District Court.

This is a civil action in which plaintiff seeks double damages under G.S. 1-539.1 by reason of the cutting of timber on plaintiff's land. Plaintiff alleged ownership of a tract of land particularly described by metes and bounds in the complaint and that defendants

went upon plaintiff's land and cut timber without plaintiff's consent and permission. The plaintiff introduced evidence in support of its allegations. Defendants introduced no evidence. At the close of the evidence the court submitted issues to the jury which were answered as follows:

"1. Did the plaintiff own the tract of land described in the Complaint?

"ANSWER: No.

"2. If so, did the defendant cut wood or timber off of the plaintiff's land?

"ANSWER: .....

"3. If so, what amount of damages, if any, is the plaintiff entitled to recover of the defendant?

"ANSWER: ....."

From judgment that plaintiff recover nothing of defendant, plaintiff appealed.

Edgar R. Bain for plaintiff appellant.

Stewart & Hayes by Gerald W. Hayes, Jr., for defendant appellees.

PARKER, J.

[1] Plaintiff excepted to the submission of the first issue to the jury. In paragraph three of its complaint, plaintiff alleged that it is the owner of "a certain tract of land in Lillington Township, Harnett County, North Carolina, and more particularly described as follows: . . ." There then follows a metes and bounds description by calls and distances from a designated beginning corner. Defendants answered paragraph three of the complaint as follows:

"3. That as to the allegations contained in Paragraph Three it is specifically denied that the plaintiff is the owner of any land which has or now includes any property claimed by these defendants. The specific allegations relating to marks and Maps of the said paragraph are denied."

Nowhere in the answer do defendants deny that plaintiff owns the land described in the complaint. They only deny that plaintiff owns any land "claimed by these defendants." Defendants' pleadings do not disclose any "claim" to any land. On the pleadings there is no controversy as to plaintiff's ownership of the land described in the

complaint. The vague and evasive denial of "allegations relating to marks and Maps" is insufficient to place in issue the ownership of the land which plaintiff had particularly described by metes and bounds.

[2] The pleadings determine the issues, and the trial must be limited to the matters put in dispute by the pleadings. *Carver v. Lykes,* 262 N.C. 345, 137 S.E. 2d 139; *Mesimore v. Palmer,* 245 N.C. 488, 96 S.E. 2d 356; *Bowen v. Darden,* 233 N.C. 443, 64 S.E. 2d 285; *Fairmont School v. Bevis,* 210 N.C. 50, 185 S.E. 463. Here, no issue was raised as to ownership of the land and it was error to submit the first issue to the jury. If submitted, it should have been answered Yes by the court. Plaintiff is entitled to a

New trial.

CAMPBELL and HEDRICK, JJ., concur.

STATE OF NORTH CAROLINA v. RICHARD PRICE

No. 7029SC201

(Filed 6 May 1970)

1. Constitutional Law § 36— cruel and unusual punishment

Punishment not exceeding the statutory limit cannot be considered cruel and unusual in the constitutional sense.

2. Burglary and Unlawful Breakings § 8— felonious breaking — validity of punishment

Sentence of eight years' imprisonment imposed upon defendant's plea of guilty to felonious breaking and entering is within the statutory maximum and cannot be considered cruel and unusual in the constitutional sense. G.S. 14-2.

3. Criminal Law § 161— appeal as exception to the judgment

An appeal is an exception to the judgment, presenting the face of the record proper for review.

ON *certiorari* to review judgment of *McLean, J.,* entered at the August 1969 Session of RUTHERFORD Superior Court.

By indictment proper in form, defendant was charged with the felony of breaking and entering a store building with intent to steal merchandise therefrom. He was represented at trial, as here, by

court-appointed counsel. When the case was called for trial he expressed a desire to plead guilty, whereupon the trial judge questioned him at length to determine if the plea was freely, voluntarily and understandingly made. After being questioned by the court, the defendant, who had completed the eleventh grade in school, signed and swore to written interrogatories relating to the voluntariness of his plea. The trial judge accepted the guilty plea, finding and determining that it was freely, understandingly and intelligently made, without undue influence, compulsion or duress, and without promise of leniency.

After hearing evidence presented by the State, the trial judge imposed an eight-year prison sentence from which defendant gave notice of appeal to this Court.

Attorney General Robert Morgan, Assistant Attorney General Sidney S. Eagles, Jr., and Staff Attorney Russell G. Walker, Jr., for the State.

Hollis M. Owens, Jr., for defendant appellant.

BRITT, J.

Defendant's only assignment of error is that the prison sentence imposed constituted cruel and unusual punishment in violation of Article I, section 14 of the Constitution of North Carolina and the Eighth Amendment to the Constitution of the United States.

[1] In *State v. Powell,* 6 N.C. App. 8, 169 S.E. 2d 210 (1969), in an opinion by Brock, J., it is said: "* * * Since the year 1838 the Supreme Court of North Carolina has held in an unbroken line of decisions that punishment not exceeding the statutory limit cannot be considered cruel and unusual in the constitutional sense. [Cases from *State v. Manuel,* 20 N.C. 144, through *State v. Weston,* 273 N.C. 275, 159 S.E. 2d 883, listed.] Also, since this Court entered into its first session it has invariably adhered to the same principle. [Cases from *State v. Burgess,* 1 N.C. App. 142, 160 S.E. 2d 105, through *State v. Perryman,* 4 N.C. App. 684, 167 S.E. 2d 517, listed.]"

[2] We reaffirm the above-stated principle here. Defendant pleaded guilty to an offense punishable under G.S. 14-2 which allows a maximum prison sentence of ten years. The sentence imposed was well within the maximum allowed by statute.

[3] It is also well established in this jurisdiction that an appeal is an exception to the judgment, presenting the face of the record proper for review. *State v. Gwyn,* 7 N.C. App. 397 (1970). We have

carefully reviewed the record proper in this case and find it to be free from error.

The judgment of the superior court is

Affirmed.

BROCK and GRAHAM, JJ., concur.

EMERSON EUGENE DALE v. JASMINE JOAN DALE

No. 7026DC202

(Filed 6 May 1970)

1. Appeal and Error § 24— assignment of error — requisites

An assignment of error must be supported by an objection and an exception.

2. Trial § 6— stipulations — effect and duration

Stipulations made during a trial constitute judicial admissions and are binding upon the parties and continue in force for the duration of the trial unless limited in some manner at the time they are made.

APPEAL by defendant from *Stukes, District Judge,* 8 September 1969 Session of District Court held in MECKLENBURG County.

Emerson Eugene Dale (plaintiff) instituted this action against Jasmine Joan Dale (defendant) for an absolute divorce on the grounds of separation of one year. Defendant filed an answer alleging, among other things, that the plaintiff abandoned her, that she was a dependent spouse and entitled to reasonable support and maintenance.

Upon the trial the jury answered the issues in favor of the plaintiff, and from the judgment dissolving the bonds of matrimony and granting an absolute divorce, the defendant appealed to the Court of Appeals.

Fairley, Hamrick, Monteith & Cobb by Laurence A. Cobb for plaintiff appellee.

Edmund A. Liles for defendant appellant.

MALLARD, C.J.

[1, 2] By stipulation contained in an addendum to the record, the parties deleted from the record the defendant's objection and exception upon which her first assignment of error is based. This assignment of error relates to the admission into evidence of a judgment for separate maintenance dated 16 July 1965. The judgment, entitled *Jasmine Joan Dale v. Emerson Eugene Dale* (Docket No. M-4353-62), was entered in the Superior Court of New Jersey, Chancery Division, Bergen County. Since there was no objection or exception to the introduction of this judgment, this assignment of error does not present the question sought to be presented. See 1 Strong, N.C. Index 2d, Appeal and Error, § 24. Moreover, in an order denying plaintiff's motion to strike portions of defendant's answer, further answer, and counterclaim, it was found as a fact by the judge, without exception taken and without limitation, "that said Judgment upon stipulation and by agreement of the parties through their counsel was received in evidence in this cause." Stipulations made during a trial constitute judicial admissions. They are binding upon the parties and continue in force for the duration of the trial unless limited in some manner at the time they are made, and thereafter a party may not take an inconsistent position. 7 Strong, N.C. Index 2d, Trial, § 6.

All of the defendant's remaining assignments of error, which have been properly made and supported by reason or argument or authority cited in her brief, have been carefully considered. We find no prejudicial error in any of defendant's assignments of error which are based on exceptions and properly presented as required by Rule 28 of the Rules of Practice in the Court of Appeals.

It is noted in the record on appeal that the plaintiff excepted to the entry of an order requiring him to pay $600 attorney fees to defendant's attorney and gave notice of appeal. However, he made no assignments of error with respect thereto, and this question is not presented on this record.

No error.

MORRIS and VAUGHN, JJ., concur.

SOUTHLAND EQUIPMENT COMPANY v. LEROY HOOKS, D/B/A HOOKS SALVAGE COMPANY

No. 7026DC188

(Filed 6 May 1970)

Appeal and Error § 30— admission of evidence — waiver of exception

Ordinarily, an exception to the admission of evidence is waived when evidence of the same import is theretofore or thereafter admitted without objection.

APPEAL by plaintiff from *Arbuckle, District Court Judge,* 24 November 1969 Session of the District Court held in MECKLENBURG County.

Plaintiff instituted this action against the defendant to recover the sum of $888.81 on an open account. The defendant filed an answer and counterclaim for $3,500 for breach of contract in the sale of a tractor by plaintiff to defendant. Trial by jury was waived by the parties.

After hearing the evidence of both plaintiff and defendant, the court made certain findings of fact and entered a judgment that the plaintiff have and recover of the defendant the sum of $16.78 with interest thereon from 9 October 1967 and the costs of the action to be taxed by the clerk. It was further ordered, adjudged and decreed that the defendant recover nothing on his counterclaim. From the judgment entered, the plaintiff appealed to the Court of Appeals.

Welling, Miller, Gertzman & Goldfarb by Charles M. Welling and Alfred F. Welling, Jr., for plaintiff appellant.

Ray Rankin for defendant appellee.

MALLARD, C.J.

Plaintiff in its brief asserts that the trial court committed error for that there was insufficient competent evidence to support the findings of fact by the trial court; that the facts found do not support the conclusions of law reached by the trial court; and that the judgment of the trial court was based on incorrect conclusions of law.

Plaintiff objected to the admission of certain evidence. Ordinarily, an exception to the admission of evidence is waived when evidence of the same import is theretofore or thereafter admitted without objection. *State v. Rogers,* 275 N.C. 411, 168 S.E. 2d 345 (1969); *Jones v. Bailey,* 246 N.C. 599, 99 S.E. 2d 768 (1957). By failing to object when evidence of the same import was thereafter admitted,

the plaintiff waived its exception to the admission thereof. *Academy of Dance Arts v. Bates*, 1 N.C. App. 333, 161 S.E. 2d 762 (1968); 1 Strong, N.C. Index 2d, Appeal and Error, § 30. Also in 1 Strong, N.C. Index 2d, Appeal and Error, § 30, the rule with respect to the competency of evidence when no objection is made to its admission is stated as follows:

> "The competency of evidence is not presented where there is no objection or exception to its admission, and evidence admitted without objection is properly considered by the court, in determining the sufficiency of the evidence, and by the jury, in determining the issue, even though the evidence is incompetent and should have been excluded had objection been made."

Applying the foregoing rule and after carefully considering all the competent evidence in the record, we are of the opinion and so hold that the evidence was sufficient to support the findings of fact by the trial court; that the facts found support the conclusions of law reached by the trial court; and that the judgment of the trial court was based on correct conclusions of law from the facts so found.

In the trial we find no error.

No error.

MORRIS and VAUGHN, JJ., concur.

STATE OF NORTH CAROLINA v. RICHARD W. DAVIS

No. 7027SC78

(Filed 6 May 1970)

Criminal Law § 167— prejudicial error in case consolidated with six other cases

Any prejudicial error in the trial of a case does not entitle defendant to a new trial where the case was consolidated for judgment with six other cases in which defendant entered pleas of guilty and thereafter made no exceptions or assignments of error.

APPEAL by defendant from *Ervin, J.*, 4 September 1969 Session of GASTON County Superior Court.

Nine true bills of indictment were returned against defendant at the 21 April 1969 Session of Gaston County Superior Court. Each

bill, proper in form, charged defendant with forgery and with uttering a forged check. The cases came on for trial before the Honorable Hubert E. May, Judge Presiding, at the 29 May 1969 Session of Gaston Superior Court. Upon the call of the cases for trial the solicitor announced in open court that at that session only case No. 69CR4368 would be tried and in that case the State would seek a conviction only on the count charging defendant with uttering a forged check. To this defendant entered a plea of not guilty. The jury returned a verdict of guilty. The court thereupon, on 2 June 1969, ordered defendant committed to the Diagnostic Center of the Department of Correction for a period of 60 days for a pre-sentence diagnostic study as provided by G.S. 148-12.

After the completion of the diagnostic study, defendant was returned to Gaston County, and at the 4 September 1969 Session of Superior Court appeared before the Honorable Sam J. Ervin, III, Judge Presiding, and entered pleas of guilty to the counts of uttering a forged instrument as charged in the remaining eight bills of indictment. In case No. 69CR4351 prayer for judgment was continued for five years. In case No. 69CR3979 defendant was given a sentence of from seven to ten years imprisonment and the sentence was suspended for five years on certain conditions. The remaining cases, including case No. 69CR4368 wherein the defendant had been found guilty at the 21 April 1969 Session, were consolidated for judgment and defendant was sentenced to an indeterminate sentence of not less than seven nor more than ten years in custody. Defendant excepted to the judgment imposing active sentence and appealed.

Robert Morgan, Attorney General, by Harrison Lewis, Deputy Attorney General, and Claude W. Harris, Trial Attorney, for the State.

J. Ben Morrow for defendant appellant.

GRAHAM, J.

All of defendant's exceptions and assignments of error relate to the trial of case No. 69CR4368 at the 21 April 1969 Session of Gaston Superior Court. Even if prejudicial error were found in the trial of that case it would avail defendant of little or no relief as that case was consolidated for judgment with six other cases in which defendant entered pleas of guilty. No exception or assignments of error were made with respect to any of the cases in which he pleaded guilty.

We have nevertheless carefully reviewed each of defendant's assignments of error and have found them to be without merit.

No error.

BROCK and BRITT, JJ., concur.

STATE OF NORTH CAROLINA v. JAMES CLEVELAND HALL

No. 7026SC128

(Filed 6 May 1970)

APPEAL by defendant from *Beal, S.J.*, 20 October 1969 Special Criminal Session of Superior Court held in MECKLENBURG County.

Defendant was charged in a bill of indictment, proper in form, with uttering a forged instrument in violation of G.S. 14-120. The defendant pleaded guilty to a violation of this statute. The judgment was imprisonment for a term of thirty months. From the imposition of the judgment, the defendant appealed to the Court of Appeals.

Attorney General Morgan and Staff Attorney Giles for the State.

William H. Scarborough for defendant appellant.

MALLARD, C.J.

Defendant is and has been represented by privately employed counsel. The maximum punishment prescribed in the statute for a violation of G.S. 14-120 is imprisonment for ten years.

The defendant, after entering a written plea of guilty to a violation of G.S. 14-120, was questioned in open court by the judge. The judge, after making findings of fact, adjudged that the defendant's plea of guilty was entered freely, understandingly and voluntarily.

There are no assignments of error appearing in the record.

We have carefully examined the record proper and find no error therein.

No error.

MORRIS and VAUGHN, JJ., concur.

STATE OF NORTH CAROLINA v. HARVEY L. REVIS

No. 7024SC224

(Filed 6 May 1970)

APPEAL by defendant from *Martin, J.*, November 1969 Session of YANCEY Superior Court.

Defendant was charged in the bill of indictment with escape on 25 June 1969 while serving a sentence imposed upon a conviction of felonious breaking and entering. The defendant was found to be indigent and counsel was appointed. The defendant's plea of guilty was accepted by the court and judgment was entered imposing an active sentence of six (6) months. In a letter from the defendant to his attorney, the defendant requested that his case be appealed. The trial court treated the letter as formal notice of appeal. The defendant's present counsel was appointed to represent him on this appeal.

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

G. D. Bailey for defendant appellant.

VAUGHN, J.

The record upon appeal shows that the defendant was charged in a bill of indictment, proper in form. He was represented by counsel. After the defendant was questioned by the trial judge as to his understanding of the nature of the offense, his opportunity to confer with counsel and his knowledge of the offense charged and the punishment therefore under the statute, the defendant's plea of guilty as charged was entered in open court. After making this inquiry of the defendant in open court, the trial judge found as a fact that the defendant's plea was freely, understandingly and voluntarily made, and that the plea was made without undue influence, compulsion or duress and without promise of leniency. The sentence imposed is considerably less than the maximum authorized by the statute. Defendant's Assignments of Error 1 and 2 raise the sole question as to whether error appears on the face of the record proper. We have examined the record and find no error therein.

No error.

MORRIS and PARKER, JJ., concur.

STATE OF NORTH CAROLINA v. DONALD JAMES BENFIELD AND WAYNE HAROLD BENFIELD

No. 7025SC133

(Filed 19 May 1970)

Criminal Law § 159— narration of evidence on appeal

Appeal is dismissed for failure of the defendants to state the evidence in narrative form. Rule of Practice in the Court of Appeals No. 19(d).

APPEAL from *Thornburg, S.J.*, 15 September 1969 Special Criminal Term, CATAWBA County Superior Court.

The defendant, Donald James Benfield, was tried on two valid bills of indictment in which he was charged with conspiracy to commit forgery and conspiracy to utter forged instruments. The defendant, Wayne Harold Benfield, was tried on one valid bill of indictment in which he was charged with conspiracy to utter forged instruments.

At their trial by jury the defendants were represented by counsel. At the close of the State's evidence the defendants moved for judgment as of nonsuit, which motion was denied. From the verdicts of guilty as to both defendants and judgments pronounced thereon, the defendants gave notice of appeal to the Court of Appeals of North Carolina.

Stroupe and Stroupe, by John C. Stroupe, Jr., for the defendants appellants.

Robert Morgan, Attorney General, and R. Bruce White, Jr., Assistant Attorney General, for the State.

HEDRICK, J.

The defendants' sole assignment of error is that the court below committed error in refusing their motion for judgment as of nonsuit made at the close of the evidence.

Rule 19(d), Rules of Practice in the Court of Appeals of North Carolina, as amended 11 February 1969, requires that the evidence in the case on appeal be in narrative form. If the appellant fails to comply with the provisions of this rule, the Court, in its discretion, may dismiss the appeal. The only reference in the present case to the evidence taken in the court below is in the record and is as follows:

"EVIDENCE IN NARRATIVE FORM

"These are criminal cases in which the defendant Donald James Benfield is charged in two bills of indictment, to-wit: Conspiracy to Forgery and Conspiracy to Utter Forged Instruments. The defendant Wayne Harold Benfield is charged in one bill of indictment, to-wit: Conspiracy to Utter Forged Instruments.

"In these criminal cases the State's Evidence tends to show one Byron McCollum living in the Town of Morganton, North Carolina, during the month of January, 1969. That at this time he was acquainted with the defendants Byrd Edgar Warlick, Donald James Benfield, Grover Cleveland Norman, Billy Dean Norman, Ben Choate, George Farris, and Vance Moore.

"That the defendant Ben Choate was living in Charlotte, North Carolina, at this time and was a printer by trade. He was employed at said time by Instant Copies Company in Charlotte.

"That during this time McCollum and defendants Moore, Donald Benfield, Warlick and Farris went to Charlotte and contacted the defendant Choate for the purpose of having some bogus insurance checks printed. The defendant Choate was told that these bogus checks were to be passed. The defendant Choate was given two guns by McCollum and the other defendants, at one of their meetings in Charlotte during the month of January, 1969.

"That McCollum and the named defendants took an insurance company check to the defendant Choate in Charlotte at this time for the purpose of having Choate print some of these checks. Choate agreed to print some of these checks on bonded paper he had. After these bogus checks were printed by Choate, McCollum and the other defendants passed them, receiving approximately FIFTEEN HUNDRED ($1500.00) DOLLARS.

"At about this time, McCollum, Moore and Warlick were looking for a genuine check to copy as was done with the insurance company check. That McCollum and Warlick shortly thereafter came in contact with the defendant Donald Benfield who was working for Broyhill Industries in Lenoir, North Carolina, and who had a genuine Broyhill payroll check made payable to the defendant Donald Benfield. McCollum, Donald Benfield, Warlick and Moore all examined this check and then examined some safety check paper that they had purchased previously in Charlotte, North Carolina, from Henley Paper Company. That they realized that the paper was not the right color to match the

genuine Broyhill check. So McCollum, Warlick, Moore and Farris went back to Charlotte to get the proper color of that safety check paper from Henley Paper Company. The color of this paper that was finally purchased from the Henley Paper Company was Primrose color.

"When this paper was purchased from the Henley Paper Company, McCollum used a fictitious name to-wit, Trans World Stereo Company. Immediately after acquiring this paper the defendant Choate was contacted in Charlotte. The paper and the genuine Broyhill payroll check were given to Choate at this time. It was agreed by McCollum, Donald Benfield, Warlick, Moore, Farris and Choate that TWO HUNDRED FIFTY (250) bogus Broyhill payroll checks would be printed on the primrose colored paper.

"After these Broyhill payroll checks were printed by Choate, Warlick picked them up in Charlotte and brought them to Morganton, North Carolina. Then Warlick contacted McCollum and told him he had the checks and that a certain couple by the name of Al Dougard and Sandra Onde were down from New Jersey and he wanted to get the checks distributed and cashed that weekend.

"Warlick told McCollum to contact Moore and meet him at Lowman's Motel in Hickory. McCollum contacted Moore and they went to Lowman's Motel in Hickory. When McCollum and Moore arrived at the Motel, Sandra Onde, Al Dougard, Byrd Warlick and Bobbie June Waller (McCollum's Mother) were there. This was on February 6, 1969. All of these parties proceeded to examine the bogus checks that Choate had printed. At this time the checks had not been filled out and a general discussion was had by the parties to use the bogus checks that could be filled out, distributed and cashed. At about this time Donald Benfield arrived at Lowman's Motel. And the parties continued to examine the bogus checks, discussing the quality of them and comparing them with the original check from Broyhill Industries that was made out to Donald Benfield. They also discussed who was to pass these checks and Donald Benfield said he had to get the names of some people that night who would help them pass them. Then Donald Benfield left Lowman's Motel and those remaining detected that the signature on the genuine check did not come through on the counterfeit checks. So McCollum took the original check and practiced

signing the name as it appeared on the original check 'Paul H. Broyhill.'

"That the defendant Al Dougard also signed the name of Paul H. Broyhill on some of these bogus checks. That Sandra Onde and Bobbie June Waller filled in the Broyhill Plant number and the date and the amount of the checks at this time. It was decided at this time that the names of the payees would not be filled in.

"That Al Dougard had brought with him from New Jersey some bogus New Jersey Driver Licenses. These driver licenses were filled out and given to the people who were to pass these checks.

"At about 10:30 o'clock PM Donald Benfield said he had a number of people that he was to pick up that night and he had better get on the road and he left.

"McCollum and Moore stayed at Lowman's Motel until about 11:30 o'clock PM discussing the next day's activities, looking more or less at the finished products of the checks except for the payee's name that had not been filled in at that time. When McCollum and Moore left, after Donald Benfield left, Al Dougard, Sandra Onde, Bobbie June Waller and Byrd Warlick remained. This was during the night of February 6, 1969.

"The following morning, February 7, 1969, Moore came by McCollum's home and picked him up and they returned to Lowman's Motel. When they arrived back at Lowman's Motel Al Dougard, Sandra Onde, Bobbie Waller and Byrd Warlick were still there. In a very few minutes the defendant Donald Benfield and Wayne Benfield drove up. About thirty minutes after the Benfields arrived, George Farris, Grover Norman and Billy Norman arrived at the motel. All of these parties met in two adjoining rooms in the Motel. At this time the checks were filled out for Grover Norman, Billy Norman and George Farris. They were given each fifteen (15) bogus checks and were also given bogus New Jersey driver licenses. The names of the payees in the bogus Broyhill checks were the same as the names of the licensees on the bogus New Jersey driver licenses.

"These three left immediately after receiving the bogus checks and driver licenses. It was understood that these three were going to the North Wilkesboro area to pass these checks.

"Subsequently it was decided by Warlick that the rest of the people there should leave Lowman's Motel and go to another

motel so that they would not draw any attention. This was about 10:00 o'clock AM. The parties left and went to Mackie's Motel in Conover, North Carolina. When they arrived, Warlick registered for two adjoining rooms. These parties discussed how the bogus checks would be cashed, who was going where, and so forth.

"It was decided that McCollum and Moore would go to Asheville to pass the bogus checks. That Warlick said he was going to call a man by the name of Owens Barrus to help him pass these checks. He said Barrus needed to make some extra money. Later that day Barrus arrived at Mackie's Motel and McCollum, Moore, Wayne Benfield, Onde, Dougard, started typing out the checks that were to be used. The names and amounts were filled in on the checks.

"After Barrus arrived he was given some of these bogus Broyhill checks and a bogus New Jersey driver license. It was agreed that the two Benfield brothers and Barrus were going to pass these checks together. Sandra Onde and Al Dougard and Warlick were going together in the Hickory area. It was agreed among the parties that after the checks were cashed they would all meet that same night at approximately 10:00 o'clock PM at Castle Bridge in Burke County. This was the 7th day of February, 1969.

"That at approximately 10:00 o'clock PM McCollum and Moore went to Castle Bridge in Burke County after having gone to Asheville and cashing a number of the Broyhill bogus checks. At Castle Bridge they met Donald Benfield, Wayne Benfield, Barrus, Billy Norman, Grover Norman, Warlick and Farris and while there they learned from one of the party that Al Dougard and Sandra Onde had been arrested in downtown Hickory while passing the bogus checks. Then the parties decided to leave Castle Bridge and go to a parking lot at the hospital which was located up the road from Castle Bridge.

"They later went on a dirt road in the vicinity of Valdese, North Carolina, for the burning of the existing checks, together with some of the bogus New Jersey Driver Licenses. From there they decided to go into Hickory and stop at Fran-Mar Motel.

"When they arrived there they registered for one room. This was in February, 1969, on the 7th. After they got into the room they took all the money from Donald Benfield and Warlick and put it on the bed and counted it. There was approximately

TWELVE THOUSAND ($12,000.00) DOLLARS which had been received."

This recital falls short of being a narrative of the evidence as required by Rule 19(d), Rules of Practice in the Court of Appeals of North Carolina. From this recitation it is impossible for us to determine from whom the evidence was being elicited, who was examining the witnesses, whether there was cross-examination, the purpose for which the witnesses were being examined, and exactly what the evidence was. This, rather than being a narration of the evidence, is a recitation of the events surrounding the arrest of these two defendants.

In *State v. Womack,* 251 N.C. 342, 111 S.E. 2d 332 (1959), it is stated:

"When the evidence adduced at the trial is not contained in the record, the appeal must be dismissed in the absence of error appearing upon the face of the record. Rule 19(4), Rules of Practice in the Supreme Court, 221 N.C. at page 556. *S. v. Griffin,* 246 N.C. 680, 100 S.E. 2d 49; *S. v. Powell,* 238 N.C. 550, 78 S.E. 2d 343; *S. v. Kirkland,* 178 N.C. 810, 101 S.E. 560; *S. v. Tyson,* 133 N.C. 692, 46 S.E. 838.

"The evidence set out in the statement of case on appeal is not sufficient to enable this Court to pass on the merits of the motion for judgment as of nonsuit. Furthermore, the judgment is supported by the verdict and the exception thereto cannot be sustained. *S. v. Barham, ante* 207; *S. v. Ayscue,* 240 N.C. 196, 81 S.E. 2d 403; *S. v. Sloan,* 238 N.C. 672, 78 S.E. 2d 738; *S. v. Oliver, supra.*"

The evidence in the record of the case on appeal is not sufficient to enable this Court to pass on the merits of the defendants' motion for judgment as of nonsuit. However, we have examined the record of the case on appeal and have found no error appearing on the record proper. For failure to comply with the rules of this Court the appeal of the defendants is dismissed.

Dismissed.

BRITT and PARKER, JJ., concur.

WILLIAM NATHAN GARNER v. STATE OF NORTH CAROLINA

No. 699SC545

(Filed 27 May 1970)

1. Criminal Law § 159— record on appeal — failure to place proceedings in correct order — failure of documents to show filing date

Record does not comply with Court of Appeals Rule 19 where the proceedings are not set forth therein in the order of time in which they occurred and are not arranged so as to follow each other in the order in which they were filed, and the documents included in the record do not plainly show the date on which they were filed.

2. Criminal Law §§ 23, 135; Constitutional Law § 29; Homicide §§ 13, 31— first degree murder — guilty plea — coercive effect of death penalty

The punishment for first degree murder provided by G.S. 14-17 does not constitute coercion so as to render void defendant's plea of guilty of first degree murder tendered and accepted pursuant to the provisions of G.S. 15-162.1 as it existed prior to its repeal in 1969.

CERTIORARI was allowed upon motion of the State from an order of *Bailey, J.*, awarding defendant a new trial on 29 June 1969.

Attorney General Morgan and Staff Attorney Shepherd for the State of North Carolina.

Watkins & Edmundson by R. Gene Edmundson for William Nathan Garner.

MALLARD, C.J.

At the April 1964 Session of Superior Court held in Granville County, William Nathan Garner (Garner) was charged in a bill of indictment with the crime of murder in the first degree. Pursuant to the provisions of G.S. 15-162.1, the defendant and his counsel tendered in writing, signed by Garner and his attorney, a plea of guilty of such crime; and the State, with the approval of the court, accepted such plea. Garner was thereupon sentenced to imprisonment for life in the State's prison.

[1] The record in this case does not comply with the provisions of Rule 19 of the Rules of Practice in the Court of Appeals in that the proceedings are not set forth therein in the order of time in which they occurred and are not arranged so as to follow each other in the order in which they were filed. In fact, an amendment to one of the petitions filed by Garner on 27 June 1969 appears beginning

on page 29 of the record, and the very same amendment appears again beginning on page 60 of the record.

Rule 19 of the Rules of Practice in the Court of Appeals also requires that documents included in the record shall plainly show the date on which they were filed. Beginning on page 26 of the record, there appears what purports to be an "Amended Petition for Post Conviction Hearing," which has no filing date thereon, which was verified on 18 September 1967, and is located in the record between an instrument showing a filing date of 9 January 1969 and another instrument showing a filing date of 27 June 1969. This latter instrument appears before a judgment by Gambill, J., which has no filing date shown but has a signatory date of 19 July 1968.

In the condition of this record, it has been extremely difficult to determine the chronological order of events in this proceeding.

However, it does appear that at the April 1968 Session of Superior Court of Granville County, Gambill, J., was presiding and held a post-conviction hearing on a petition filed by Garner. After the hearing, the following judgment was entered:

> "This cause coming on to be heard before the undersigned Judge Presiding at the April 1, 1968, Criminal Session of Superior Court of Granville County by virtue of a petition heretofore filed in this cause by the petitioner, William Nathan Garner, under the provisions of G.S. 15-217, et seq. it appearing wherein the petitioner alleges that certain of his constitutional rights were violated in the trial of the case at the April 1964 Criminal Session of Superior Court of Granville County, wherein the defendant received a sentence of life imprisonment for the charge of murder in the first degree, and the petitioner was personally present in court with his counsel, R. Gene Edmundson, Esquire, and the State being represented by the Honorable W. H. S. Burgwyn, Jr., Solicitor of this District, and after hearing the testimony of the petitioner and his witnesses and after hearing arguments by counsel for the petitioner and counsel for the State, the court finds the following facts:
>
> 1. That the defendant, William Nathan Garner, was charged in a warrant in the Recorder's Court of Granville County issued February 13th, 1964, wherein he was charged on or about the 9th day of February 1964 did unlawfully, wilfully and feloniously, with force and arms and with malice aforethought, and with premeditation and deliberation, with a deadly weapon, to-wit, a knife, kill, slay, and murder one William (Billie) Dean; that defendant, William Nathan Garner appeared in

said Recorder's Court without counsel and was ordered held in the Granville County Jail without privilege of bond until the next Criminal Term of Superior Court of Granville County.

2. That the defendant, William Nathan Garner, was indicted under a bill of indictment returned by the Grand Jury of Granville County at the April, 1964 Session of Superior Court of Granville County, wherein he was charged on or about the 9th day of February, 1964 with force and arms, at and in the said county, feloniously, wilfully, and of his malice aforethought, did kill and murder William (Billie) Dean.

3. That it was stipulated by the petitioner through his counsel and the State, through its Solicitor, that according to the tax scrolls of Granville County and from comparing the same with the juries drawn from the jury box from July Term 1958 through the list drawn for Term of Court, October, 1964, that by exhibit one, a certified copy of the jury list for the July Term, 1958, of the Superior Court of Granville County that forty-eight (48) jurors were drawn, forty-two (42) of whom were members of the White race, and six (6) of whom were members of the Negro race; that exhibit two, a certified copy of the jury list for the November, 1958, Term of Superior Court of Granville County that twenty-eight (28) jurors were drawn, twenty-four (24) of whom were members of the White race, and four (4) of whom were members of the Negro race; that exhibit three, a certified copy of the jury list for the January, 1959 Term of the Superior Court of Granville County, that forty-five (45) jurors were drawn, forty-two (42) of whom were members of the White race, and three (3) of whom were members of the Negro race; that by exhibit four, a certified copy of the jury list for the April, 1959 Term of the Superior Court of Granville County that twenty-nine (29) jurors were drawn, twenty-six (26) of whom were members of the White race, and three (3) of whom were members of the Negro race; that by exhibit five, a certified copy of the jury list for the July, 1959 Term of Superior Court of Granville County that forty (40) jurors were drawn, thirty-six (36) of whom were members of the White race and four (4) of whom were members of the Negro race; that by exhibit six, a certified copy of the jury list for the November, 1959 Session of the Superior Court of Granville County that twenty-nine (29) jurors were drawn, of whom twenty-six (26) were of the White race, and three (3) of whom were members of the Negro race; that by exhibit seven, a certified copy of the jury list for the January, 1960 Term of the Superior Court of Gran-

ville County that forty-six (46) jurors were drawn, of whom forty-five (45) were members of the White race, and one (1) of whom was a member of the Negro race; that by exhibit eight, a certified copy of the jury list for the April, 1960 Term of the Superior Court of Granville County, twenty-eight (28) jurors were drawn, twenty-four (24) of whom were members of the White race and four (4) of whom were members of the Negro race; that by exhibit nine, a certified copy of the jury list for the July, 1960 Term of Superior Court of Granville County, thirty-nine (39) jurors were drawn, thirty-eight (38) of whom were members of the White race and one (1) of whom was a member of the Negro race; that by exhibit ten a certified copy of the jury list for the November, 1960 Term of the Superior Court of Granville County, thirty (30) jurors were drawn, twenty-six (26) of whom were members of the White race, and four (4) of whom were members of the Negro race; that by exhibit eleven a certified copy of the jury list for January, 1961, forty-five (45) jurors were drawn, forty (40) of whom were member of the White race and five (5) of whom were members of the Negro race; that by exhibit twelve, a certified copy of the jury list for the April, 1961 Term of Superior Court of Granville County, twenty-nine (29) jurors were drawn, twenty-four (24) of whom were members of the White race and five (5) of whom were members of the Negro race; that by exhibit thirteen, a certified copy of the jury list for the July, 1961 Term of Superior Court of Granville County, forty-seven (47) jurors were drawn, thirty-nine (39) of whom were members of the White race and eight (8) of whom were members of the Negro race; that by exhibit fourteen, a certified copy of the jury list for the November, 1961 Term of Superior Court of Granville County, twenty-eight (28) jurors were drawn of whom twenty-seven (27) were members of the White race and one (1) of whom was a member of the Negro race; that by exhibit fifteen, a certified copy of the jury list for the January 1962 Term of Superior Court of Granville County, forty-seven (47) jurors were drawn, forty-two (42) of whom were members of the White race and five (5) of whom were members of the Negro race.

That by exhibit sixteen, a certified copy of the jury list for the April 1962 Term of Superior Court of Granville County thirty (30) jurors were drawn, twenty-eight (28) of whom were members of the White race and two (2) of whom were members of the Negro race; that by exhibit seventeen, a certified copy of the jury list for the July, 1962 Term of Superior Court of Gran-

ville County, forty-nine (49) jurors were drawn, forty-four (44) of whom were members of the White race, and three (3) of whom were members of the Negro race; that by exhibit eighteen, a certified copy of the jury list for the November, 1962, Term of Superior Court of Granville County, twenty-nine (29) jurors were drawn, twenty-seven (27) of whom were members of the White race and two (2) of whom were members of the Negro race; that by exhibit nineteen, a certified copy of the jury list for the January, 1963 Term of Superior Court of Granville County, forty-five (45) jurors being drawn, forty-one (41) of whom were members of the White race and four (4) of whom were members of the Negro race.

That by exhibit twenty, a certified copy of the jury list for the April, 1963 Term of Superior Court of Granville County, thirty (30) jurors were drawn, thirty (30) of whom were members of the White race and no members of the Negro race; that by exhibit twenty-one, a certified copy of the jury list for July, 1963, forty-eight (48) jurors were drawn, forty-two (42) of whom were members of the White race and six (6) of whom were members of the Negro race; that by exhibit twenty-two, a certified copy of the jury list for the November, 1963 Term of Superior Court of Granville County, twenty-nine (29) jurors were drawn, twenty-eight (28) of whom were members of the White race and one (1) of whom was a member of the Negro race; that by exhibit twenty-three, a certified copy of the jury list for the January, 1964 Term of Superior Court of Granville County, seventy-eight (78) jurors were drawn, seventy-five (75) of whom were members of the White race and three (3) of whom were members of the Negro race; that by exhibit twenty-four, a certified copy of the jury list for the April, 1964 Term of Superior Court of Granville County, sixty (60) jurors were drawn, of whom fifty-nine (59) were members of the White race and one (1) of whom was a member of the Negro race.

That by exhibit twenty-five, a certified copy of the jury list for the July, 1964 Term of Superior Court of Granville County, being the regular jury panel and a special venire, one hundred twenty-three (123) jurors were drawn, one hundred sixteen (116) of whom were members of the White race, and seven (7) of whom were members of the Negro race; that by exhibit twenty-six, a certified copy of the jury list for the October, 1964 Term of Superior Court of Granville County, thirty (30) jurors were drawn, thirty (30) of whom were members of the White race and no members of the Negro race; that it was stipulated by the

petitioner through his counsel and the State, through its Solicitor, that the 1960 census for Granville County shows that the total population was 33,110 people, that of this 33,110, 16,245 were male, that 16,865 were female; that these figures are further broken down to show that there were 8,954 White males, that there were 9,435 White females, that there were 7,430 non white females and that there were 7,291 non white males; that there was in the 1960 census 18,580 people over the age of 21 years, that this figure was broken into 8,846 males, 9,734 females. The male population is broken down as follows: it shows that there were 5,418 white males over the age of 21, that there were 6,166 white females over the age of 21, that there were 3,428 non white males over the age of 21 and that there were 3,568 non white females over the age of 21.

It is further stipulated by the petitioner and the State that there are nine townships in Granville County, to-wit: Fishing Creek, Brassfield, Dutchville, Tally Ho, Walnut Grove, Oak Hill, Sassafrass Fork, Salem and Oxford, and that the official tax scrolls for each of said townships for the years 1962 and 1964 contain the names of all white taxpayers in one section of the scrolls for each township and that the names of all colored taxpayers are in a different section within said book.

It is stipulated by the counsel for the petitioner and the Solicitor for the State that the 1962 tax scrolls for Granville County shows that there were 6,551 white persons who listed taxes and that there were 3,496 colored persons who listed their taxes making a total of 10,047 tax listers for the year 1962; that the number of whites is 65.2 per cent of the total and the number of colored tax listers is 34.8 per cent.

It is further stipulated by the counsel for the petitioner and the solicitor for the State that the 1964 tax scrolls for Granville County shows that there were 6,771 white persons who listed taxes and that there were 3,466 colored persons who listed their taxes making a total of 10,237 tax listers for the year 1964, that the number of white is 66.1 per cent of the total and the number of colored tax listers is 33.9 per cent.

It is stipulated by the counsel for the petitioner and the solicitor for the State that the official minutes of the meeting of the County Commissioners as relates to the constitution of the jury box show: 'As required by law G.S. 9-2, a new jury list was checked by the county commissioners in their respective districts and names typed by the Clerk to the Board during the

month of 6-1963. These names were reviewed again by the county commissioners who ordered the county attorney to empty the jury box of all names drawn for jury service during the past two years, and this was done by the attorney to the Board, W. M. Hicks. Upon motion of Commissioner S. M. Watkins, seconded by Commissioner Henry Currin and unanimously carried, these names checked from the 1962 tax books were ordered to be placed in the jury box by the chairman of the Board of County Commissioners and this was done with the Commissioners stating that these names constituted the jury list as checked by them and in accordance with the law for the next two years.'

It is stipulated by the counsel for the petitioner and the solicitor for the State that there is nothing in the jury box on the slip bearing the name that indicates race.

4. That the petitioner alleges in the petition that he was deprived of his constitutional rights as guaranteed to him by the Constitution of the United States of America and the Constitution of the State of North Carolina in that:

(1) Upon petitioner's arrest by the Person County Sheriff's Department on February 13, 1964 (Exhibit A) for first degree murder, he was delivered to the Granville County Sheriff's Department and placed in the Granville County jail.

(2) He was not advised of his rights to remain silent, that any statement he might make would be used against him at the trial, that he had a right to have assistance of counsel, nor of any other constitutional rights due him;

(3) That the petitioner unknowingly and without assistance of counsel waived preliminary hearing on February 14, 1964.

(4) That counsel, Royster and Royster, Attorneys at Law, Oxford, N. C., was appointed for the petitioner on the day of April 6, 1964, when the case came on to be heard in Superior Court, Granville County, N. C., and the trial was commenced on April 8, 1964, after only brief consultation with the petitioner, and the petitioner was denied a reasonable time or opportunity to prepare his defense; with the lack of opportunity being cited in the petition as follows:

(a) No motion for a continuance.

(b) No motion to quash indictment on basis of discrimination in jury selection.

(c) Appointed counsel's suggestion of plea bargaining despite Petitioner's continued denial of guilt.

(d) No opportunity to obtain witnesses in behalf of petitioner.

(3) (sic) No motion was made for a special venire from another county.

5. It is stipulated and agreed between counsel for the petitioner and the solicitor for the State that the following exhibits are made a part of the record:

Exhibit A, being warrant in Case #14,590, Granville County Recorder's Court, State v. William Nathan Garner, Rt. #1, Oxford, N. C., on a charge of First Degree Murder, received Feb. 13, 1964, and executed Feb. 13, 1964.

Exhibit B, being bill of indictment in case #28,434, State v. William Nathan Garner, charging murder, April Term, 1964 Granville County Superior Court, signed W. H. S. Burgwyn, Solicitor.

Exhibit C, being 3 pages of written plea in records of Case #28,-434, April 1964 Term of the Superior Court of Granville County, the first page being plea signed by defendant William Nathan Garner, the second page being the acceptance of such plea on behalf of the State by W. H. S. Burgwyn, Jr., Solicitor and the third page being the acceptance of said plea on behalf of the Court by the Honorable Henry A. McKinnon, Jr., Judge Presiding, said plea having been accepted on April 8th, 1968.

6. It is stipulated that the cause came on for trial at the April, 1964 Term of Superior Court of Granville County with the Honorable Henry A. McKinnon, Jr., Judge Presiding and the Solicitor, Honorable W. H. S. Burgwyn, Jr., appearing for the State. It is further stipulated that the firm of Royster and Royster, Attorneys of Granville County, North Carolina were appointed attorneys of record on April 6, 1964; it is further stipulated and agreed that according to the official court minutes for the Superior Court of Granville County, North Carolina, the petitioner was duly arraigned on April 6th, 1964; further, that upon plea being tendered and accepted on April 8, 1964, judgment was pronounced. According to law, petitioner was given a life sentence to the North Carolina State Prison Department. It is further stipulated and agreed that no exception or notice of appeal was given and none was perfected to the Supreme Court of North Carolina; further, counsel stipulate that the records, being the official minutes of the Superior Court of

Granville County, show that there was no motion for continuance made at the time counsel was appointed and said plea was tendered and accepted; further, there was no motion to quash the indictment on the basis of discrimination in the jury selection and that there was no motion for a special venire.

7. Further, let the record show that on September 2, 1967, the petitioner filed in the office of the Clerk of Superior Court of Granville County an amended petition for a Post Conviction Hearing alleging among other things that he is restrained of his liberty and the petitioner alleges that he was denied due process of law and his right for a fair trial as reflected in the following language: 'the atmosphere of hostility which existed in the community, which was greatly exaggerated by the fact that the defendant was a Negro and the deceased was a White man; further, that the selection method of jurors for Granville County constituted a prima facie case of purposeful racial discrimination and thereby deprived the petitioner of the equal protection of the law and due process guaranteed by the Fourteenth Amendment to the United States Constitution.' Further, 'that the petitioner was not a man of letters and not familiar with the niceties of the law, and that the petitioner did not ever knowingly or intentionally waive any of his constitutional rights under the Constitution of North Carolina or the United States Constitution', and prays the court that he be released from Prison on the basis of the violation of the petitioner's constitutional rights, and that he be granted a new trial, and for such other and further relief as the court deems proper.

8. That the petitioner in propria persona and through his counsel state in open court that he is making no claim of any violation of his constitutional rights other than those alleged in the petition.

9. That upon inquiry by the presiding judge the petitioner and his counsel stated that there was no further evidence on behalf of the petitioner; that the petitioner and respondent have had a full and plenary hearing as to their respective rights and contentions.

10. That counsel for the petitioner and solicitor for the State agreed in open court that this judgment may be signed out of the District; out of the Term and out of the County.

11. The court finds as a fact that the defendant in open court, during the April, 1964 Session of Superior Court in Granville County, tendered to the court his written plea of guilty to mur-

der in the first degree, which plea the State accepted; that the presiding judge asked the following questions which were answered as follows by the defendant:

COURT: Garner, will you stand up, please. (Defendant Garner stands)

COURT: You understand that by this plea of guilty that the sentence required by the law is life imprisonment?

MR. GARNER: Yes, sir.

COURT: You understand fully what you are charged with?

MR. GARNER: Yes, sir.

COURT: Have you talked with your lawyer?

MR. GARNER: Yes, sir.

COURT: They have advised with you and are you satisfied with the advice they have given you?

MR. GARNER: Yes, sir.

COURT: And understand it?

MR. GARNER: (Nods head up and down.)

COURT: No promises have been made to you or threat against you about it, have they?

MR. GARNER: No. sir.

COURT: Messrs. Royster, you have investigated the matter and are satisfied this is a proper plea to enter and advised him fully of the consequences, is that correct?

MR. S. S. ROYSTER: Yes, sir.

COURT: All right. (To Garner) Have a seat. Plea accepted by the court.

The court further finds as a fact that the petitioner, during the April, 1964, Session of Superior Court of Granville County, was ably represented by competent and qualified counsel.

The court further finds as a fact that the petitioner during the April 1964 Session of Superior Court of Granville County was ably advised of his constitutional rights; that there was no atmosphere of hostility as alleged in his petition; that there were no witnesses to the crime with which petitioner was charged and that all witnesses were subpœnæd which petitioner requested to be subpœnæd.

The court further finds as a fact that the petitioner by his voluntary plea of guilty waived any right of objections he had to the constitution of the jury box either grand or petit, and that no denial of constitutional rights has been found.

IT IS NOW THEREFORE, ORDERED, ADJUDGED AND DECREED that the relief prayed for by the petitioner in his amended petition filed September 20, 1967, in the office of the Clerk of the Superior Court of Granville County be and the same is hereby DENIED; and that the judgment of the court heretofore entered in said case is legal, valid and constitutional and was entered in full compliance with all the petitioner's rights; and that petitioner's imprisonment is legal, valid and proper and in compliance with the Constitution of the United States and the by-laws and Constitution of the State of North Carolina.

IT IS FURTHER ORDERED that a copy of this order be forwarded to the Commissioner of the Department of Corrections, 831 W. Morgan St., Raleigh, N. C., to the petitioner and to petitioner's counsel."

Thereafter on 12 September 1968, Garner filed a petition for certiorari in the Court of Appeals which was denied on 1 October 1968.

It appears from the filing dates in the record that thereafter on 9 January 1969 Garner filed what he called "Petition for a Writ of Habeas Corpus in Forma Pauperis (For a Post Conviction Hearing)." In this lengthy petition (it consumes over eighteen pages of the record) Garner at the end thereof, after the word "Summary," writes:

"Briefly stated: The defendant alleges that he was denied a fair and impartial trial because certain of his absolute constitutional rights was violated.

1. That he was denied the Equal Protection and Due Process of the laws, guaranteed to him by the Fourteenth Amendment, in that the jury which returned his indictment and the jury which tried him was illegally constituted since Negroes was (were) systematically, arbitrarily and intentionally excluded from service.

2. That he was denied the right to counsel and due process of law as guaranteed by the Sixth and Fourteenth Amendments in that his counsel was given insufficient amount of time in which

to prepare his defense, because of this, the defendant was denied the effective assistance of counsel.

3. That he was denied counsel at a critical stage of the proceeding; namely, the preliminary hearing, and such was a violation of his rights under the Sixth (6th) and Fourteenth (14th) Amendments.

4. That, petitioner be released from prison on the basis of the violations of the petitioner's constitutional rights as heretofore set forth.

5. That, petitioner be granted a new trial on the basis of the violations of the petitioner's constitutional rights as heretofore set forth.

6. For such other and further relief as to the court may seem just and proper.

WHEREFORE, it is now submitted that the defendant's life sentence should be vacated and set aside. So thus this brief (Petition) is submitted in good faith and the defendant will forever pray."

Apparently this petition was amended by the filing on 27 June 1969 of an amendment in the following language:

"The petitioner, William Nathan Garner, hereby amends to the original petition filed in this cause, said petition having been filed in the office of the Clerk of the Superior Court of Granville County on January 9, 1968, as follows:

By adding Section D. to said original petition on page 12 thereof, Section D. to read as follows: 'That at the trial of the trial of petitioner's case in April, 1964, that the petitioner pleaded guilty and at such time to have exercised his right of a trial by jury as guaranteed him under the Sixth Amendment to the Federal Constitution he would have had to accept the risk of the death penalty.'

In all other respects the petition of the petitioner heretofore filed is hereby in all respects ratified.

This the 26 day of June, 1969."

Under date of 29 June 1969 (there is no filing date shown), Judge Bailey entered an order which indicates that before the filing date of the foregoing amendment, he heard the matter at the April 1969 Session of the Superior Court of Granville County. This order of Judge Bailey reads as follows:

"This cause coming on to be heard and being heard before the undersigned Judge Presiding at the April, 1969, Session of the

Superior Court of Granville County, by virtue of a Petition heretofore filed in this cause by the petitioner, William Nathan Garner, under the provisions of G.S. 15-217, et seq. and amendments thereto; it appearing wherein the petitioner alleges that certain of his constitutional rights were violated in the trial of the case at the April, 1964 Criminal Session of the Superior Court of Granville County and wherein the defendant received the sentence of life imprisonment for the charge of murder in the first degree and the petitioner was personally present in court with his counsel, R. Gene Edmundson, and the State being represented by the Honorable W. H. S. Burgwyn, Jr., Solicitor of this district and after hearing arguments by counsel for the petitioner and counsel for the State the court finds the following facts:

That the first three contentions set forth in the petition filed herein have been adjudicated at a prior hearing the same having been determined adversely to the petitioner and been denied and certiorari to the Court of Appeals to the State of North Carolina in regard to same were denied.

That at the time the petitioner plead guilty, to have exercised his right of trial by a jury under the Sixth Amendment of the United States Constitution he would have had to accept the risk of the death penalty.

That the petitioner was warned at this hearing that if the petitioner was retried he could get the death penalty and notwithstanding he pursued his contention, that his plea of guilty was coerced by the possibility of the death penalty. On the authority of the case of *U. S. v. Charles Jackson, et al,* 390 U.S. 570; 20 L Ed 2d 138, 88 S Ct — (argued December 7, 1967, decided December 8, 1968); said contention is sustained;

NOW, THEREFORE, it is hereby Ordered, Adjudged and Decreed that William Nathan Garner be granted a new trial,

This the 29th day of June, 1969."

To the signing of the foregoing order, the State gave notice of appeal. Thereafter, certiorari was allowed by this Court.

In the case of *United States v. Jackson,* 390 U.S. 570, 20 L. Ed. 2d 138, 88 S. Ct. 1209 (1968), cited by Judge Bailey as authority for granting a new trial, the punishment under the Federal Kidnapping Act, 18 U.S.C., § 1201(a), was "(1) by death if the kidnapped person has not been liberated unharmed, and *if the verdict of the jury shall so recommend,* or (2) by imprisonment for any

term of years or for life, if the death penalty is not imposed." (Emphasis Added.) The Court held, in substance, that because the only way that death could be imposed was by the jury on a not guilty plea while upon a plea of guilty, death could not be imposed; this needlessly encouraged a defendant to plead guilty instead of taking a chance of the jury imposing the death sentence.

Under our statute, G.S. 14-17, the punishment imposed by law, not the jury, for first degree murder is death. The jury does not impose the sentence of death. However, the Legislature has given the jury the right to extend mercy to one guilty of first degree murder in the following language: "Provided, if at the time of rendering its verdict in open court, the jury shall so recommend, the punishment shall be imprisonment for life in the State's prison, and the court shall so instruct the jury." G.S. 14-17.

Under the Federal Kidnapping Act, only the jury could impose the death penalty. Under G.S. 14-17, the statute imposes the death penalty, and the jury can give life imprisonment in lieu of death.

The Legislature provided another way a defendant could escape the full penalty of the law for his crime under G.S. 15-162.1 (repealed in 1969 but which was in effect in 1964). When Garner entered his plea of guilty to murder in the first degree, the defendant could, upon being charged with murder in the first degree, "after arraignment, tender in writing, signed by such person and his counsel, a plea of guilty of such crime; *and the State, with the approval of the court, may accept such plea. Upon rejection of such plea, the trial shall be* upon the defendant's plea of not guilty, and such tender shall have no legal significance whatever." (Emphasis added) G.S. 15-162.1(a).

Under G.S. 15-162.1(b), it was provided:

> "In the event such plea is accepted, the tender and acceptance thereof shall have the effect of a jury verdict of guilty of the crime charged with recommendation by the jury in open court that the punishment shall be imprisonment for life in the State's prison; and thereupon, the court shall pronounce judgment that the defendant be imprisoned for life in the State's prison."

Under G.S. 15-162.1(a), the defendant could only tender the plea, and in such event the statute gave the prosecuting officer for the State and the judge, acting together, the authority to accept the plea and thus give life imprisonment in lieu of death. In effect, the defendant could bargain with the judge and solicitor for life imprisonment. The law required that death is his punishment. The

law gave him two opportunities to escape death; one by the jury recommending life imprisonment, the other by obtaining the approval of the State and the judge to accept a plea of guilty.

Under our statute, a defendant had no right to *plead* guilty; his right under the law was to plead not guilty, which gave him his constitutional right to a trial by jury. The fact that he was given the right to tender to the State a plea of guilty, which, if accepted by the State and the judge mitigated the statutory punishment, did not coerce him to plead guilty. In other words, it was possible for him to obtain lesser punishment by tendering his plea of guilty if he succeeded in obtaining the approval of the judge. He could not receive a greater punishment than that provided by the statute if he exercised his constitutional right to trial by jury. To hold under these circumstances that it is coercion for a defendant to plead guilty in order to obtain a lesser sentence than that provided by law for the crime with which he is charged, would effectively prohibit the prosecuting officer for the State from accepting on any charge any plea by any defendant to a lesser included offense which carried a lesser penalty.

The Legislature provides and permits different punishment for different crimes. The Legislature is the voice of the people of North Carolina. When the Legislature provides differing degrees of punishment for different crimes, it cannot be logically said that in so doing, it is improperly coercing a defendant who is charged with a more serious crime to plead guilty to a lesser included crime for which the people of North Carolina have provided a lesser degree of punishment. Moreover, the plea of guilty by the defendant in this case was both voluntarily and intelligently entered. See *Parker vs. North Carolina,* 38 U.S.L.W. 4371 (U.S. 4 May 1970).

[2] We hold that our statute is distinguishable from the Federal Kidnapping Act and that a plea of guilty tendered and accepted pursuant to the provisions of G.S. 15-162.1, prior to its repeal in 1969, nothing else appearing, does not constitute coercion. Under our statute, the defendant is not penalized for exercising his right to trial by jury. He can receive a sentence of life imprisonment by grace from the jury or by pleading guilty to his crime, in writing, and obtaining the approval of the State and the judge.

In the case of *State v. Roseboro,* 276 N.C. 185, 171 S.E. 2d 886 (1970), although the defendant was tried by a jury and found guilty of murder in the first degree, we think that the following statement by Justice Higgins is appropriate in this case:

"At the time the offense was committed and the indictment was

returned in this case, G.S. 15-162.1 was in effect. The section permitted a defendant in a capital case to tender to the court a written plea of guilty to the charge and if the solicitor for the State agreed to accept the plea, and the presiding judge approved, the acceptance had the effect of a verdict of guilty with a recommendation that the punishment should be imprisonment for life in the State's prison. The section was repealed effective March 15, 1969, eight months after the indictment was returned, but 43 days before the trial. The defendant never at any time tendered or attempted to tender to the State any written plea of guilty to the charge. Nevertheless, the defendant argues that G.S. 15-162.1 abolished capital punishment in North Carolina. The defendant cites as authority the Supreme Court decision in *United States v. Jackson,* 390 U.S. 570, and the United States Court of Appeals Fourth Circuit decision in *Alford v. North Carolina,* 405 F. 2d 340.

This Court has repeatedly held that G.S. 15-162.1 (Chapter 616, Session Laws of 1953) did not alter G.S. 14-17. The 1953 Act offered a means by which a defendant charged with a capital felony and his counsel were permitted to tender the plea of guilty, which plea, if and when accepted, had the effect of a conviction with a recommendation that the punishment be imprisonment for life in the State's prison. Neither the prosecutor nor the judge was under any obligation to accept the plea. Clearly, until the plea was offered and accepted, the offer was without legal effect. The Act provided: 'Upon rejection of such plea (and of course if it was never tendered) the trial shall be upon the defendant's plea of not guilty, and such tender shall have no legal significance whatever.' The repeal in 1969 neither added to, nor took from, G.S. 14-17. As stated by Justice Lake in *State v. Atkinson, supra,* the section, G.S. 14-17 '. . . is capable of standing alone'. We do not interpret *United States v. Jackson, supra,* as deciding that capital punishment for first degree murder is abolished in North Carolina by G.S. 15-162.1.

In *Alford v. North Carolina, supra,* the United States Court of Appeals for the Fourth Circuit apparently attempted to pass on the validity of G.S. 14-17 and hold the death penalty invalid. A charge of murder in the first degree includes murder in the second degree and manslaughter. In the *Alford* case the defendant entered a plea of guilty of murder in the second degree and was sentenced to a prison term. We consider the decision neither authoritative nor persuasive."

The defendant in this case entered a written plea of guilty. There

is no finding by Judge Bailey that the defendant's act in entering a written plea of guilty was motivated by fear. The finding is that the defendant was warned by Judge Bailey (rightly or wrongly, we do not now decide) that he could get the death penalty upon a retrial, and the defendant insisted that he wanted to be tried again and contended "that his plea of guilty was coerced by the possibility of the death penalty."

On the hearing of this matter the defendant testified:

> "I understand that if I am given a new trial that the jury no longer has the option to give me a life sentence but that if they find me guilty of murder in the first degree the court has no choice but to sentence me to die, and I want to take my chance on that."

The defendant was wrong in his "understanding" because G.S. 14-17 is still in effect, and no changes have been made therein since 1964 when the defendant was first tried. We think the defendant's own testimony negatives the fact that he was coerced by the possibility of the death penalty when he entered his plea.

We fail to see how the defendant could have been coerced by the possibility of the death penalty in 1964 and not coerced by the possibility of the same death penalty in 1969. The same law with respect to the punishment for first degree murder is still in effect. Could the defendant have an ulterior reason for contending that he was coerced in 1964 when he entered his plea, such as the death of material State's witness or the loss of other evidence by the State, or could there be some other reason that would cause the defendant to be unafraid of the death penalty now after the passage of these years?

It is common knowledge that a defendant is entitled to a speedy trial. The State is likewise entitled to a speedy trial. We do not think that a defendant, under these circumstances, should be permitted to have a new trial.

[2] We are of the opinion that *United States v. Jackson, supra,* is distinguishable from this case. We are also of the opinion and so hold that the punishment for murder in the first degree as contained in G.S. 14-17, does not constitute coercion in fact so as to render void Garner's plea to murder in the first degree, pursuant to the provisions of G.S. 15-162.1 as it existed prior to its repeal in 1969.

The order entered by Judge Bailey in granting the defendant a new trial is reversed.

Reversed.

MORRIS and HEDRICK, JJ., concur.

THOMAS SULLIVAN ATKINS v. EDDIE LEE MOYE AND BARNEY BURKE TRANSFER COMPANY, INC., A CORPORATION

No. 7028SC39

(Filed 27 May 1970)

1. Automobiles § 88— automobile accident — contributory negligence — issue of plaintiff's intoxication

Issue of plaintiff's contributory negligence on the ground that plaintiff was under the influence of intoxicating liquor at the time of the collision between plaintiff's automobile and defendant's stopped truck on the highway, *held* improperly submitted to the jury, where the only evidence relating to plaintiff's intoxication consisted of (1) defendant's testimony that plaintiff had the odor of whiskey on his breath immediately after the collision, (2) a highway patrolman's testimony that there was an odor of alcohol in plaintiff's car and that he noted on his accident report that plaintiff had been drinking, and (3) testimony that a partially filled whiskey bottle was found under the seat of plaintiff's car.

2. Automobiles § 44— contributory negligence

The burden of proof on the issue of plaintiff's contributory negligence is on the defendant.

MALLARD, C.J., dissenting.

APPEAL by plaintiff from *Snepp, J.*, 16 June 1969 Session BUNCOMBE Superior Court.

This is a personal injury action arising out of a collision which occurred immediately east of the intersection of U. S. Highway 19-23 and Interstate Highway 40, at approximately 10 o'clock p.m. on 11 December 1964, between an automobile owned and driven by plaintiff and a tractor-trailer unit owned by defendant Barney Burke Transfer Company, Inc., and driven by defendant Eddie Lee Moye.

Plaintiff's primary allegation of negligence as to defendants was that defendant Moye parked his tractor-trailer unit upon the main portion of a main traveled highway at night without displaying the lights and flares required by law when it was practicable to park his unit on the shoulder of the highway.

Each defendant answered separately, and each denied negligence and averred that plaintiff was contributorily negligent. One of the specific acts of negligence attributed to plaintiff by each defendant's answer was that he was "operating a motor vehicle while he was drinking intoxicating beverages" and was "operating a motor vehicle while his faculties were appreciably impaired by the consumption of intoxicating beverages."

Among other questions submitted to the jury on the issue of

plaintiff's contributory negligence, the court submitted the question of plaintiff's operation of a motor vehicle while under the influence of some intoxicating beverage. The jury answered the issue of defendant's negligence and the issue of plaintiff's contributory negligence in the affirmative. Plaintiff appeals.

Bennett, Kelly & Long, by Robert B. Long, Jr., for plaintiff appellant.

Van Winkle, Buck, Wall, Starnes & Hyde by O. E. Starnes, Jr., for defendant appellees.

MORRIS, J.

[1] The first question raised by plaintiff on appeal is whether the court erred in submitting to the jury the question of whether he was driving a motor vehicle while under the influence of some intoxicating beverage on the issue of contributory negligence. He strenuously argues that there was insufficient evidence of intoxication to warrant a finding of intoxication.

The portion of the charge to which the plaintiff excepts and which he assigns as error is:

> "Now the defendant also contends that on this occasion the plaintiff was operating a vehicle while under the influence of some intoxicant. Plaintiff contends that he was not operating his vehicle under the influence of any intoxicant.
>
> It is provided by statute in North Carolina that it shall be unlawful for any person who is under the influence of intoxicating liquor to drive any vehicle upon a highway within this State. A violation of this statute is negligence per se, and if you are satisfied by the greater weight of the evidence that there was a violation of the statute and that this contributed to the plaintiff's injuries, then this would be contributory negligence.
>
> Now, a person is under the influence of intoxicating liquor within the meaning and intent of this statute when he has drunk a sufficient quantity of an intoxicating beverage to cause him to lose the normal control of his bodily or mental faculties, or both, to such an extent that there is an appreciable impairment of either or both of these faculties. The word 'appreciable' means: capable of being estimated, weighed, judged of, or recognized by the mind. The test is not the amount of intoxicating liquor a person may have drunk, but whether he was affected thereby to the extent just stated.

> The evidence tending to show that the plaintiff was operating his motor vehicle while under the influence of some intoxicant is mainly circumstantial. An essential fact may be proved by circumstantial evidence, but the circumstances must be such as to raise a logical inference of the fact to be proved, and not to raise a mere conjecture or surmise, and they must be such as to satisfy you of the necessary facts by the greater weight of the evidence.
>
> So I instruct you, ladies and gentlemen, that if the defendant has satisfied you by the greater weight of the evidence that on this occasion the plaintiff was operating his motor vehicle on this highway while he was under the influence of some intoxicating liquor, as I have defined that term to you, then that would be negligence on the part of the plaintiff. If you are further so satisfied that this contributed to the plaintiff's own injuries, then this would be contributory negligence upon the part of the plaintiff."

Plaintiff testified that the accident occurred approximately 208 feet east of the intersection of U.S. Highway 19-23 and Interstate 40 and that his home was situate approximately three or four hundred feet east of the intersection. On the evening in question, he had been to Canton and was returning home when the collision occurred. He left home about 7:30, went to Valley View Shopping Center, about one mile east of his home, where he remained until about 8:30, looking around and making his Christmas list. From there he drove to Canton, found that the stores were about to close, and shortly started back home. The weather was rainy and foggy and very disagreeable. The road was black top, and it was difficult to see with patches of fog. He stopped at the Owl Drive-In to wait for the weather to clear a bit. He remained there approximately 25 or 30 minutes, had a cup of coffee, and talked with the owner. He left there a few minutes before 10:00 — just about three minutes before the accident occurred. As he approached his driveway, he was going approximately 30 miles per hour and had his windshield wipers on, because it was raining. He "picked up" two headlights approaching which were very bright. He could not see beyond that rim of light, so he looked down at the white line. Just about the time he passed the lights, he saw the back end of defendant's truck which looked like a big load of lumber, apparently standing still. He observed that there were no lights, reflectors or flares of any kind on the rear or to the rear of this vehicle. When he first saw the truck, he was approximately 8 or 10 feet from it, had no time to do anything, and collided with the rear of the truck. Although he saw it for

only an instant, it was in the center of the lane in which he was traveling. The lights on plaintiff's car were on dim. The truck looked to him like a load of lumber stacked in the middle of the road. He had "not had anything of an intoxicating nature to drink on this day, beer, wine or anything."

On cross-examination plaintiff testified that there was a small amount of whiskey in the car which had been there about a week or ten days and about which he had forgotten. He did not customarily carry whiskey with him. This very small amount had been given to him and he had put it back under the seat and had forgotten about it. He denied that he was drinking on the night of the collision. The restaurant at which he stopped was located about midway between his home and Canton and it is about three and one half or four miles from Canton to the restaurant. The headlights which he saw were east of the truck — east of where he was ultimately involved in the collision. "On the right there on the south side of 19-23 there's a fifteen and a half feet of fairly level ground where cars and trucks pull off all the time there." There was very little slope at the time of the accident. "The place where the impact occurred on the road is straight. 19-23 is straight to the west."

The highway patrolman who investigated the accident testified that he arrived at the scene at approximately 10:15 p.m. Both vehicles were on the highway. No part of the trailer was off the lane of traffic, but the front of the tractor was partially angled toward the shoulder. The plaintiff was still in his automobile and was semiconscious. Defendant Moye told him the brakes on his rig had frozen and he had just gotten out of his tractor to set up flares when the plaintiff's car hit the rear of the trailer. He observed no flares or reflectors on the highway at the time. He did observe lights on the rear of the trailer. He was in close proximity to plaintiff and did not observe any odor whatever of an alcoholic nature on his person but did observe the odor in the car. There was a portion of a pint bottle of whiskey under the seat of the car in the floorboard. The seal was broken but there was a cap on it. At the time of the accident, it was raining and there was a light fog. He asked defendant Moye to move his unit to Luther Road. "I don't recall any difficulty that he had in moving his unit. I saw him drive his '57 tractor to the intersection of Luther Road and U.S. 19-23. It is three-quarters to a mile from the scene of the collision. The tractor trailer proceeded east behind my patrol car." When the officer pulled in the service station drive and stopped, the tractor-trailer unit behind him pulled in and stopped. Defendant Moye accompanied the officer to the hospital and slept all the way there. The shoulder to the south

of the highway was approximately 6 to 8 feet. On cross-examination "I observed lights on the rear of the tractor trailer. They were burning when I arrived there. I saw seven lights burning. Those lights that I have referred to, they would emit a light toward the back of the trailer. The seven lights were spread over the rear of the trailer." The accident report prepared by the officer shows that plaintiff had been drinking.

The ambulance attendant testified that he did not observe any odor of alcohol upon or about plaintiff's person.

The owner of the restaurant testified that he had known plaintiff between 15 and 20 years, that he saw him somewhere between 9:15 and 9:30 on the night of the accident, that plaintiff ordered a cup of coffee and they had a conversation. Plaintiff appeared to him to be perfectly normal and he did not detect any odor of alcohol about him. They had a conversation of at least 15 minutes duration and he was four feet from plaintiff during that time.

Plaintiff's wife testified that he had nothing to drink in her presence before he left home and she did not smell any odor of alcohol on him at the hospital when she leaned over and kissed him.

Defendant Moye testified that on the day of the accident he had left Atlanta about 3:00 p.m. headed to Hickory, North Carolina. Around 10:00 p.m. he was traveling east on U.S. Highway 19-23. He did not intend to get to Hickory that night. All the lights were burning on his truck. Six lights were burning on the back of the trailer. Just beyond Canton, he had stopped to get a Coca-Cola. While there he took his hammer and beat his tires to make sure they were all up and took a shop towel and cleaned off his headlights and taillights. As he headed east on Highway 19-23, traveling upgrade, he noticed that something "kept pulling" his truck and the wheels were smoking. He pulled over to the right until he felt the front end of the tractor begin to lean so he stopped. He put his "trouble lights" on and the two were blinking at the same time behind the trailer. He got out of the truck with his adjustable wrench, flashlight and five reflectors. He put one reflector at the front of the truck, one at the middle, one at the back, "and another about twenty-five or thirty foot, but another one angled in behind the truck." All the lights were working. He had not gotten down under the trailer to loosen the brake when he saw a car headed east about 400 feet or further back. He could not judge the speed. He "dialed" with his flashlight. The car continued without bearing to the left and without reducing speed. When the car got within 150 or 200 feet, he stepped from behind the trailer and ran across the road. He had seen

no other cars headed west at that time. When he turned around the car hit the truck. He saw a whiskey bottle in the car. "By me getting up to him, I could easily smell the odor on his breath, the odor of whiskey." After the car was moved he loosened his brake down, picked up his reflectors and put them in the truck and followed the patrolman to park his unit. He had gotten cold, it was warm in the officer's car, and he went to sleep on the way to the hospital. He did not carry in his truck any fusees, or lanterns, or any type flare. Nothing that he set out was set out a distance of 200 feet to the front or rear of his vehicle.

[2] The burden of proof on the issue of plaintiff's contributory negligence was, of course, on defendant. Viewing the evidence on the question of whether plaintiff was under the influence in the light most favorable to defendant, the evidence tends to show that there was an odor of alcohol in plaintiff's car; there was a pint whiskey bottle, partially empty, with the cap on it found in the floorboard of the car under the seat; there was an odor of alcohol on plaintiff, and the patrolman noted on his report that plaintiff had been drinking.

We are of the opinion that these are circumstances which raise merely a conjecture. "Circumstances which raise merely a possibility or conjecture should not be left to the jury as evidence of a fact which a party is required to prove." *Lunsford v. Marshall,* 230 N.C. 610, 55 S.E. 2d 194 (1949), and cases there cited.

We find no case in this jurisdiction in which this precise question has been raised on appeal. In *Brewer v. Garner,* 264 N.C. 384, 141 S.E. 2d 806 (1965), plaintiff sought to recover for personal injuries allegedly resulting from defendant's negligent operation of an automobile. Among the acts of negligence of which defendant alleged plaintiff was guilty was the operation of his automobile while under the influence of intoxicating liquor. The only evidence as to intoxication was that of the patrolman who testified that he detected the odor of some type of whiskey in plaintiff's automobile. The Court excluded evidence on cross-examination that the patrolman had signed a statement to the effect that he could not say whether any of the parties had been drinking. The Court, on appeal, held the exclusion of the evidence to be error. Higgins, J., speaking for the Court said:

> "Assuming, without deciding, the odor of some type of whisky in plaintiff's vehicle some thirty minutes after the wreck would be sufficient to permit an inference the plaintiff was driving under the influence, then certainly it would be proper by way of impeachment for the plaintiff's counsel on cross-examination to

> show that on January 14, 1963, twenty-eight days after the accident, the witness had signed a statement saying, 'I could not say whether any of the parties had been drinking.' "

The Court held that after the court had permitted the evidence on intoxication to go to the jury, it was error to exclude evidence on cross-examination which weakened its effect or destroyed it altogether. With respect to instructions on contributory negligence the Court noted that the charge underscored the importance of plaintiff's intoxication on the issue of contributory negligence. "There was no evidence of intoxication except the odor of some type of whisky in and around the plaintiff's automobile thirty minutes after the collision. That odor, Mr. Bolick alone detected. The instruction on intoxication based on such equivocal evidence magnified the effect of the court's error in excluding Mr. Bolick's signed statement, 'I could not say whether any of the parties had been drinking.' " Apparently the precise question before us was not before the Court. We do not interpret this decision as approval of an instruction on the question of intoxication where the evidence is as "equivocal" as in *Brewer* and the case now before us.

We find in other jurisdictions cases, some of which appear to us to be factually stronger than this case, where the courts have found reversible error in instructing the jury on the question of intoxication on the evidence before the jury. An example is *Madill v. Los Angeles Seattle Motor Express, Inc.*, 64 Wash. 2d 548, 392 P. 2d 821 (1964). There the evidence as to drinking was not disputed. It appeared that Mrs. Madill went to Mrs. Mueller's home about 4:00 p.m. and remained there about one hour. There was beer in the icebox. They decided to go for a ride. Mrs. Madill drove. On the way out of town Mrs. Madill realized that she had no money, so they stopped at a market to get a check cashed. As a reason for cashing a check, she bought 6 bottles of beer and put them in the back seat. Later they stopped for gas, and Mrs. Mueller bought some ice and a pail into which she put the ice and the beer. Still later they stopped for dinner but found that that restaurant was not serving food. There each of them drank a bottle or glass of beer. This was 67 miles from the scene of the accident. They continued their drive, reached another town and asked directions to a restaurant. Mrs. Madill, in attempting to follow directions, missed her turn off the bypass and had to turn around to go back. After making the right turn, she proceeded north to where the collision occurred. She testified she slowed down to make a turn into the restaurant and was struck in the rear by defendant's truck. Defendant testified that she passed him and immediately swung back in front of him and slowed

down. The patrolman testified that there were 5 unbroken bottles of beer in the car and one can of beer. A witness testified he smelled alcohol strongly on Mrs. Mueller. The doctor who rendered medical attention to Mrs. Madill testified that he did not detect the odor of alcohol on her breath. Her own physician testified that she was in the habit of drinking too much beer. The trial court instructed the jury on the question of driving under the influence on the issue of her contributory negligence. On appeal, defendant's counsel argued that it was a reasonable conclusion that Mrs. Madill was driving under the influence. However, the majority of the Supreme Court (two justices dissenting) were of the opinion that though it could conceivably be said that Mrs. Madill had more than one bottle of beer, there are no facts in evidence to support it and such a conclusion would have to be based on mere speculation and held that it was prejudicial error to instruct on this question because there was no substantial evidence concerning it.

In *White v. Peters,* 52 Wash. 2d 824, 329 P. 2d 471 (1958), the evidence was that plaintiff had had two drinks prior to the accident. There the Court said "There is no evidence in this case that plaintiff White was affected in any way by the two drinks, and no evidence of conduct or appearance, from which a fair inference could be drawn that he was under the influence of intoxicating liquor prior to or at the time of the accident."

In *Wood v. Myers,* 48 Wash. 2d 746, 296 P. 2d 525 (1956), the accident occurred about 3:00 a.m. There was evidence that plaintiff had had two beers after lunch, that after 10:30 p.m. he had a beer, and that about 12:30 a.m. he went to visit a friend, left there and went to visit another friend with whom he split a "jumbo of beer." The accident occurred about 15 minutes after he left the friend's home. The patrolman and ambulance attendant both testified they smelled liquor on his breath. The trial court refused to instruct the jury on the question of intoxication on the issue of contributory negligence. On appeal, the Supreme Court affirmed saying:

> "Although this is ordinarily a question of fact to be determined by the jury, we are of the opinion that, under the facts of this case, the trial court was correct in refusing to submit this issue. Under the evidence produced, the jury would not have been justified in concluding that, at the time of the accident, Wood was under the influence of or affected by intoxicating liquor.
>
> Substantial evidence is that which would convince an unprejudiced, thinking mind of the truth of the fact to which the evidence is directed."

The Appeals Court of Illinois reached a similar result in *Kitten v. Stodden,* 76 Ill. App. 2d 177, 221 N.E. 2d 511 (1966). The evidence there was that in a four-hour period preceding the accident, plaintiff had beer and a small bottle of champagne. He and other witnesses testified he was sober. There was no other evidence of intoxication. The court instructed the jury: "Whether or not a person involved in the occurrence was intoxicated at the time is a proper question for the jury to consider together with other facts and circumstances in evidence in determining whether or not he was contributorily negligent . . ." On appeal, the instruction was held to be prejudicial error. The Court noted that the drinking of an alcoholic beverage does not of itself raise the question of intoxication. This must be proved by the evidence and testimony of witnesses. The Court said:

> "Intoxicating beverages affect different persons in different ways and some persons would be intoxicated by the consumption of the same quantity of intoxicating beverages that the plaintiff consumed, but the consumption of a similar amount by other persons would have no effect. Thus, no court has ever turned to an arithmetic solution to this problem. Rather, the courts have uniformly required the proof of facts which would tend to show intoxication, rather than the mere consumption of alcoholic beverages."

In *McCarty v. Purser,* 373 S.W. 2d 293, (Tex. Civ. App. 1963), Rev'd on other grounds, 379 S.W. 2d 291 (Tex. Sup. Ct. 1964), both plaintiff and defendant had attended a party at the officers club from 6:00 p.m. until immediately prior to the accident. Defendant had been drinking scotch but could not say how many drinks she had had during the 9 or 10 hours she was at the party. There was no evidence that anybody was drunk or intoxicated. The Court was of the opinion that the evidence was insufficient to support a finding that she was incompetent to drive by reason of being under the influence. "To hold otherwise would be to credit surmise or conjecture drawn from premises which are uncertain. There are not sufficient facts established by direct evidence upon which any such inferences can be based." See also *Van Zandt v. Schell,* 200 S.W. 2d 725, (Tex. Civ. App. 1947).

In *Baldwin v. Schipper,* 155 Col. 197, 393 P. 2d 363 (1964), the only evidence of intoxication was the testimony of one witness who said he detected the odor of alcohol on defendant. There was insufficient evidence of irregular driving. The court granted a motion for directed verdict in favor of defendant. This was affirmed on appeal,

the Colorado Court saying the evidence of intoxication was of a highly tenuous nature.

[1] In the case before us, the only evidence of odor of alcohol on plaintiff came from the defendant himself. The officer testified there was the odor of alcohol in the car and that he noted on his report that plaintiff had been drinking. A bottle, partially empty, was found in the floorboard under the seat with the cap on. There is no direct evidence that plaintiff had had anything to drink. There is no evidence that plaintiff was speeding or weaving on the highway. The evidence is to the contrary — that for the approximately 400 feet defendant observed him, he did not turn his car to the left or right and did not change his speed. The only evidence of irregular driving is that he hit the rear of the truck.

We are of the opinion and so hold that the evidence submitted in this case is not sufficient to warrant a finding that plaintiff was driving under the influence. To hold otherwise would allow the jury to draw an inference of fact from premises which are uncertain. "The submission of any question of fact to a jury without sufficient evidence to warrant a finding is error." *Lunsford v. Marshall, supra.* Since we cannot know whether the jury's answer to the second issue was based upon a finding, under the instructions of the court, that plaintiff was driving under the influence at the time of the accident, there must be a new trial.

New trial.

VAUGHN, J., concurs.

MALLARD, C.J., dissenting.

There is evidence that immediately after colliding with the truck the plaintiff had the odor of alcohol on his breath. It is common knowledge that alcohol consumed as a beverage affects human beings. In this case the fact that the plaintiff had the odor of alcohol on his breath is circumstantial evidence that he had consumed some kind of alcohol as a beverage. When this circumstantial evidence is considered together with defendant's evidence that the truck was well lighted while stopped on the highway at night; that the road was straight; that defendant "dialed" a lighted flashlight in the direction the plaintiff's vehicle was coming before getting out of the way; that no other vehicles were meeting the plaintiff at the time of the collision and that the plaintiff drove his vehicle into the rear of the

defendant's truck without swerving and without reducing his speed, there is sufficient circumstantial evidence in my opinion to require submission to the jury of the question as to whether any alcohol plaintiff had consumed was of sufficient quantity to cause him to lose the normal control of his bodily or mental faculties, or both, to such an extent that there was an appreciable impairment of either or both of the faculties. I think the trial judge correctly presented to the jury the question of whether the plaintiff was operating his vehicle while under the influence of intoxicating beverages.

MARTHA P. PEOPLES v. LINWOOD T. PEOPLES

No. 7014DC86

(Filed 27 May 1970)

1. Courts § 14; Divorce and Alimony § 21— alimony order entered in superior court — contempt authority of district court

A district court judge has authority to hold a party to a proceeding before him in civil contempt for failure to comply with court orders issued pursuant to a confession of judgment regarding payment of alimony which was entered in the superior court prior to the establishment of a district court for the district in which the order was entered.

2. Courts § 14; Venue § 9— overturning district court order entered in improper division

No order of the district court may be overturned merely because it was not the proper division of the General Court of Justice to enter the order. G.S. 7A-242.

3. Appeal and Error § 24; Courts § 14; Venue § 9— authority of district court to enter contempt order — failure to make timely objection

Appellant's attack on authority of district court to enter order holding him in contempt for failure to comply with an alimony consent order entered in the superior court must fail where there is no showing in the record that he entered timely objection to the jurisdiction or venue of the district court. G.S. 7A-257.

4. Divorce and Alimony §§ 19, 21— alimony order — pendency in district court

An order for the payment of alimony is not a final judgment, since it may be modified upon application of either party; thus, an action for alimony would continue to be "pending" in the court of proper jurisdiction, which is now the district court. G.S. 7A-244.

5. Divorce and Alimony § 21— failure to comply with alimony order — contempt of court — possession of means to comply

In order to hold defendant husband in contempt for failure to comply with a provision of a consent judgment for payment of alimony to plaintiff wife, the trial judge must make particular findings that defendant possessed the means to comply with such provision.

6. Divorce and Alimony § 21— possession of means to comply with alimony order — sufficiency of evidence to support finding of fact

Finding by the district court that defendant husband possessed the means and ability to comply with consent judgment requiring payment of alimony to plaintiff wife was amply supported by evidence of defendant's income and indebtedness.

APPEAL by defendant from *Lee, District Judge,* 28 May 1969 Session of the General Court of Justice, District Court Division, DURHAM County.

The defendant appellant Linwood T. Peoples (Peoples) entered into a Confession of Judgment on 23 March 1966 in the Durham County Superior Court regarding the support of his estranged wife, Martha Perdue Peoples (Mrs. Peoples). Judgment was entered by the Clerk on 4 May 1966 as follows:

> "Upon the foregoing Confession of Judgment, it is now, THEREFORE, ORDERED, ADJUDGED AND DECREED that the plaintiff have and recover of the defendant as follows:
>
> 1. That defendant will pay toward the support of Martha Perdue Peoples each month so long as she remains unmarried an amount equal to 1/12 times 25% of my adjusted gross income as shown on the Federal Income Tax Return of defendant for the previous year. Defendant shall present his income tax return to plaintiff or her attorney for the purpose of computation of the monthly amount no later than April 30th of each year; provided that in no event shall the monthly amount be less than Seventy Dollars ($70.00) per month. That the payments shall be made before the tenth of each month beginning April, 1966.
>
> 2. That the defendant shall in addition to number one above, pay any hospital and medical expense excluding medicines, over what is paid for by hospital insurance. Plaintiff will keep in force a hospital insurance policy.
>
> This the 4th day of May, 1966.
>
> ROSE F. CATES, Ass't.
> Clerk of the Superior Court"

An affidavit and a motion were filed by the plaintiff, Mrs. Peoples, in Durham County Superior Court on 6 May 1968 reciting that Peoples was then $641.04 in arrears in payments pursuant to the judgment of 23 March 1966; that he had tendered to her a check for $480.78 which was returned twice marked "Not sufficient funds"; that he had been late in making the payments that had been made to the plaintiff; that he had failed to supply Mrs. Peoples with his 1966 and 1967 income tax returns and that he had never paid any of her medical bills. She further recited that he was an attorney at law and a candidate for District Judge and was well able to meet his obligations under the Confession of Judgment. She prayed the Court to order him to appear and show cause why he should not be held in contempt for failure to comply with the terms of the judgment.

An order was signed by Superior Court Judge C. W. Hall on 6 May 1968 transferring the case to the District Court Division of the General Court of Justice in Durham County, since it appeared that that was the "proper division." District Court Judge E. Lawson Moore then issued a show cause order on 6 May 1968 setting a hearing for 16 May 1968. It was served on Peoples on 7 May 1968 by the Sheriff of Vance County.

The defendant filed an affidavit and motion reciting that he had not willfully failed to comply with the order. He related that conditions had materially changed since the Confession of Judgment in that he had remarried and now had his new wife and four children to support. He alleged that his present income was insufficient to "provide for his family and make the payments" to Mrs. Peoples. Peoples asked that he be given additional time to make up arrearages and that the original decree be modified to more nearly comport with Mrs. Peoples' needs and his earnings.

District Judge Lee entered an order on 16 May 1968 finding that Peoples was $801.30 in arrears; that his failure to make the payments was because of financial difficulties and was not willful; that he had not produced his income tax returns; and that the Confession of Judgment continued to be proper in its provisions. He ordered Peoples to pay $100.00 attorney's fees to Mrs. Peoples' lawyer by 15 July 1968 and to make up the above arrearage in alimony payments by 15 July 1968 as well.

An affidavit and motion was filed by the plaintiff on 7 August 1968 reciting that the defendant was then $1,462.17 "in arrears of previous orders of Court"; that no payments had been made by defendant since December 1967 and that plaintiff had been forced to

stop her work as a teacher because of bad health due to chronic kidney disease.

Chief District Court Judge E. Lawson Moore entered an order on 11 October 1968 finding that defendant was in arrears in the sum of $852.75 plus the $100.00 attorney fee, minus a $200.00 payment made by check, for a total of $752.75, and that he was willfully in contempt of the order of Lee, J., of 16 May 1968 and the Confession of Judgment of 4 May 1966. Execution against the person of Peoples was stayed, however, upon the condition that Peoples make timely payments required by previous orders or judgments of Court and that in addition he pay $50.00 per month to be credited upon the arrearage.

On 11 August 1969 plaintiff again filed an affidavit and motion reciting that defendant was in arrears $1,393.74 at that time; that the $200.00 check had been returned for insufficient funds; that a check to replace that returned check was itself returned for insufficient funds and that defendant had made no payments whatsoever during 1969. This pleading had been verified on 14 April 1969 but had not been filed at that time since it was learned by the plaintiff that the defendant had suffered a heart attack on 17 April 1969 and that he had been hospitalized, all of this being recited in an amendment to the original motion and affidavit. The amendment, also filed on 11 August 1969, further stated that the plaintiff understood that the defendant had continued to receive his salary during his illness and that he had returned to work sometime before the filing of the affidavit and amendment thereto.

A show cause order was issued by Judge Lee on 11 August 1969 ordering the defendant to appear at the contempt hearing to be set on or after 18 August 1969 in the Durham County District Court. This was served by the Sheriff of Vance County on 13 August 1969. An order was signed by Judge Lee on 25 August 1969 continuing the matter until 28 August 1969, stating, *inter alia*, that the defendant had tendered a $500.00 check to the plaintiff on the arrearages.

Defendant Peoples answered, denying the material allegations of the complaint except that he had made no payments at all during 1969. For a further answer and defense, the defendant submitted an affidavit reciting his current expenses and the changes of conditions referred to above. He stated that the plaintiff had a monthly income of $500.00; that he had expenses of approximately $720.00 a month; that as a result of his heart attack he had expenses of some $500.00 above insurance and that he had had to pay some $900.00 in income taxes for the year 1969. He alleged that he had paid some

$2,211.00 to the plaintiff during 1968 and that he did "not now have sufficient income" to pay the plaintiff 25% of his adjusted gross income and still "raise his present family; that defendant's entire income is spent except for the retirement that is taken out of his pay." A 1968 Federal Income Tax form was attached to the answer and affidavit.

At the hearing, the plaintiff presented no evidence outside of the pleadings and moved that defendant be held in contempt of the court. The defendant called Mrs. Peoples to the stand. She testified that she had an income of about $450.00 a month for nine months; that she had quite a few hospital bills which she had not paid; that she had periodic expenses of some $160.00 per month plus other expenses in such amounts that she had to borrow about $200.00 a month from her parents to live; that she received no income during the summer, and during a trip to Texas, which she took against the orders of her doctor since she was able to get a study grant, she collapsed and had to be hospitalized.

Peoples testified that he had a $101.00 a month expense for car payments which he did not mention in his affidavit and that he had outstanding obligations to two banks for about $2,400.00. He stated that he had gotten behind in house payments and was trying to catch up during the early part of 1969. He said that his illness required him to be on a special, expensive diet. He admitted that he received about $1,030.00 net after taxes and retirement a month as a District Judge and that his wife received $282.00 take-home a month. He admitted writing a bad check to the appellee. He admitted that Mrs. Peoples helped in putting him through law school. He stated further:

> "I admit that I have not paid anything in 1969. I do not know if we agree on what we are behind. We were figuring on $270.00 up until August. I tried to point that out in my affidavit it is purely the question of either paying one or paying the other. It's as simple as that. I have not said that I have no intention of paying her. If I keep getting further and further in debt as I did last Fall when I did get behind because of spending money in the election that I had and the plaintiff admits that I paid most of it under the orders of the Court in the Fall of last year. I got behind again and there is so much you can borrow before you have to start paying back."

On this evidence, the following order was entered by Judge Lee (in pertinent part):

"This cause, coming on to be heard and being heard on the 28th day of August, 1969, before The Honorable Thomas H. Lee, District Court Judge, upon motion of plaintiff that defendant show cause why he should not be found in contempt of previous orders of Court; and the plaintiff being present and being represented by W. Paul Pulley, Jr., and the defendant being present and appearing on behalf of himself without other counsel;

"Upon consideration of affidavits and oral testimony, it appearing to the Court and the Court finds the following facts:

* * *

"16. That from December 1, 1968, through June 30, 1969, defendant has been employed as a District Court Judge at an annual salary of Fifteen Thousand Dollars ($15,000.00) per year; that on or about July 1, 1969, defendant's salary was increased to Seventeen Thousand Dollars ($17,000.00) per year; that during the year 1969 as District Court Judge defendant has earned approximately Ten Thousand One Hundred Sixty-Six Dollars ($10,166.00) for an eight-month period gross income.

"17. That defendant willfully failed and refused to furnish his income tax return by April 30, 1969, as required by the Confession of Judgment and has furnished his 1968 income tax return for the first time at this hearing, August 28, 1969. That said income tax return shows that for the year 1968 defendant earned Nine Thousand Eight Hundred Thirty and 18/100 ($9,830.18) adjusted gross income.

"18. That defendant was responsible to pay plaintiff for the year 1969 pursuant to the Confession of Judgment the sum of Two Hundred Four and 81/100 Dollars ($204.81) per month.

"19. That with the exception of Five Hundred Dollars ($500.00) paid when defendant was ordered to appear in Court and appeared in Court on the 21st day of August, 1969, defendant paid nothing to plaintiff during the year 1969.

"20. That defendant is currently in arrears in his payments to plaintiff in the amount of One Thousand Six Hundred Fifty-Two and 48/100 Dollars ($1,652.48), and that figure is after subtracting the Five Hundred Dollars ($500.00) paid when defendant appeared in Court August 21, 1969.

"21. That subsequent to the Confession of Judgment and a later judgment for absolute divorce, defendant has remarried and has one natural child born of the marriage and has adopted

another child and that two step-children live with defendant and his present wife; that defendant's present wife is currently employed in the office of the Clerk of Superior Court of Vance County and has been so employed since before October 11, 1968.

"22. That on or about April 17, 1969, defendant suffered a heart attack and was hospitalized at Duke Hospital in Durham, North Carolina, until May 8, 1969.

"23. That at an examination August 25, 1969, defendant's physicians found him 'to be without symptoms and to have not suffered demonstrable impairment of the function of his heart' and stated that defendant's 'present outlook for continued good health is quite good.'

"24. That defendant is now in good health and able to continue working full time.

"25. That defendant has been working full time for approximately two months.

"26. That defendant's salary continued without interruption during his illness.

"27. That defendant's medical expenses which he was required to personally pay other than that covered by insurance were Four Hundred Eighty-Two and 03/100 Dollars ($482.03).

"28. That since the order of The Honorable E. Lawson Moore of October 11, 1968, defendant has possessed the means and ability to comply with said order and the previous orders of Court.

"29. That defendant willfully failed and refused to comply with the order of The Honorable E. Lawson Moore of October 11, 1968, and previous orders of this Court and specifically the Confession of Judgment of the 4th day of May, 1966.

"IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that defendant is in willful contempt of the order of Court of The Honorable E. Lawson Moore of October 11, 1968, and previous orders of Court and that execution shall issue against the person of defendant and that the Sheriff of Vance County shall deliver him to the Sheriff of Durham County and that he shall be confined in the common jail of Durham County until he purges himself of contempt.

"This 29th day of August, 1969.

THOMAS H. LEE
District Court Judge"

W. Paul Pulley, Jr., for plaintiff appellee.

Bobby W. Rogers for defendant appellant.

CAMPBELL, J.

[1] The appellant in this action raises the question of whether or not a District Court Judge may hold a party to a proceeding before him in civil contempt for failure to comply with court orders issued pursuant to a confession of judgment regarding payment of alimony which was entered in the Superior Court prior to the establishment of a district court for the district in which the order was entered. We answer that question unequivocally in the affirmative.

[2, 3] The Judicial Department Act of 1965, as codified in Chapter 7A of the General Statutes, sets up a "unified judicial system for purposes of jurisdiction, operation and administration, and consists of an appellate division, a superior court division, and a district court division." G.S. 7A-4. In civil matters, original general jurisdiction is vested, with some exceptions, "in the aggregate" in the General Court of Justice. G.S. 7A-240. The superior court division or the district court division, or both, are designated as "proper" divisions in which to bring a given civil action, but no judgment in a matter in which the trial courts have original jurisdiction is "void or voidable for the sole reason that it was rendered by the court of a trial division which . . . is improper for the trial and determination of the civil action or proceeding." G.S. 7A-242. It follows that no order of the district court may be overturned merely because it was not the proper division to enter the order. Appellant's attack must fail, at any rate, since there is no showing in the record that he entered timely objection to the jurisdiction or venue of the district court here. G.S. 7A-257.

We think, however, that the district court was the proper division to enforce the provisions of the confession of judgment in the instant case. A judgment ordering the payment of alimony may be enforced by the contempt power as provided for in G.S. 5-8 and 5-9. G.S. 50-16.7. G.S. 5-8 provides in part that

> "Every court of record has power to punish 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. . . ."

[4] "An action is pending from the time it is commenced until its final determination." *Spencer v. Motor Co.*, 236 N.C. 239, 72 S.E. 2d 598 (1952). An order for the payment of alimony is not a final judg-

ment, since it may be modified upon application of either party. *Barber v. Barber,* 217 N.C. 422, 8 S.E. 2d 204 (1940). Thus, an action for alimony would continue to be "pending" in the court of proper jurisdiction. The district court has jurisdiction over alimony proceedings and, indeed, the Legislature has decreed that it is the only "proper" division for such a proceeding. G.S. 7A-244.

[1] It is manifest that the court which has been given the duty to supervise domestic relations matters — including alimony judgments and orders pursuant thereto — must have the authority to enforce those judgments and orders. This is true whether the judgment was entered in the superior court or the district court. It would be anomalous to assume that when the Legislature changed the statutory framework to make the district court division the proper agency in which to bring actions for alimony or actions to enforce alimony judgments, it meant to leave supervision of prior alimony judgments to the superior court. We decline to construe the statutes so as to reach that result. The district court was established in Durham County as of the first Monday in December of 1966. G.S. 7A-131. We hold that it has the power to enforce by a civil contempt proceeding a confession of judgment entered in the Superior Court on 4 May 1966 allowing alimony to the appellee.

The appellant also questions the sufficiency of the findings of fact in the final order of Judge Lee entered 29 August 1969.

> "The findings of fact by the judge in contempt proceedings are conclusive on appeal when supported by any competent evidence . . . and are reviewable only for the purpose of passing on their sufficiency to warrant the judgment." *Willis v. Willis,* 2 N.C. App. 219, 162 S.E. 2d 592 (1968), quoting from *Rose's Stores v. Tarrytown Center,* 270 N.C. 206, 211, 154 S.E. 2d 313 (1967).

Judge Lee found here that the appellant had "willfully failed to furnish his income tax return by April 30, 1969, as required by the Confession of Judgment . . ."; that appellant had completed his 1968 tax return by 15 April 1969; that he was hospitalized from 17 April 1969 to 8 May 1969 suffering from a heart attack and that "defendant has possessed the means and ability" to comply with Judge Lee's order.

[5] For appellant to be held in contempt for failure to comply with the provisions of the judgment requiring him to "furnish his income tax return by April 30," the trial judge must make "particular findings that defendant possessed the means to comply" with them. *Willis v. Willis, supra.* Here the defendant was hospitalized

with a heart attack on 30 April 1969, and it is questionable whether he had the means to comply with the order at that time, although he admits "it would have been a simple matter for me to drop a copy [of the form] in the mail." However, if this were error, it was harmless error, in that Judge Lee's final order recites that the income tax form has now been furnished to the appellee and to the court. The appellant has apparently been purged of such contempt as would have been associated with his failure to supply the form on time.

[6] Judge Lee found, even though the appellant had been ill, that "since the order of The Honorable E. Lawson Moore of October 11, 1968, defendant has possessed the means and ability to comply with said order and the previous orders of Court." This finding is amply supported by the evidence of relative income and indebtedness. The appellant was earning $15,000-$17,000 a year, his net income was about $1,000 a month and his wife's net income was $282 a month. His monthly expenses were about $800, his medical expenses above insurance incident to his heart attack were $482.03, and he had borrowed $2,400 from local banks. There is no merit in this assignment of error.

The evidence in this case amply supports the order of Judge Lee and further shows that the defendant has been extended far more consideration and delay than he deserves.

We have likewise reviewed the other assignments of error brought forward by appellant and find no error in law.

Affirmed.

PARKER and HEDRICK, JJ., concur.

JAMES S. HOWELL, EXECUTOR OF THE ESTATE OF HARVEY McDARIS, DECEASED, AND HELEN McDARIS v. GERALD WARREN GENTRY

No. 7028SC169

(Filed 27 May 1970)

1. Wills § 73— action to construe will — intention that estate qualify for marital deduction — fee simple title in wife

Where it was apparent from the will in question that the testator intended that his estate would qualify for the tax advantage of the marital deduction, and where a construction of the will giving the wife merely a life interest in the estate would disqualify the estate for the marital de-

duction, the provisions of Article IX which devise and bequeath all of testator's property to his wife are properly construed so as to give the wife a fee simple title to the property; consequently, (1) additional language in Article IX providing that the wife shall not sell any assets of the estate without the written approval of her son is merely precatory, and (2) language in Article X attempting to give the son a remainder interest in the estate is repugnant to the fee and is void.

2. Wills § 28— construction of will — intent of testator

The ultimate consideration of a will must be founded on what the court believes the testator's intent to have been at the time the will was written.

3. Wills § 28— construction of technical words

In the absence of some expression to show the testator meant otherwise, technical words used in a will will be given their technical meaning.

4. Wills § 28— consideration that attorney drafted will

In the construction of a will, the fact that an attorney drafted the will may be considered.

5. Wills § 28— intent as determined from entire will

The testator's intent must be determined from the entire instrument so as to harmonize, if possible, provisions which might otherwise be inconsistent.

6. Wills § 28— particular or general intent

If there is a particular and a general or paramount intent apparent in the same will, the general intent must prevail.

APPEAL by defendant from *Martin (Harry C.), J.*, 21 August 1969 Session of BUNCOMBE County Superior Court.

This is an action for a declaratory judgment under G.S. 1-253, et seq., to construe the will of Harvey McDaris. The portions of the will, the interpretation of which is in dispute, are as follows:

"ARTICLE VIII

It is my intention that the bequest to my wife, hereinafter set forth, shall qualify for the marital deduction. My Executor shall have no power or authority to exercise any discretionary power in any manner which would disqualify such bequest for the marital deduction; and, accordingly, all other provisions of this Will shall be subordinated to this requirement.

ARTICLE IX

All the rest and remainder of my property, located in North Carolina, I will, devise and bequeath unto my wife, HELEN McDARIS, of whatever kind and description and wheresoever the same may be located, at the time of my death, including by

way of description but not of limitation, my home, located on White Pine Drive in the City of Asheville, North Carolina; eighteen (18) acres of land owned by me in Reems Creek Township; Buncombe County, North Carolina, which I purchased from the Mundy Heirs; Notes secured by Chattel Mortgages on Harley-Davidson motorcycles, which at this time exceed Thirty Thousand and no/100 ($30,000.00) Dollars; together with three (3) lots, located on the South side of but not adjoining the Harley-Davidson building, at a point where I have had and do have at this time a shed for the storing of motor vehicles. Said three (3) lots are located immediately North of some property owned by Mr. SAM YOUNG. Together with all real estate Notes of approximately Twenty Eight Thousand and no/100 ($28,000.00) Dollars, and all other real estate not herein devised, and two (2) Certificates of Deposit of Twenty Thousand and no/100 ($20,000.00) Dollars each, issued by the Wachovia Bank and Trust Company of Asheville, North Carolina, (which are in my lock box at the bank, and which shall remain in said lock box during the life of my wife, with the income to be paid to her until my Estate is settled, at which time GERALD WARREN Gentry, Harvey McDaris (The names Gentry Harvey McDaris are handwritten on the original will to complete the name of Gerald Warren Gentry. Harvey McDaris is the signature of the testator.) shall have the privilege of cashing said Certificates, after my Estate is finally settled, if my wife needs the same for her care and protection, all in the discretion of the said GERALD WARREN. It is my further will that GERALD WARREN Gentry, Harvey McDaris (see parenthetical explanation above) counsel with his mother as to the sale of my property, devised and bequeathed to her, as I have great confidence in his good judgment; and it is my will that she shall not sell any assets turned over to her by my Executor without the written approval of GERALD WARREN. The proceeds from the sale of any real or personal property, sold by his approval, shall be deposited in the Wachovia Bank and Trust Company of Asheville, North Carolina, in order to produce income from the interest thereon for the use and benefit of my wife.

ARTICLE X

Upon the death of my wife, I will, devise and bequeath all of my Estate, of every nature and kind, to GERALD WARREN Gentry, Harvey McDaris (see parenthetical explanation above) if he survives me; otherwise, to his child or children surviving him, in equal shares."

"ARTICLE XII

The assets I have heretofore devised to my wife represent in excess of fifty (50) per cent (%) of my Estate; and, it is my intention that such bequest to her shall always qualify for the marital deduction."

After having heard plaintiff's and defendant's evidence and argument the court made the following findings of facts:

"6. The will of January 10, 1968 disposed of all of Harvey McDaris' assets except a Five Thousand ($5,000.00) Dollar Life Insurance policy and a tract of land held by Harvey McDaris and Helen McDaris as tenants by the entirety worth Two Thousand ($2,000.00) Dollars. The assets of Harvey McDaris on January 10, 1968, and disposed of by his will of said date, had a fair market value of Two Hundred Thousand ($200,000.00) Dollars. The assets disposed of by the will of January 10, 1968 had a fair market value of One Hundred Ninety Thousand ($190,000.00) Dollars on the date of Harvey McDaris' death, May 5, 1968.

7. Those items disposed of by Article IX of said will had a fair market value of One Hundred Thirty-Four Thousand ($134,000.00) Dollars as of May 5, 1968.

8. If those items disposed of by Article IX of said will were not devised to Helen McDaris in fee simple, they would not constitute fifty (50%) percent of Harvey McDaris' gross estate and the items devised under Article IX would not qualify for the marital deduction mentioned in Articles VIII and XII of said will and would result in an additional federal estate tax liability to said estate of Twenty-Three Thousand ($23,000.00) Dollars.

9. That as to Articles VIII, IX and XII, the following questions have arisen: What interest did Helen McDaris and Gerald Warren Gentry take under Article IX of said will as to the following items:

(a) Mr. McDaris' home located on White Pine Drive in the City of Asheville, North Carolina;

(b) Eighteen (18) acres of land owned by Mr. McDaris in Reems Creek Township, North Carolina;

(c) Those notes secured by chattel mortgages on Harley-Davidson motorcycles which exceeded Thirty Thousand ($30,000.00) Dollars;

(d) Three (3) lots located on the south side of, but not adjoining the Harley-Davidson building at a point where Mr. McDaris had a shed for the storing of motor vehicles;

(e) All real estate notes in the amount of approximately Twenty Eight Thousand ($28,000.00) Dollars;

(f) All other real estate not herein devised;

(g) Two (2) certificates of deposit of Twenty Thousand ($20,000.00) Dollars each issued by Wachovia Bank and Trust Company of Asheville, North Carolina which were in Harvey McDaris' lock box at the bank;

(h) All the rest and remainder of Mr. McDaris' property located in North Carolina of whatever kind and description and wheresoever the same may be located."

Upon these findings and questions the court concluded:

"1. The language of Article IX of the Will of Harvey McDaris following the specific devisees (sic) and bequests to Helen McDaris and reading as follows:

. . . 'and which shall remain in said lock box during the life of my wife, with the income to be paid to her until my Estate is settled, at which time GERALD WARREN GENTRY shall have the privilege of cashing said Certificates, after my Estate is finally settled, if my wife needs the same for her care and protection, all in the discretion of the said GERALD WARREN. It is my further will that GERALD WARREN GENTRY counsel with his mother as to the sale of my property, devised and bequeathed to her, as I have great confidence in his good judgment; and it is my will that she shall not sell any assets turned over to her by my Executor without the written approval of GERALD WARREN. The proceeds from the sale of any real or personal property, sold by his approval, shall be deposited in the Wachovia Bank and Trust Company of Asheville, North Carolina, in order to produce income from the interest thereon for the use and benefit of my wife.'

is precatory rather than imperative and constitutes an ineffective attempt to limit fee simple devisees (sic) and bequests made to Helen McDaris by the preceding provisions of Article IX of said Will.

2. The interest taken by Helen McDaris and Gerald Warren Gentry of the items devised and bequeathed under Article IX of said Will is as follows:

(a) Mr. McDaris' home located on White Pine Drive in the City of Asheville, North Carolina; Helen McDaris took fee simple interest; Gerald Warren Gentry took no interest;

(b) Eighteen (18) acres of land owned by Mr. McDaris in Reems Creek Township, Buncombe County, North Carolina, Helen McDaris took fee simple interest; Gerald Warren Gentry took no interest;

(c) Those notes secured by chattel mortgages on Harley-Davidson motorcycles which exceeded Thirty Thousand ($30,000.00) Dollars; Helen McDaris took fee simple interest; Gerald Warren Gentry took no interest;

(d) Three (3) lots located on the south side of, but not adjoining the Harley-Davidson building at a point where Mr. McDaris had a shed for the storing of motor vehicles; Helen McDaris took fee simple interest; Gerald Warren Gentry took no interest;

(e) All real estate notes in the amount of approximately Twenty-Eight Thousand ($28,000.00) Dollars; Helen McDaris took fee simple interest; Gerald Warren Gentry took no interest;

(f) All other real estate not herein devised; Helen McDaris took fee simple interest; Gerald Warren Gentry took no interest;

(g) Two (2) certificates of deposit of Twenty Thousand ($20,000.00) Dollars each issued by Wachovia Bank and Trust Company of Asheville, North Carolina which were in Harvey McDaris' lock box at the bank; Helen McDaris took fee simple interest; Gerald Warren Gentry took no interest;

(h) All the rest and remainder of Mr. McDaris' property located in North Carolina of whatever kind and description and wheresoever the same may be located; Helen McDaris took fee simple interest; Gerald Warren Gentry took no interest.

Upon the foregoing Findings of Fact and Conclusions of Law, the Court ADJUDGES that:

1. Helen McDaris by virtue of Article IX of the Will of Harvey McDaris is the fee simple owner of the following properties:

(a) Mr. McDaris' home located on White Pine Drive in the City of Asheville, North Carolina;

(b) Eighteen (18) acres of land owned by Mr. McDaris in Reems Creek Township, Buncombe County, North Carolina;

(c) Those notes secured by chattel mortgages on Harley-Davidson motorcycles which exceeded Thirty Thousand ($30,000.00) Dollars;

(d) Three (3) lots located on the south side of, but not adjoining the Harley-Davidson building at a point where Mr. McDaris had a shed for the storing of motor vehicles;

(e) All real estate notes in the amount of approximately Twenty Eight Thousand ($28,000.00) Dollars;

(f) All other real estate not herein devised;

(g) Two (2) certificates of deposit of Twenty Thousand ($20,000.00) Dollars each issued by Wachovia Bank and Trust Company of Asheville, North Carolina which were in Harvey McDaris' lock box at the bank;

(h) All the rest and remainder of Mr. McDaris' property located in North Carolina of whatever kind and description and wheresoever the same may be located.

2. Gerald Warren Gentry by virtue of Article IX of said Will is not the owner of any of the properties devised and bequeathed under Article IX of said Will."

Defendant has appealed from the entry of the judgment of which the quoted findings and conclusions are a part.

Bennett, Kelly and Long by E. Glenn Kelly for plaintiff appellees.

Peter L. Roda for defendant appellant.

MORRIS, J.

[1-6] The only question to be determined in this case is whether Helen McDaris takes a fee simple interest, excluding Gerald Warren Gentry, or merely a life estate in the property, passing under the terms of the will, with Gerald Warren Gentry taking a fee simple as remainderman. It is axiomatic that the ultimate construction of a will must be founded on what the court believes the testator's intent to have been at the time the will was written. There are, of course, many other elements to be considered when construing a will. In the absence of some expression to show the testator meant otherwise, technical words used in a will will be given their technical meaning. *McCain v. Womble*, 265 N.C. 640, 144 S.E. 2d 857 (1965).

The fact that an attorney drafted the will may be considered. *Clark v. Conner,* 253 N.C. 515, 117 S.E. 2d 465 (1960). The testator's intent must be determined from the entire instrument so as to harmonize, if possible, provisions which might otherwise be inconsistent. *Olive v. Biggs,* 276 N.C. 445, 173 S.E. 2d 301 (1970). Each clause, phrase or word should be given a meaning in accord with the general purpose of the will. *Gatling v. Gatling,* 239 N.C. 215, 79 S.E. 2d 466 (1953). If there is a particular and a general or paramount intent apparent in the same will, the general intent must prevail. *Ross v. Toms,* 15 N.C. 376 (1833). A statement of Parker, J., (later C.J.), in *Gatling v. Gatling, supra,* seems particularly appropriate:

> "Every will is so much a thing of itself, and generally so unlike other wills, that it must be construed by itself as containing its own law, and upon considerations pertaining to its own peculiar terms. Probing the minds of persons long dead as to what they meant by words used when they walked this earth in the flesh is, at best, perilous labor."

Applying the well-known rules of construction to the will now before us, we are of the opinion that the construction placed upon the will by the trial court is correct.

[1] There can be no doubt the paramount intent of the testator was that his estate have the tax advantage of the marital deduction. This intent is unequivocally expressed in Article VIII when the testator says *"It is my intention that the bequest to my wife,* hereinafter set forth, *shall qualify for the marital deduction.* My Executor shall have no power or authority to exercise any discretionary power in any manner which would disqualify such bequest for the marital deduction; *and accordingly, all other provisions of this Will shall be subordinated to this requirement."* (Emphasis supplied.) This intent was reiterated in Article XII: "The assets I have heretofore devised to my wife represent in excess of fifty (50) per cent (%) of my Estate; and, *it is my intention that such bequest to her shall always qualify for the marital deduction."* (Emphasis supplied.)

The complaint filed in this action alleges, and the allegation is admitted by the answer, that the will was drafted by a licensed practicing attorney.

Technical words are presumed to have been used in a technical sense. *McCain v. Womble, supra.* The words "marital deduction" are technical words and have a recognized particular meaning. In these times of tax consciousness, it would almost defy credulity to say that the attorney and the testator were unaware of the requirements in devising property to qualify for the marital deduction. To

qualify, property must be includable in the decedent's gross estate, must be a deductible interest, must pass to the surviving spouse, and must not be disqualified as a nondeductible terminable interest, Internal Revenue Code, 26 U.S.C.A. § 2056. A terminable interest is defined as an interest which will terminate or fail after a certain period of time, the happening of some contingency, or the failure of some event to occur. I.R.S., Reg. § 20.2056(b) — 1(b). Obviously a life estate would come within the terminable interest definition, and this is specifically stated in both the Code and the Regulations. Nor was any attempt made to bring the devise to the wife within any of the exceptions to the terminable interest rule. Bolstering the argument that the primary intent of the testator that the property given his wife should qualify for the marital deduction is his specific instruction that his executor shall have no power or authority to exercise any discretionary power in any manner which would disqualify the bequest to his wife for the marital deduction. Although the will contained no pecuniary bequest to the wife which the executor could, in his discretion, satisfy by a distribution in kind at estate tax values, thus running the risk of losing the entire marital deduction, it appears that the testator was taking every precaution known to him to assure his estate of the advantage of the marital deduction.

Defendant argues that Article X of the will clearly expresses the intent of testator that defendant have a remainder interest in the property devised and bequeathed to testator's wife. As already expressed herein, it appears to us that the primary object of the testator, as expressed in the language of the will, was to give his wife a fee simple title to the property passing to her under the will in order to qualify it for the marital deduction. By Article IX he provides: "All the rest and residue of my property, located in North Carolina, I will, devise and bequeath unto my wife, HELEN McDARIS, of whatever kind and description and wheresoever the same may be located, at the time of my death, including by way of description but not of limitation . . ." "Having devised an estate in fee, it is said that there was no estate left in testator to dispose of." *Carroll v. Herring,* 180 N.C. 369, 370, 104 S.E. 892 (1920). The attempt to devise a remainder by Article X is void as repugnant to the fee given by Article IX and certainly, in view of the expressed intent of the testator, could have no effect.

Defendant suggests that if the express intent of the testator with respect to the marital deduction be given effect it should only be effective for property valued up to one-half the estate or, in the

alternative, give effect to the special treatment with respect to the two certificates of deposit listed in Article IX of the will by an interpretation which would result in the widow's taking a life estate in those with remainder to defendant. It is not within our province, however, to rewrite the will of the testator. Had the testator desired to use a formula bequest for the marital deduction with appropriate directions to the executor in order to insure the qualification for the marital deduction, we presume he would have done so. We agree with the interpretation of the trial court that the language of Article IX of the will following the specific devises and bequests to the wife are merely precatory. In our opinion they constitute merely expressions of the testator in the way of suggestions to his wife as a possible practical method of handling and conserving the property passing to her under the will after the administration of his estate has been completed.

For the reasons stated herein, the judgment of the trial court is Affirmed.

MALLARD, C.J., and VAUGHN, J., concur.

IN THE MATTER OF SANDRA WHICHARD

No. 703DC225

(Filed 27 May 1970)

1. Appeal and Error § 24— necessity for assignments of error — indigent appellant — consideration of appeal

Appeal is subject to dismissal where both the record on appeal and the appellant's brief contain no assignments of error but list or refer only to the exceptions, Rule of Practice in the Court of Appeals No. 28; however, the Court of Appeals considers the appeal on its merits where it does not appear that appellant, a juvenile and an indigent, was represented by court-appointed counsel either on appeal or in the district court.

2. Constitutional Law § 29; Courts § 15; Infants § 10— juvenile hearing — right of jury trial

A juvenile has no constitutional right to a jury trial in a juvenile hearing.

3. Constitutional Law § 30; Courts § 15; Infants § 10— juvenile hearing — right to public trial

District court did not err in excluding the general public from a juvenile hearing.

4. Courts § 15; Infants § 10; Constitutional Law § 20— juvenile delinquency statute — lengthy commitment — constitutionality

The Juvenile Court Act is not unconstitutional on the ground that it authorizes a longer period of confinement for a juvenile who violates a criminal statute than for an adult who violates the same statute.

5. Infants § 10— juvenile hearing — sufficiency of evidence

In a juvenile hearing on a charge that the juvenile, a 15-year-old girl, assaulted a female schoolmate with her hands and fists during school hours, the evidence *is held* sufficient to withstand the juvenile's motion to dismiss the charge.

6. Infants § 10; Courts § 15— juvenile hearing — court as trier of fact

As the trier of the facts, the court in a juvenile delinquency proceeding has the duty to determine the weight and credibility to be given to the evidence presented, and it can believe or disbelieve the testimony of any witness.

7. Appeal and Error § 45— the brief — abandonment of exceptions

An exception not argued in appellant's brief is deemed abandoned. Rule of Practice in the Court of Appeals No. 28.

8. Infants § 10— juvenile delinquency statute — commitment for indefinite time — constitutionality

The Juvenile Court Act is not unconstitutional on the ground that it permits a delinquent to be confined in a state institution for an indefinite period of time.

9. Infants § 10— purpose of Juvenile Court Act

The purpose of the Juvenile Court Act is to give to delinquent children the control and environment which may lead to their reformation and enable them to become law abiding and useful citizens — a support and not a hindrance to the State.

10. Infants § 10; Courts § 15— juvenile statute — jurisdiction over child

Under the Juvenile Court Act, as amended, jurisdiction of the child ordinarily does not extend beyond the eighteenth birthday of the child. G.S. 7A-286(4)(c).

11. Infants § 10— subject matter of Juvenile Court Act — termination of judisdiction

The subject matter of the Juvenile Court Act is delinquent children, over whom the juvenile courts are given control and jurisdiction during their minority; this clearly ends when their minority ends and their status as children no longer obtains.

APPEAL by respondent from *Phillips, District Judge,* November 1969 Session, District Court, PITT County.

This case arose out of an incident which occurred at Julius Rose High School in Greenville. The facts are set out in the opinion.

The appellant, a juvenile age 15, and her parents were summonsed to attend a juvenile hearing pursuant to a juvenile petition filed by David R. Bullock of the Greenville Police Department, as follows:

"D. R. Bullock, Petitioner, having sufficient knowledge or information to believe that the child named above is in need of the care, protection or discipline of the State, alleges:

1. That said child is less than sixteen years of age, and is now residing within the territorial jurisdiction of the District Court for this County at the address shown above.

2. That the names of the parents, and of the person having the guardianship, custody or supervision of said child if other than a parent, are as follows:

Name	*Relation*	*Address*
David Whichard	Father	904-A Bancroft Avenue, Greenville
Mildred Whichard	Mother	904-A Bancroft Avenue, Greenville

3. That the facts and circumstances supporting this petition for court action are as follows:

Assaulted Betty Moore with her hands and fist, Betty Moore a white female, age 16.

Petitioner, therefore, prays the court to hear and determine this case, and, if need be found, to give said child such oversight and control as will promote the welfare of such child and the best interest of the State."

At the hearing, the juvenile was represented by counsel, Jerome Paul, attorney of Greenville, and James E. Ferguson, II, of Chambers, Stein, Ferguson and Lanning, Charlotte, North Carolina. The court, of its own motion, ruled that the public would be excluded from the hearing, to which ruling the juvenile objected and excepted.

Prior to the introduction of evidence, the juvenile moved to dismiss the petition on the ground that the juvenile statute is unconstitutional — that it is vague and overbroad and violates the juvenile's rights of due process and equal protection. To the denial of this motion, the juvenile objected and took an exception.

At the conclusion of the evidence for the State, the juvenile moved that the petition be dismissed. The motion was denied and

was renewed at the conclusion of all the evidence. It was again denied, and the juvenile objected and excepted.

The court entered an order finding facts and adjudicating the juvenile to be a delinquent child and committing her "to the Dobbs Farm, an institution for girls of the age of 15 years maintained and operated by the State of North Carolina, at Kinston, North Carolina, to be and remain in the custody of said institution for such period of time as the Board of Juvenile Correction or the Superintendent of said institution may determine consistent with the law controlling."

To the entry of the judgment the juvenile objected, excepted, and appealed to this Court.

Attorney General Robert Morgan by Staff Attorney L. Philip Covington for the State.

Jerry Paul and Chambers, Stein, Ferguson and Lanning, by James E. Ferguson, II, for respondent appellant.

MORRIS, J.

[1] At the outset, we notice that the record on appeal contains no assignments of error, but the exceptions are listed. The brief of appellant does not refer to any assignment of error but refers only to the exceptions shown in the record. The appeal is subject to dismissal for failure to comply with the rules of this Court. *Trust Co. v. Henry,* 267 N.C. 253, 148 S.E. 2d 7 (1966); Rule 28, Rules of Practice of the Court of Appeals of North Carolina. It does not appear that appellant was represented by court-appointed counsel either on appeal or in District Court. It does appear, however, that she was allowed to appeal as a pauper upon the filing of an affidavit of indigency. We have, therefore, despite the failure to present her appeal properly, considered the appeal on its merits.

[2-4] The appellant strenuously argues that the court committed error in denying her motion for a jury trial (Exception No. 3) and in excluding the general public from the hearing (Exception No. 1). She also argues that Article 2 of Chapter 110, General Statutes of North Carolina (the North Carolina Juvenile Court Act) is unconstitutional on its face or as applied because it is void for vagueness and overbreadth and authorizes a longer period of confinement for a juvenile who violates a criminal statute than for an adult who violates the same statute (Exception No. 2). All of these questions were raised in *In re Burrus,* 275 N.C. 517, 169 S.E. 2d 879 (1969),

comprehensively discussed by Huskins, J., in the opinion therein and decided adversely to the juvenile's position. We note that the juvenile in that case was represented by the same counsel who now argues the same position he argued in that case. Counsel urges that the ruling in *In re Burrus, supra,* should now be reconsidered in light of the decisions in *DeBacker v. Brainard,* 396 U.S. 28, 24 L. Ed. 2d 148, 90 S. Ct. 163 (1969). There the Supreme Court of Nebraska had affirmed the District Court of Dodge County, Nebraska, in its dismissal of a habeas corpus petition by a minor, who, after a hearing without a jury before a juvenile court judge, had been found to be a delinquent and committed to a training school because of an act which, if committed by an adult, would have constituted forgery under state law. Appeal to the United States Supreme Court was dismissed as an inappropriate case for determining whether the juvenile was entitled to a jury trial because at the time of the juvenile's hearing, he would have had no constitutional right to a jury trial if he had been tried as an adult in a criminal proceeding. The appellant points to the strong dissenting opinions of Justices Douglas and Black, in *DeBacker,* as the basis for her argument. We find nothing in appellant's argument indicating or requiring a reassessment of the principles enunciated in *In re Burrus.* We adhere to the principles of *In re Burrus,* and the questions here set out as raised by appellant are answered adversely to her.

[5] Appellant also contends that her motion to dismiss the petition as of nonsuit should have been allowed. The evidence for the petitioner tends to show that at about 1:00 p.m. on 24 October 1969 Betty Moore and a friend were standing in the foyer or hall at the front door of Julius Rose High School. The respondent, Sandra Whichard, and two other girls came into the entrance hall. Sandra was in the middle. One of the girls pushed Betty. When Betty regained her balance, she stuck out her tongue at the girl. After a verbal exchange, Betty again stuck out her tongue. Betty Moore's account of the events following was: "Before I knew what was happening, Sandra had backed away among the other people and it was calm for a brief moment. And then all of a sudden, just like a ball of fire hit her, Sandra slapped me. Sandra slapped me on the right side of my face. I was pushed and lost my balance, and when I regained my balance I was mad, and I slapped Sandra who was back leaning onto the trophy case. Someone yelled, 'Get her.' Then Sandra hit me back in the face, grabbed my face and scratched it. Before I knew it, everyone was on me pulling me by the hair. I was on the floor. I did not see Sandra any more. I was knocked out. I was trying to get up and grabbed a boy in the stomach. I felt my fingernails

go into him. I pulled myself up and as soon as I got up I was knocked down again. I don't remember what happened then until I was taken into a room where I passed out again. The next thing I remember I was sitting on some kind of board. I was injured. I had fingernail scratches on my face which have now cleared up. I had bumps all over my head. Half of my hair was pulled out. I got scratched and kicked. My lip was busted inside. My knees were badly bruised up, and my arms and hands got bruised. I had no broken bones. I was taken out on a stretcher, put in an emergency rescue squad truck and carried to Pitt Memorial Hospital where I was treated and released. I did not stay overnight."

A teacher testified that he was in the hall at the time the commotion started and was not more than 10 feet from Betty Moore who had stopped and was watching what was going on. As she was watching, someone came by and "either pushed or hit her". She "said something back" and stuck her tongue out at them. Someone hit her and then everything broke loose on her. He tried to get her away and get her out. Finally a policeman got there and was able to stop it and get people away from her. When the witness got to Betty Moore, the police officer was holding some girl who was trying to get away from him, was kicking and hollering. Betty Moore was lying on the floor with her face down. He picked her up and put her into the construction area where she was administered first aid.

The police officer testified that when he got through the crowd and got the crowd pushed back, he found Sandra Whichard on top of Betty Moore. He further testified: "She was on top of her pulling her hair out. She had her hands full of hair, that she had pulled from Miss Moore's head. I immediately reached down and took hold of both of Sandra Whichard's hands and pulled her up and kinda set her to one side. At that time I realized that Betty Moore was unconscious. At that time Sandra Whichard went back on Betty Moore on the floor, hitting her with her fists and reached up and grabbed two more hands full of hair. At that time I grabbed her by her hands again; and when I got her up that time I held on to her and summoned aid so I could get Betty Moore into a room off to herself. I then turned Sandra Whichard over to two other officers who brought her to the courthouse."

The juvenile and witnesses testifying in her behalf testified, in substance, that Betty Moore struck the first blow, that Betty Moore was not unconscious when the officer arrived but became unconscious after he pulled Sandra Whichard from Betty Moore. One witness for the juvenile testified, on direct examination, that before the fight-

ing was stopped, Betty Moore looked up and said, "Please stop hitting me."

Clearly the evidence was sufficient to withstand the motion to dismiss, and the court did not commit error in denying the motion.

[6] Appellant contends that the judgment should have been set aside, arguing that the evidence was clearly insufficient to establish guilt beyond a reasonable doubt. We do not agree. Prior to the presentation of any evidence and upon inquiry of counsel for the juvenile, the court announced that the degree of proof required to be met by petitioner was proof of the allegations in the petition beyond a reasonable doubt. *In re Winship*, 25 L. Ed. 2d 368 (decided 31 March 1970). Appellant cites no authority to support her contention. She argues that the juvenile produced five witnesses who contradicted the testimony of Miss Moore, the police officer, and the teacher. Apparently appellant's position is that the juvenile's witnesses were numerically stronger and, therefore, the trier of the facts could not be convinced of the juvenile's guilt beyond a reasonable doubt. This argument, of course, finds no support in our law. Where, as here, there is no jury trial, the court is the trier of the facts. As the trier of the facts, the court had the duty to determine the weight and credibility to be given to the evidence presented, and he could believe or disbelieve the testimony of any witness. *Taney v. Brown*, 262 N.C. 438, 137 S.E. 2d 827 (1964). Appellant's contention in this respect is without merit.

[7] Appellant's Exception No. 5 apparently is taken to the court's ruling on two separate motions; the motion to set the judgment aside and her motion for arrest of judgment on the ground that to subject the juvenile to further disposition by the State would constitute double jeopardy because she had already been disciplined by an institution of the State by her suspension from school. Even should we assume this exception to be properly taken, appellant's brief contains no argument on this question, and we therefore deem this position abandoned. Rule 28, Rules of Practice of the Court of Appeals of North Carolina.

[8] Finally, appellant contends that the North Carolina Juvenile Court Act (Article 2 of Chapter 110) was, at the time of this occurrence and hearing, unconstitutional in that, as applied, it permitted one who was adjudicated a delinquent to be confined in a State institution for an indefinite period of time. Again appellant cites no authority for this argument. She takes the position that the judgment providing that she remain at Dobbs Farm "for such period of time as the Board of Juvenile Correction or the Superintendent of said

institution may determine consistent with the law controlling" could result in her remaining in a State institution forever.

[9, 10] The speciousness of this paralogistic argument is readily apparent upon an analysis of the statute. The purpose of the statute is to give to delinquent children the control and environment which may lead to their reformation and enable them to become law abiding and useful citizens — a support and not a hindrance to the State. *State v. Burnett,* 179 N.C. 735, 102 S.E. 711 (1920). Under the statute, as amended, effective pending this appeal, jurisdiction of the child ordinarily does not "extend beyond the eighteenth birthday of the child." G.S. 7A-286(4)(c). The training schools were established for the training and moral and industrial development of the delinquent children of the State. *State v. Frazier,* 254 N.C. 226, 118 S.E. 2d 556 (1961). In that case, Parker, J. (later C.J.), quoted the Court in *In re Watson,* 157 N.C. 340, 72 S.E. 1049 (1911), as follows:

> "The question as to the extent to which a child's constitutional rights are impaired by a restraint upon its freedom has arisen many times with reference to statutes authorizing the commitment of dependent, incorrigible, or delinquent children to the custody of some institution, and the decisions appear to warrant the statement, as a general rule, that, where the investigation is into the status and needs of the child, and the institution to which he or she is committed is not of a penal character, such investigation is not one to which the constitutional guaranty of a right to trial by jury extends, nor does the restraint put upon the child amount to a deprivation of liberty within the meaning of the Declaration of Rights, nor is it a punishment for crime."

[11] The subject matter of the statute is delinquent *children,* over whom the juvenile courts are given control and jurisdiction during their *minority.* This clearly ends when their *minority* ends and their status as a *child* no longer obtains. As was said in *In re Burrus, supra,* appellant seeks "to equate the protective custody of children under the juvenile laws of the State with the trial and punishment of adults under the criminal statutes." By so doing, she concludes that since a juvenile may be committed "during minority" (unless sooner released by the proper authorities) he may be required to "remain in a state institution FOREVER." Therefore, she argues the statute is unsound. This rationale is fallacious and is not supported by the statute, by any decision of the courts of this State, other states, or any federal decision called to our attention or which we have been able to find.

The juvenile here was fully advised of the alleged misconduct, had ample time for preparation for hearing, she and her parents had ample notice of the hearing and adequate opportunity to be heard. She was ably represented by counsel of her choice.

No error.

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

JACK HOPKINS v. SALLY HOPKINS

No. 7028SC20

(Filed 27 May 1970)

1. Domicile § 3— child custody decree — domicile of child

Where custody of children was awarded to the mother by a divorce decree entered in another state, the children are considered domiciled where the mother is domiciled.

2. Divorce and Alimony § 22— child custody action — application of former G.S. 50-13

[Former] G.S. 50-13 applies to an action for child custody begun prior to 1 October 1967, the effective date of G.S. 50-13.1 *et seq.* which repealed and replaced G.S. 50-13.

3. Divorce and Alimony § 22— foreign child custody decree — jurisdiction under former G.S. 50-13 to determine custody

Where a decree of divorce of another state awarded custody of the minor children of the marriage, the courts of this State have no jurisdiction under [former] G.S. 50-13 to award custody of the children except in conformity with the decree of the sister state unless the children are domiciled in this State at such time.

4. Divorce and Alimony § 22— custody of children domiciled in foreign state — temporary visit in this State — jurisdiction under former G.S. 50-13

Where a divorce decree of another state awarded custody of the children of the marriage to the mother, who is a resident of and is domiciled in such other state, and the children have continuously resided with the mother and have been in this State only for temporary visits with the father, the courts of this State had no jurisdiction to determine an action for custody of the children instituted by the father during a temporary visit of the children in this State, notwithstanding the mother filed an answer in the father's action, and orders issued by the court in such action are null and void.

5. Courts § 2; Judgments § 17— decision by court without jurisdiction — null and void proceedings

When a court decides a matter without having jurisdiction, the whole proceeding is null and void.

6. Divorce and Alimony § 22— child custody order — lack of jurisdiction — motion to modify original order

Where the court did not have jurisdiction to enter an order in the father's action for custody of children domiciled in another state, the court did not have jurisdiction to pass upon the father's motion for modification of the original order based upon an alleged change of conditions, the motion being merely a continuance of the original action.

7. Divorce and Alimony § 22— modification of foreign child custody decree — G.S. 50-13.7(b)

In order to invoke the aid of G.S. 50-13.7(b) governing the entry of a new order for child custody or support which modifies or supersedes an order entered by a court of another state, plaintiff must show (1) jurisdiction and (2) changed circumstances.

8. Divorce and Alimony § 22— child custody — jurisdiction — physical presence in State

The courts of this State can acquire jurisdiction in a child custody proceeding instituted after 1 October 1967 when the child is physically present in this State. G.S. 50-13.5(c)(2)(a).

9. Divorce and Alimony § 22— child custody — acquisition of jurisdiction — child subsequently leaves State

If the court acquires jurisdiction in a child custody proceeding, the fact that the child subsequently leaves the State would not deprive the court of jurisdiction. G.S. 50-13.5(c)(4).

10. Divorce and Alimony § 22— child custody order — lack of jurisdiction — motion to modify order — children physically present in State

Where the court had no jurisdiction when it entered a custody order for children domiciled in another state, the court did not acquire jurisdiction under G.S. 50-13.7(b) by a motion in the cause for change in the custody of one of the children filed by the father after the effective date of that statute while the children were physically present in this State, since the filing of a motion in a cause in which the court has not acquired jurisdiction does not confer jurisdiction under G.S. 50-13.7.

11. Courts § 9— general county court — disregard of void order by another judge

If a judge of the general county court enters an order without legal power to act in respect to the matter, such order is a nullity, and another judge of the general county court may disregard it without offending the rule which precludes one judge of the general county court from reviewing the decision of another.

12. Courts § 9; Divorce and Alimony § 22— custody order void for lack of jurisdiction — dismissal of action by another judge

Where the general county court had no jurisdiction in a child custody action, judge of the general county court did not err in setting aside the custody orders entered in the matter by another judge of the general county court and in dismissing the action.

APPEAL by plaintiff from *Grist, J.*, July 1969 Session of Superior Court held in BUNCOMBE County.

Jack Hopkins (plaintiff) and Sally Hopkins (defendant) were married on 16 October 1954 in Bar Harbor, Florida. At that time they were both citizens and residents of the State of Florida. Three children, John Taylor Hopkins, George P. Hopkins, and James Gillmore P. Hopkins, were born of the marriage. The plaintiff and defendant were divorced in June 1964 in Duval County, Florida. The Florida court had jurisdiction of the plaintiff, the defendant, and the three children. In the divorce decree an order was entered awarding custody of the children to the defendant, with the right given to the plaintiff to visit with and be visited by said minor children. Subsequent to the divorce, the plaintiff moved his residence to Buncombe County, North Carolina. The children resided with their mother in Florida until 11 August 1967 when, pursuant to an agreement between plaintiff and defendant, the children were permitted to visit plaintiff in Buncombe County. The period of visitation was to be from 11 August 1967 until 28 August 1967. On 28 August 1967, the plaintiff filed a petition in the general county court for custody of the three children. Temporary custody of the children was granted to plaintiff on 29 August 1967. On 19 October 1967, the defendant filed an answer to the complaint asking the court to dismiss the action for lack of jurisdiction and in the alternative praying for the custody and support of the children.

On 27 October 1967 the judge held a hearing and granted custody to the defendant but required that (1) the children be given psychological and psychiatric treatment; (2) the mother file biweekly reports with the father on the children's progress; (3) the father pay $27.50 per week support; (4) the father could have custody of the children during the summer of 1968; and (5) each party must file a $5,000 bond to secure compliance with this judgment. No exception or appeal was taken from this order by either of the parties. The children again visited the plaintiff in August 1968, and on 7 August 1968 the plaintiff filed a motion in Buncombe County Superior Court alleging a change of conditions since the order of 27 October 1967 and asking for one year temporary custody of the

oldest child. The record is silent as to whether such notice was served on defendant. The child was returned to Florida at the end of August 1968.

On 9 December 1968 defendant filed an answer to the motion asking that the motion be denied and that the children's visitation with the plaintiff be curtailed and that support paid by the plaintiff be increased.

On 14 December 1968 Judge Willson of the General County Court issued an "Interim Order" ordering the oldest child, John Hopkins V, to be delivered to the plaintiff in order that the child undergo a "complete and up-to-date psychological evaluation." The record fails to reveal that the defendant had any notice of this hearing.

On 20 December 1968 defendant filed a motion before Judge Cogburn of the General County Court asking that the "Interim Order" be set aside and that the court dismiss the pending actions for lack of jurisdiction.

Judge Cogburn, after a hearing, found the facts to be as follows:

"1. That this action was instituted by the plaintiff, filed August 28, 1967; that the return on the summons in said action showed the defendant not to be found in Buncombe County; that thereafter attempted service of process was made by publication upon the defendant.

2. That at the time of the institution of said action by the filing of complaint on August 28, 1967, the plaintiff had physical possession of the children born of plaintiff and defendant, pursuant to an informal agreement of the parties that said children would visit with the plaintiff during the summer of 1967, said informal agreement providing that the children were to visit with the plaintiff from August 11, 1967, until no later than August 28, 1967, so that the children may rest several days prior to returning to school in Florida, and that said informal agreement further provided that any litigation in any state pending at the time of said agreement concerning child visitation rights of Jack P. Hopkins, be withdrawn.

3. That at the time of the institution of said action by the plaintiff on August 28, 1967, the plaintiff obtained an order wherein the court awarded temporary custody to the plaintiff, Jack Hopkins, upon a finding without hearing or notice of hearing, that the custody of John Taylor Hopkins, George P. Hopkins and James Gilmore P. Hopkins, was within the jurisdiction of this court.

4. That the plaintiff in his complaint alleged and the defendant by answering, admitted the following:

(a) That plaintiff is a citizen and resident of Buncombe County, North Carolina.

(b) That the defendant is a citizen and resident of the State of Florida.

(c) That the plaintiff and defendant were married on the 16th day of October, 1954.

(d) That the following children were born of the marriage, to-wit: John Taylor Hopkins, born June 12, 1960, George P. Hopkins, born January 2, 1962, and James Gillmore P. Hopkins, born August 25, 1963.

(e) That the plaintiff and defendant were divorced in Duval County, Florida, during the month of June, 1964.

(f) That the above named children have been in the custody of the defendant since the time of the divorce.

5. That pursuant to questions proposed by the court to the plaintiff through his counsel with plaintiff being present in open court, the following facts were admitted by the plaintiff:

(a) That a final decree in a certain action entitled 'Sally C. Hopkins, plaintiff, vs. Grover P. Hopkins, defendant', and bearing case number 64-843-E was entered in the Circuit Court, Fourth Judicial Circuit in and for Duval County, Florida, on June 9, 1964, and that the parties to the action now before the court were one and the same parties in the action instituted in Duval County, Florida, and that the defendant in the Duval County Florida action, plaintiff herein, filed pleadings and appeared before the court and the Duval County, Florida court in all respects had personal jurisdiction over the defendant in said action, plaintiff herein.

(b) That said final decree entered in Duval County, Florida, as aforesaid, provided as follows with reference to the custody of the minor children named in said action, same being the same minor children named in the action now pending before the court:

'2. That the plaintiff, Sally C. Hopkins, shall have the permanent care, custody and control of the three minor children of the parties, to-wit: John T. Hopkins, age 3 years, George P. Hopkins, age two years, and James Gillmore Hopkins, age 8½ months. The defendant shall have the right to

visit with and be visited by said minor children of the parties at reasonable time and proper places.'

(c) That said final decree insofar as it affected the custody of the minor children of plaintiff and defendant had not been modified, changed, stricken or otherwise disturbed by motion of either party prior to the institution of the action now before the court on August 28, 1967.

(d) That the plaintiff acknowledged the informal agreement made between the parties for the visitation of the three minor children herein named, said informal agreement previously referred to and pertinent parts thereof set forth herein.

(e) That prior to August 28, 1967, the children had not been to the State of North Carolina, except for the purpose of visitation with their father, the plaintiff herein, with specific arrangements being made for their return to their usual residence in the State of Florida.

6. That the defendant in her answer and by way of further answer and defense by way of motion to dismiss for lack of jurisdiction, affirmatively alleged the entry of the final decree in the Duval County, Florida, action and asserted said final decree as being entitled to full faith and credit in the court of the State of North Carolina, in (sic) a bar to any action instituted within the State of North Carolina.

7. That the minor children herein named were returned to the State of North Carolina during the summer of 1968, and remained here for the purpose of a summer visitation with their father, the plaintiff herein, and returned to the State of Florida on or about August 18, 1968, and that prior to their return on August 18, 1968, and on August 7, 1968, the plaintiff made motion in the cause requesting certain relief of the court concerning the minor child, John Taylor Hopkins, V.

8. That on December 14, 1968, this court entered an interim order requiring that the defendant relinquish the custody of the minor child, John Taylor Hopkins, V, to the plaintiff, that said order was entered without notice or opportunity to be heard and said order was entered when neither the defendant nor the subject of said order, John Taylor Hopkins, V, were in the State of North Carolina.

9. That the minor child, John Taylor Hopkins, V, and the other minor children of plaintiff and defendant, are not now presently before the court nor within the State of North Car-

olina, and that the defendant in this action is now and consistently has been for a number of years, a resident of and domiciled in the State of Florida, and that the minor children of plaintiff and defendant herein named, are now and consistently have been since their birth, domiciled in and residents of the State of Florida."

There were no exceptions taken to these findings of fact by either party. Judge Cogburn concluded and adjudged that the court did not have jurisdiction of the children, vacated all orders heretofore entered herein, and dismissed the action. Plaintiff appealed to the Superior Court, and Judge Grist affirmed the judgment of the General County Court.

From the order of the superior court plaintiff appealed to the Court of Appeals.

Sheldon L. Fogel for plaintiff appellant.

Gudger, Erwin and Crow by James P. Erwin, Jr., for defendant appellee.

MORRIS, J.

[1] Originally, custody of the children had been awarded to the mother of the children pursuant to a divorce decree in the State of Florida. The children are considered domiciled where the mother is domiciled. *Allman v. Register,* 233 N.C. 531, 64 S.E. 2d 861 (1951). The mother is a resident of and is domiciled in Florida. The children lived with their mother in Florida. They have only been in North Carolina for temporary periods of time when they visited with their father, after he became a resident of North Carolina.

[2] Since this action was begun on 28 August 1967, G.S. 50-13 applies, even though it was repealed and replaced by G.S. 50-13.1 through 50-13.8, which became effective from and after 1 October 1967. This statute as amended does not apply retroactively. *Speck v. Speck,* 5 N.C. App. 296, 168 S.E. 2d 672 (1969).

[3] Prior to the 1967 amendments of the statute (G.S. 50-13), our Supreme Court had held that "(w)here decree of divorce of another State awards the custody of the minor children of the marriage, our court has no jurisdiction in the proceeding under G.S. 50-13 to award the custody of the children except in conformity with the decree of the sister state unless the children are domiciled in this State at such time." *Allman v. Register, supra.*

In *Richter v. Harmon,* 243 N.C. 373, 90 S.E. 2d 744 (1956), the Court quoted 43 C.J.S., Infants, § 5, p. 52, et seq., with approval and stated:

> "'Jurisdiction to control, and determine and regulate the custody of, an infant is in the courts of the state where the infant legally resides, and the courts of another state are without power in the premises, and cannot obtain jurisdiction for such purpose over persons temporarily within the state . . . .'"

[4] While *Allman v. Register, supra,* has been distinguished and harmonized by our Supreme Court in various decisions [see *Dees v. McKenna,* 261 N.C. 373, 134 S.E. 2d 644 (1965); *Lennon v. Lennon,* 252 N.C. 659, 114 S.E. 2d 571 (1960); *Richter v. Harmon, supra*], it still, on its facts, remained the law of North Carolina until the 1967 legislative amendments of G.S. 50-13, which became effective on 1 October 1967. The facts in *Allman* and the facts in this case are substantially the same. In each case the children were domiciled and resident in another state. The children were visiting with their father in North Carolina for a specific and temporary period of time. In the case before us the father petitioned the court during this time for an award of custody of the children. The fact that the mother filed an answer in the father's action for custody did not confer jurisdiction over these children. *Allman* controls here, and we hold that the orders of the General County Court issued in the action commenced 28 August 1967 are null and void since the court was without jurisdiction to determine the matter.

[5] When a court decides a matter without the court's having jurisdiction, then the whole proceeding is null and void, *i.e.,* as if it had never happened. *Burgess v. Gibbs,* 262 N.C. 462, 137 S.E. 2d 806 (1964); *Hart v. Motors,* 244 N.C. 84, 92 S.E. 2d 673 (1956); *Hill v. Stansbury,* 224 N.C. 356, 30 S.E. 2d 150 (1944).

[6] On 7 August 1968 the plaintiff filed a motion in this action asking for custody of the oldest child. The plaintiff alleged change of conditions since the entry of the original judgment granting custody to the defendant on 27 October 1967. This motion is merely a continuance of the original action. See Lee, N.C. Family Law, § 226, and G.S. 50-13.7(a). Since we hold that the court did not have jurisdiction in the original action, then it logically follows that the court could not modify that which was *null* and *void.* See *Hill v. Stansbury, supra.*

The question arises as to whether the motion filed on 7 August 1968 might be treated as a motion for a "new order" under G.S. 50-13.7(b) (effective 1 October 1967).

[7] G.S. 50-13.7(b) reads as follows:

> "(b) When an order for custody or support, or both, of a minor child has been entered by a court of another state, a court of this State may, upon gaining jurisdiction, and upon a showing of changed circumstances, enter a new order for support or custody which modifies or supersedes such order for custody or support."

In order to invoke the aid of this statute, the plaintiff must show (1) jurisdiction and (2) changed circumstances.

[8-10] Jurisdiction after 1 October 1967 could be acquired under G.S. 50-13.5(c)(2)a. when the child is *"physically present"* in this State. The child at the time of the filing of the motion in August 1968 may have been physically present in this State. If the court had acquired jurisdiction the fact that the child subsequently left the State would not deprive the court of jurisdiction. G.S. 50-13.5(c)(4). However, filing a motion in a cause in which the court has not acquired jurisdiction does not serve to confer jurisdiction under G.S. 50-13.7. Moreover, the "Motion to be used as an affidavit" filed by the plaintiff on 7 August 1968 does not contain allegations sufficient to state a cause of action under G.S. 50-13.7(b).

[11, 12] Plaintiff contends that the orders of one judge of the General County Court may not be modified or reversed by another judge of the General County Court. The rule as to the authority of one superior court judge to modify and reverse the orders of another superior court judge is applicable here. See *Johnson v. Johnson,* 7 N.C. App. 310, 172 S.E. 2d 264 (1970). However, the correct rule upon these facts is stated in 2 Strong, N.C. Index 2d, Courts, § 9: "If a judge of the Superior Court enters an order without legal power to act in respect to the matter, such order is a nullity, and another Superior Court judge may disregard it without offending the rule which precludes one Superior Court judge from reviewing the decision of another." The General County Court had no jurisdiction to determine the custody of the children in the action commenced on 28 August 1967. Judge Cogburn of the General County Court did not commit error in setting aside the orders issued and dismissing the action.

For the reasons stated above, the judgment of the Superior Court of Buncombe County is

Affirmed.

PARKER and VAUGHN, JJ. concur.

FRANCES LOUISE TOOTHE v. CITY OF WILMINGTON, NORTH CAROLINA, AND THE THALIAN ASSOCIATION, INC.

No. 705SC62

(Filed 27 May 1970)

1. Trial § 21— nonsuit — consideration of evidence

On a motion for judgment of nonsuit the evidence on behalf of the plaintiff must be taken as true and considered in the light most favorable to plaintiff, and all reasonable inferences therefrom which are favorable to plaintiff must be drawn.

2. Games and Exhibitions § 2— liability of proprietor to patrons

One who, expressly or by implication, invites others to come upon his premises to view an event being carried on therein has the duty to be reasonably sure that he is not inviting them into danger and must exercise reasonable care for their safety.

3. Games and Exhibitions § 2— liability of arena proprietor — standard of reasonable care

Since what constitutes reasonable care varies with the circumstances, the vigilance required of the owner of the arena in discovering a peril to the invitee and the precautions which he must take to guard against injuries therefrom will vary with the nature of the exhibition, the portion of the building involved, the probability of injury, and the degree of injury reasonably foreseeable.

4. Games and Exhibitions § 2— duty of arena proprietor — safety of premises

The law does not require the owner of an arena to take steps for the safety of his invitees such as will unreasonably impair the attractiveness of his establishment for its customary patrons.

5. Games and Exhibitions § 2— duty of patrons

Those who attend concerts and similar amusements or exhibitions must anticipate that they will be conducted in the usual manner and surroundings; the duty of the owner is to use reasonable care under the circumstances.

6. Games and Exhibitions § 2— patron's fall into orchestra pit — liability of sublessor to plaintiff — sufficiency of evidence

In an action against the sublessor of a theater by a patron who was injured when she fell into the orchestra pit, the patron's fall occurring after the completion of a concert given by the sublessee, a church college choir, plaintiff's evidence *is held* insufficient to establish the breach of any duty owed to the plaintiff by the sublessor with regard to the sufficiency of the lighting or the construction of the pit, where the evidence was to the effect (1) that the sublessor had relinquished control and operation of the premises to the sublessee for the concert, (2) that the choir leader, and not the sublessor, had given directions for the lighting and the curtains, and (3) that the sublessor was not responsible for the construction of the pit and could not alter it, in any event, without approval of the theater owner.

APPEAL by plaintiff from *Cohoon, J.*, 18 August 1969 Civil Session, NEW HANOVER Superior Court.

The plaintiff instituted this action for personal injuries received when she fell in a theater owned by the City of Wilmington and located in a wing of the City Hall. The City leased the theater premises to the co-defendant, The Thalian Association, Inc., (Thalian). At the close of the plaintiff's evidence, a judgment of nonsuit was entered as to both defendants. The plaintiff appealed from that portion of the judgment granting a nonsuit to the defendant Thalian. No appeal was taken as to the City.

The evidence discloses the following factual situation.

The lease from the City of Wilmington to Thalian provided that the City leased the hall to Thalian "including the dressing rooms, stage, hall, orchestra pit, balconies, lounges, ticket offices, portico and entries . . . ." The lease further provided that Thalian would maintain the premises and make repairs "as may be required for proper maintenances [*sic*] and fire prevention, provided, however, that all such improvements, betterments, interior alterations and expenditures of a nature to change the architectural character and purposes of the demised premises to be made by the lessee are first to be approved as to the nature and kind thereof by [the City]." "The lessee, its successors and assigns, are granted the right and privilege to sublet the demised premises for public gatherings, conferences, public entertainment and assembly; and the lessee agrees that it, and its successors and assigns, will make the said demised premises available from time to time for such public entertainment, gatherings and public conferences, and at all reasonable times when the demised premises are not actually required for use by the lessee."

Pursuant to the terms of its lease, Thalian made the hall available for the Berkshire Christian College Choir for 24 March 1967. The Berkshire Christian College is the theological school located in Lennox, Massachusetts, of the Advent Christian Church, a church denomination with several churches in the Wilmington, North Carolina, area. The plaintiff's husband, Frank Everett Toothe, is a clergyman and has served one of the churches of the denomination in the Wilmington area for some four years. Reverend Crocker of the Ogden Church was supposed to make the arrangements for the choir on behalf of the denomination, but Reverend Toothe did so for Reverend Crocker. Reverend Toothe paid $35.00 for the use of the hall on 24 March 1967. He testified,

". . . I went in to see what it was like, I had never been in.

> That was some few days perhaps before March 24th. I looked over the facilities there and I noted the existence of the orchestra pit. I saw the poles there with the ropes around it up to the center aisle. I went there prior to the commencement of the concert on the night of the 24th, some period of time ahead of the concert. . . ."

The evidence discloses that the $35.00 paid for the use of the hall represented $25.00 for cleaning up the hall before and after the performance, and electricity and heat; and $10.00 for a Mr. Foster, who is a licensed electrician. Thalian required that Mr. Foster, or somebody like him, be present to operate the lighting equipment which "is quite complicated and just a casual sublessee would not be able to work it . . . ." Thalian gave no instructions to Foster when someone else was using the hall. In this regard Rev. Toothe testified that the choir leader from the Berkshire Choir "gave the directions as to what lights would be needed, and when the curtain would need to be opened and he told Mr. Foster this information."

Rev. Toothe further testified,

> "I had seen that the orchestra pit was there and that it was depressed before the night of March 24th. . . . The purpose of having a depressed orchestra pit is to get the orchestra out of the vision of the audience."

The auditorium consisted of a raised stage, a center aisle with seats arranged in rows on each side of the center aisle and a balcony in the rear. There was a space of some 7 to 8 feet between the front row of orchestra seats downstairs and the edge of the depressed orchestra pit which was in front of the raised stage. The depth of the orchestra pit below the floor level was some 8 to 14 inches. Between the orchestra pit and the orchestra chairs, there were located metal posts supporting a large rope. The rope did not extend between the posts on each side of the center aisle so that it was possible to step from the center aisle into the orchestra pit. There have been no changes made in the interior arrangement of the hall since 1938, that is, artistically in the arrangement of the aisle, the orchestra pit and the stage.

The concert on this particular occasion was a public one, and the public had been invited by a newspaper advertisement inserted by Rev. Toothe. There was no admission charge but a free will offering.

The plaintiff, at the time of her fall, was a registered nurse in her early sixties. As the wife of the pastor of the church, she was

active in entertaining the choir by seeing that they received supper the night of the performance and that they got to the hall. She also helped in making the arrangements for housing them with members of the church congregation and seeing that they met their host and hostess. She had nothing to do with making arrangements for the use of the hall itself. She had never been in the hall before and got there just a few minutes before the concert began. She testified:

". . . When the concert was over, as I said before, I was responsible for the students to get a place to stay and I checked and found that most of the students had made their contacts already with their host and hostess that were waiting in the lobby but this one boy so I proceeded down the center aisle to find Gayle Bailey. With respect to the difference in the lights, if any, between the time the concert was just getting over and the time it was over, it is hard to say, the lights were still dim, at least they had not been turned on bright. They were still dim in the auditorium. The appearance of the lighting on the stage of the auditorium immediately after the concert when I started walking down the aisle was very bright.

As to whether I could see the rope part the way around the orchestra pit before I got to it, I say, before I got to it there were people standing down there and you could see portions of it but not the whole rope. There was no one in the center aisle.

* * *

With respect to the appearance of the orchestra pit as I walked along the aisle headed towards the stage, just the continued walkway of the floor that I was walking on of the aisle; I was — didn't see an orchestra pit, didn't seem like there was one there. There were no lights of any sort on the posts beside of the aisle that lead into the pit. There were no lights within the pit. There were no lights shining into the pit. As I walked forward down the aisle I was not talking to anyone, I was looking straight ahead, I was looking for some particular person, Gale Bailey, one of the students. As I walked down one of the other students, another student was on the platform and I called to him and said, 'Where is Gale?' By platform, I mean staging, whatever you want to call it.

I am five-two tall. With respect to the approximate height or my best estimate as to the approximate height of the stage above the floor level of the audience hall at the front of the hall, I say, I am sorry, but I didn't have to look up if that is what you

mean. I did not have to look up. Seems I was looking straight ahead, I didn't have to look up from where I was.

In comparing the lighting in the pit with the lighting in the hall and the lighting on the stage, I say, in that case I would say it was bright and it was dark and it was dim. From where I was walking down that aisle, I cannot recall that I could see any particular individual light or light bulb on the stage. I actually recall falling down into the pit. I could not give you an estimate of the depth of the pit below the floor right side of the pit, that is the floor of the hall, or how far I fell down into the pit. I have not seen that pit since, I do not know. I was so frightened that I could not tell you. It all happened so quickly I am sure —I just know I fell and it was a sudden shock. I don't recall seeing a table either within the orchestra pit or outside the pit. I don't recall it either with or without recording devices. I had not arranged to make any recordings myself and I have no knowledge that anyone else was. I do not recall seeing any recording devices in there."

The plaintiff further testified that as she walked down the aisle and reached the last row of seats before the orchestra pit, she called to someone on the stage,

". . . While I was talking to this person I was continuing to walk up, on up towards the stage. After he said that Gale was back I kept on going.

As to whether my attention was still directed to this person, I say, not necessarily because he had already —no, because he already had answered my question. I was not still carrying on a conversation with this person on the stage when I stepped off from the aisle into the orchestra pit. . . .

* * *

I don't know where I was looking when I stepped off the aisle into the orchestra pit. I don't know now where I was looking at that time."

Plaintiff received serious injuries.

Smith & Spivey for plaintiff appellant.

Marshall, Williams & Gorham by Lonnie B. Williams for defendant appellee, Thalian Association, Inc.

CAMPBELL, J.

[1] On a motion for judgment of nonsuit the evidence on behalf of the plaintiff must be taken to be true and considered in the light most favorable to her and all reasonable inferences therefrom which are favorable to her must be drawn. *Aaser v. Charlotte,* 265 N.C. 494, 144 S.E. 2d 610 (1965).

[2-5] One who, expressly or by implication, invites others to come upon his premises to view an event being carried on therein, has the duty to be reasonably sure that he is not inviting them into danger and must exercise reasonable care for their safety. He is not an insurer of their safety and is liable only for injuries proximately caused by his failure to use reasonable care to discover and remove, or otherwise protect against, dangerous conditions, activities, or occurrences upon his premises. Since what constitutes reasonable care varies with the circumstances, the vigilance required of the owner of the arena in discovering a peril to the invitee and the precautions which he must take to guard against injuries therefrom will vary with the nature of the exhibition, the portion of the building involved, the probability of injury and the degree of injury reasonably foreseeable. The law does not require the owner to take steps for the safety of his invitees such as will unreasonably impair the attractiveness of his establishment for its customary patrons. Those who attend concerts and similar amusements or exhibitions must anticipate that they will be conducted in the usual manner and surroundings. The duty of the owner is to use reasonable care under the circumstances. *Aaser v. Charlotte, supra.*

The statement of the rule is much easier than the application thereof.

There are numerous cases in which the rules are set out and are applied to varying situations. In *Smith v. Agricultural Society,* 163 N.C. 346, 79 S.E. 632 (1913), a judgment of nonsuit was reversed where the plaintiff was attending a ballon ascension, his foot was caught in a rope attached to the ballon, and the plaintiff was taken on a ballon ride rather than simply remaining as a spectator. In *Williams v. Strickland,* 251 N.C. 767, 112 S.E. 2d 533 (1960), it was held that the complaint stated a good cause of action when the plaintiff alleged that the defendant, in operating an automobile race track, failed to provide patrons watching the race with proper seating or protective devices around the track in the way of adequate fences and barricades to prevent patrons from being injured. In this case a wheel came off one of the racing automobiles and struck the plaintiff.

In *Dockery v. Shows,* 264 N.C. 406, 142 S.E. 2d 29 (1965), a general concessionaire was held liable for the negligence of a sub-concessionaire when a patron was injured by one of the amusement devices which was inherently dangerous if precautions were not taken to assure the safety of the riders thereon.

In *Revis v. Orr,* 234 N.C. 158, 66 S.E. 2d 652 (1951), a dance hall proprietor was held not liable to a patron who fell over a chair outside of the ladies restroom door. The patron complained that the fall was due to the dim lights. It was held that a dance hall need not be brightly lighted.

In *Benton v. Building Co.,* 223 N.C. 809, 28 S.E. 2d 491 (1944), a patron opened a door from the lobby of a building into a cigar shop, failed to notice a step-down and fell. A judgment of nonsuit was sustained for that maintaining a difference in floor levels necessitating a step-down does not constitute negligence.

In *Cupita v. Country Club,* 252 N.C. 346, 349, 113 S.E. 2d 712 (1960), a judgment of nonsuit was sustained where a musician preparing to play for a club dance left the parking lot and took a shortcut across the premises and fell into a hole. The court said:

> "'"The owner or occupant of premises is liable for injuries sustained by persons who have entered lawfully thereon only when the injury results from the use and occupation of that part of the premises which has been designed, adapted, and prepared for the accommodation of such persons." . . . If an invitee goes "to out-of-way places on the premises, wholly disconnected from and in no way pertaining to the business in hand" and is injured, there is no liability. [B]ut a slight departure by him "in the ordinary aberrations or casualties of travel" do not change the rule or ground of liability, and the protection of the law is extended to him "while lawfully upon that portion of the premises reasonably embraced within the object of his visit." . . .'"
>
> "The owner or person in charge of premises has a duty to keep the premises which are within the scope of the invitation in a reasonably safe condition for an invitee's safety for all uses by an invitee in a manner consistent with the purpose of the invitation, but the owner or person in charge is not bound to keep them in a reasonably safe condition for uses which are outside of the scope and purpose of the invitation, for which the property was not designed, and which could not reasonably have been anticipated . . . ."

In *Harrison v. Williams*, 260 N.C. 392, 132 S.E. 2d 869 (1963), the plaintiff was directed by an employee of a restaurant to a cigarette machine which was at the end of a counter. In going to the cigarette machine the plaintiff did not anticipate a step-down when she came around the end of the counter in the restaurant and as a result fell and was injured. It was held that the plaintiff had failed to establish actionable negligence on the part of the defendant for that different floor levels in private or public buildings connected by steps are so common that the possibility of their presence is anticipated by prudent persons. Such construction is not an act of negligence unless by its character, location, or surrounding conditions a reasonably prudent person would not be likely to expect a step or see it.

[6] In the instant case there is no evidence that the construction of the hall with a depressed orchestra pit some 8 to 14 inches below the main floor of the auditorium constituted negligent construction. There was no evidence that patrons attending the concert were expected to go down to the front of the hall after the concert was over when that was not the way to any exit and only led to the stage. In the instant case Thalian had subleased the premises and surrendered charge thereof to the Advent Christian denomination for the choir performance. Thalian was obligated to do this under the lease which it had with the city. Thalian was not responsible for the construction of the hall, and under its lease, could not have changed the construction of the orchestra pit without first procuring approval from the city which owned the premises. There was no inherent danger in the construction, and the type and manner of construction was observed by and known to the sublessee, Advent Christian denomination, which was in charge of putting on the performance. The choir leader, and not Thalian, had given the directions as to what lights would be needed and when the curtain would need to be opened. The evidence in this case reveals that Thalian had relinquished control and operation of the premises for this particular performance.

The evidence, in the light most favorable to the plaintiff, fails to establish any duty on the part of Thalian to the plaintiff which was breached and for which Thalian should respond in damages. We hold that the judgment of nonsuit was proper.

Affirmed.

PARKER and VAUGHN, JJ., concur.

TELERENT LEASING CORPORATION v. SNEED HIGH, COMMISSIONER OF NORTH CAROLINA DEPARTMENT OF REVENUE

No. 7010SC87

(Filed 27 May 1970)

1. Taxation §§ 2, 31— double taxation — sales tax — TV lease proceeds

The imposition of a sales tax upon the gross proceeds received by a motel or hotel owner for the rental of a room, and upon the gross proceeds received by the lessor of television sets for the rental of a set located in that room, does not constitute double taxation, the taxes being imposed upon totally separate incidents. G.S. 105-164.4(2), G.S. 105-164.4(3).

2. Taxation § 2— double taxation

Double taxation, as such, is not prohibited by the Federal or State Constitutions.

3. Taxation § 19— exemptions from tax — burden of proof

The burden of showing exemptions or exceptions from taxing statutes is upon the one asserting the exemption or exclusion.

4. Taxation § 31— sales tax — exemption — resale certificates

A lessor of television sets who had not procured resale certificates from any of its customers had the burden to show that its leasing transactions constituted a "sale for resale" entitling the lessor to an exemption from the sales tax. G.S. 105-164.3(13), G.S. 105-164.4, G.S. 105-164.28.

5. Taxation § 31— sales tax — exemption — sale for resale — lease of TV sets

The leasing of a television set to a motel or hotel owner for use in a room rented to transients is not a "sale for resale" within the meaning of the Sales and Use Tax Act. G.S. 105-164.1 et seq.

6. Taxation § 31— sales tax — liability of retailer

The retailer is liable for the sales tax notwithstanding he did not collect it from his customers.

APPEAL by plaintiff, Telerent Leasing Corporation (Telerent), from *Bone, E.J.*, August 1969 Civil Session of WAKE Superior Court.

This action was instituted by Telerent to recover the sum of $16,337.02 (plus interest) which it claims was improperly assessed against it by the Commissioner of the North Carolina Department of Revenue (Commissioner) as a sales and/or use tax. The case was tried upon affidavits and stipulation of facts. The following judgment was entered, reciting the material facts and denying the relief sought by the plaintiff.

"*JUDGMENT* of Bone, J. (Filed 9/9/69)

THIS CAUSE coming on to be heard before the undersigned Judge Presiding at the August 1969 Civil Session of the Superior Court of Wake County, and being heard by the Court upon designated affidavits and an agreed Statement of Facts and Stipulation that the cause may be heard without a jury and judgment signed after the session and out of the District, and, having considered the affidavits and Agreed Statement of Facts and Stipulation of the parties, and having heard arguments of counsel for both parties, the Court makes the following findings of fact and conclusions of law:

(a) The plaintiff is, and was at the time hereinafter mentioned a corporation organized and existing under the laws of the State of North Carolina with its principal place of business in the City of Raleigh, Wake County, North Carolina;

(b) The defendant at the time this suit was begun was the then duly appointed, qualified and acting Commissioner of Revenue of the State of North Carolina and resided at said time in Wake County, North Carolina;

(c) On or about the 22nd day of January, 1964, the North Carolina Department of Revenue notified plaintiff of a sales and/or use tax assessment in the total amount of Twenty-two Thousand Six Hundred Thirty-seven and 60/100 ($22,637.60) Dollars; that said assessment purported to cover a period from January 1, 1961, to November 30, 1963;

(d) Sixteen Thousand Three Hundred Thirty-seven and 02/100 ($16,337.02) Dollars of the tax assessment referred to in the preceding paragraph represented a tax at the rate of three (3%) per cent of the plaintiff's receipts from the rental of television sets to hotels and motels located in the State of North Carolina during the period referred to in the assessment;

(e) On or about the 29th day of September, 1964, the plaintiff paid to the defendant under protest the tax in question, and on or about the 16th day of October, 1964, pursuant to G.S. 105-267 made a formal demand upon the defendant for the refund of said sum plus interest; that the defendant denied the demand for refund, and further, that all other statutory requirements prior to the filing of the suit have been met and the matter is properly before the Court for decision;

(f) During the period from January 1, 1961, to November 30, 1963, the plaintiff leased television sets to sixty-three (63) hotel and motel customers for which it received, by way of gross

rentals, the sum of Five Hundred Forty-four Thousand Five Hundred Sixty-seven and 10/100 ($544,567.10) Dollars;

(g) During the period from January 1, 1961, to November 30, 1963, the plaintiff had television lease agreements with sixty-three (63) hotels and motels; that each of said hotels or motels charged its overnight guest room rentals which in some hotels and motels differed in varing amounts according to the type and quality of accommodations furnished in each room, including, among other varying accommodations, whether or not there was a television set in the room;

(h) All of plaintiff's hotel and motel customers in North Carolina during the tax period were liable for a three (3%) per cent retail sales tax on room rent receipts pursuant to G.S. 105-164.4(3);

(i) The North Carolina Department of Revenue, in making the assessment against the plaintiff, made no allowance or consideration for any differentiation in room rates charged by plaintiff's customers depending on whether or not said rooms contained therein television sets, the assessment against the plaintiff being measured solely by the rentals collected by the plaintiff from its own customers;

(j) For the period covered by the audit, plaintiff's lessees did not furnish to it resale certificates as provided by G.S. 105-164.28;

(k) Except in a few cases the billing statement by the hotel or motel to its guests during the period in question did not show a separate itemization for television sets;

(l) Title to the television sets during the period in question remained at all times in plaintiff;

(m) Affidavits submitted by plaintiff tend to show that during the period covered by the assessment in question some of plaintiff's lessees charged their overnight guests room rates varying from 50¢ to $1.00 over the rate for a room without a television set, said rates being dependent on whether or not there was located in the hotel or motel room a television set, while cross-affidavits submitted by the defendant tend to show that there was no room rate differential depending upon the presence or absence of a television set, but, regardless of this, the Court deems any such differential, as the affidavits of plaintiff tend to show, immaterial; and, as a matter of law, the said gross proceeds derived by plaintiff from its rental of its television sets

to its said hotel and motel customers during the period covered by said assessment were taxable to plaintiff under G.S. 105-164.4(2), and said assessment being properly made, the plaintiff is not entitled to any refund for the taxes paid upon said gross proceeds pursuant to said assessment

IT IS NOW, THEREFORE, ORDERED, ADJUDGED AND DECREED that the plaintiff is not entitled to recover the refund prayed for in its Complaint and plaintiff's prayer for relief is denied and this action is hereby dismissed with the costs to be taxed against the plaintiff.

This the 6th day of September 1969.

s/ WALTER J. BONE
Judge Presiding"

The defendant, Telerent, appealed from this Judgment, asserting (1) that the North Carolina Sales and Use Tax statutes did not permit this tax, which would constitute a "double" tax; and (2) that the leasing transactions constituted sales for resale, which are not covered by the retail sales or use tax.

Attorney General Robert Morgan by Assistant Attorney General I. Beverly Lake, Jr., for Commissioner of Revenue of North Carolina, defendant appellee.

Broughton & Broughton by Robert B. Broughton for plaintiff appellant.

CAMPBELL, J.

[1] Telerent first asserts that the imposition of a sales/use tax on the gross rental of a motel or hotel room as well as on the gross proceeds from the leasing of a television set located in that room constitutes double taxation, and should be held void. We hold that the taxes were properly imposed here, and at any rate do not amount to "double taxation."

[2] First of all, "double taxation," as such, is not prohibited by the Federal or State Constitutions. *Jamison v. Charlotte,* 239 N.C. 682, 80 S.E. 2d 904 (1954). We feel, however, that the levying of the two taxes in the instant case was not "double taxation" as asserted by appellant and as referred to in *Jamison v. Charlotte, supra.* It was stated therein that

"To constitute double taxation both taxes must be imposed on the same property, for the same purpose, by the same state, fed-

eral or taxing authority, within the same jurisdiction, or taxing district, during the same taxing period and there must be the same character of tax. . . ."

The appellant has misconstrued the meaning of the phrase "imposed on the same property" contained in the above definition, as applied to the facts of the instant case. It must be remembered that the *Jamison* case dealt with an *ad valorem* tax, Chapter 1034, Session Laws 1949, whereas we are dealing with a sales/use tax. There, the real or personal property of a *single* taxpayer was being taxed by different taxing authorities for the same purpose. Here two different incidents are being taxed.

[1] The first levy here is upon the gross proceeds from the rental of a room, pursuant to G.S. 105-164.4(3). The second levy is upon the lease of a television set which is located within that room, pursuant to G.S. 105-164.4(2). The statutory language is as follows:

"G.S. 105-164.4. *Imposition of tax; retailer.* — There is hereby levied and imposed, in addition to all other taxes of every kind now imposed by law, a privilege or license tax *upon every person* who engages in the business of selling tangible personal property at retail, renting or furnishing tangible personal property or the renting and furnishing of rooms, lodgings and accommodations to transients, in this State, the same to be collected and the amount to be determined by the application of the following rates against gross sales and rentals, to wit:

* * *

(2) At the rate of three per cent (3%) of the gross proceeds derived from the lease or rental of tangible personal property as defined herein, where the lease or rental of such property is an established business, or the same is incidental or germane to said business; except that whenever a rate of less than three per cent (3%) is applicable to a sale of property which is leased or rented, the lower rate of tax shall be due on such lease or rental proceeds.

(3) Operators of hotels, motels, tourist homes and tourist camps shall be considered 'retailers' for the purposes of this article. There is hereby levied upon every person, firm or corporation engaged in the business of operating hotels, and every person, firm or corporation engaged in the business of operating tourist homes, tourist camps and similar places of business, a tax of three per cent (3%) of the gross receipts derived from the rental of any room or rooms, lodgings, or accommodations furnished to tran-

> sients at any hotel, motel, inn, tourist camp, tourist cabin or any other place in which rooms, lodgings or accommodations are regularly furnished to transients for a consideration. The tax shall not apply, however, to any room, lodging or accommodation supplied to the same person for a period of 90 continuous days or more. Every person subject to the provisions of this section shall register and secure a license in the manner provided in subdivision (7) of this section, and, insofar as practicable, all other provisions of this article shall also be applicable with respect to the tax herein provided for." (Emphasis added)

Our Supreme Court has stated that taxes under G.S. 105-164.4 such as are involved here are *not* imposed upon the *consumer,* but are rather a privilege tax for engaging in business. *Canteen Service v. Johnson, Comr. of Revenue,* 256 N.C. 155, 123 S.E. 2d 582 (1962). As such, the taxes here are imposed on the *owner* of the motel in the first instance and the *lessor* of the television sets in the second instance. It does not matter that the motel owner might conceivably collect the tax with the rental of the room and remit it to the State, as well as pay a tax on the lease of a television in the room, passed on to him by the lessor. Nor does it matter that the renter of the room will pay a tax which is based in part on proceeds arguably attributable to the presence in the room of a television set which was the basis of a sales/use tax on the lessor — the tax is, by its terms, levied upon the "retailer." There is, perforce, no double levy on any one object of taxation, since the two different sections of the sales/use tax impose two separate taxes on two separate people for two separate transactions: a lessor, for the gross proceeds of a lease, and a motel owner, for the gross proceeds of a room rental. The additional room charge when a television set is in the room is not the same amount which Telerent charges as rental. This argument is without merit.

[3, 4] Appellant, secondly, contends that the "lease" transaction here was a "sale for resale," exempted from the effect of G.S. 105-164.4 since it would not be a "retail" sale. G.S. 105-164.3(13). The burden of showing exemptions or exceptions from taxing statutes is upon the one asserting the exemption or exclusion. *Chemical Corporation v. Johnson, Comr. of Revenue,* 257 N.C. 666, 127 S.E. 2d 262 (1962). The burden could be avoided by obtaining "resale certificates" from vendees, as provided for in G.S. 105-164.28. This certificate was not procured by Telerent from any of its customers here, so it must allege and prove that its leasing activities fell outside the purview of the statute.

[5] The question resolves itself to the inquiry as to whether the supplying of a television set to a guest in a room of a motel or hotel by the owner thereof constitutes a "sale" (or more properly, a "resale") to the transient renting the room. We hold that the leasing of a television set to a motel or hotel owner, as under the facts of this case, for use in a room rented to transients, is not a "sale for resale" as contemplated by the North Carolina Sales and Use Tax Act. G.S. 105-164.1 *et seq.*

When a room is rented to a transient guest, it is common practice that the price of the room varies according to the accommodations furnished. For instance, a room with two double beds will usually rent for a higher rate than will one with a single twin bed. Likewise, it is conceivable that a room with a television set would rent at a slightly higher rate than a room similarly furnished, but without a television. It is clear, however, that there is no separate lease or rental of each furnishing which may appear in the room. The consideration paid is for the lodging or accommodation itself —not for a specific bed, lamp, painting, table, chair or television. While we find no pertinent North Carolina authority, we do agree with the reasoning in *Atlanta Americana Motor Hotel Corp. v. Undercofler*, 222 Ga. 295, 149 S.E. 2d 691 (1966), construing a sales/use tax statute similar to ours. The hotel owner there contended that a sales tax was not due to be collected on items which it bought for use in its hotel rooms, such as furniture, television sets, carpeting and other personal property. In upholding the sales tax levy, the court stated:

> "As we view it, Section 3 of the Act, in imposing the tax on charges for rooms, contemplates the room as a total, the complete room. The levy is on 'The sale or charges for any room or rooms, lodgings or accommodations furnished to transients * * *' Code Ann. § 92-3403a, supra. This encompasses whatever is rented — whether one room or several, whether bare or elaborately appointed.
>
> Furthermore, the plaintiff's allegations here as to the personal property show that such property merged with and became part of its hotel rooms and that the charge made to its guests was for the use of the complete rooms. The property was, as alleged, 'Included in said hotel rooms * * *.'
>
> Actually, the plaintiff itself used the property to make its rooms livable, and thus rentable to guests, and the fact that a part of the charge for the rooms was allegedly attributable to such property does not cause such use of it to be a resale. Although

the plaintiff's guests also used this property while occupying the rooms, they used it as a part of the rooms which they rented, not independently. Not many of them would have cared to use the rooms without any of the items mentioned."

[6] G.S. 105-164.26 provides that ". . . it shall be presumed that all gross receipts of wholesale merchants and retailers are subject to the retail sales tax until the contrary is established by proper records as required herein." (See G.S. 105-164.22 *et seq.*) Telerent has not demonstrated that in law or in fact it is entitled to be exempted from the payment of the tax levied on it in the instant case. The retailer is liable for the tax notwithstanding that he did not collect it from his customers. *Canteen Service v. Johnson, supra.*

Affirmed.

PARKER and HEDRICK, JJ., concur.

DOYT HUFFMAN, ADMINISTRATOR OF THE ESTATE OF RUTH HUFFMAN, DECEASED, AND BURKE COUNTY SAVINGS & LOAN ASSOCIATION v. STATE CAPITAL LIFE INSURANCE COMPANY

No. 7025DC108

(Filed 27 May 1970)

1. Insurance § 37— action on life insurance policy — sufficiency of evidence

In this action to recover benefits of a life insurance policy, admissions by defendant insurance company that it issued the policy, that insured died during the period for which premiums were paid, and that proof of death was duly submitted, and introduction of the policy by plaintiff made a *prima facie* case for the jury and placed on defendant the burden of showing legal excuse for refusing payment according to the terms of the policy.

2. Insurance § 18— avoidance of life insurance policy — false application statements as to health

In order to avoid a policy of life insurance on the ground that the insured made false statements as to his health in his application for the insurance, it is not necessary that the insurance company show that the insured harbored any intent to deceive, the statement as to insured's health being material as a matter of law.

3. Insurance §§ 18, 37— action on life policy — instructions — false

application statements as to health — avoidance of policy — burden on defendant insurer

In this action to recover life insurance benefits wherein defendant insurer sought to avoid the policy on the ground that insured had made false statements in her application for the policy that she was in good health "as far as she knew" and that she had not consulted a physician in the last seven years, when in fact deceased was being treated for lung cancer which subsequently caused her death, the trial court erred in instructing the jury that to avoid the policy defendant was required to prove not only that insured answered incorrectly the question as to her knowledge of her state of health, but that she did so with intent to deceive and mislead defendant into issuing the policy of insurance.

4. Insurance §§ 13, 37— life insurance — construction of "good health" clause

Where a life insurance policy is issued without prior medical examination, a "good health" clause in the application will be construed literally as requiring good health of the insured at the time the policy is issued or delivered and will not be construed as applying only to changes in the applicant's health which have taken place since the making or acceptance of the application, it being immaterial that the insured was ignorant of his condition.

APPEAL by defendant from *Evans, District Judge*, 15 September 1969 Session of BURKE District Court.

In this civil action plaintiffs seek recovery of death benefits allegedly payable to them as beneficiaries of a policy of insurance issued by defendant insuring the life of Ruth Huffman, who died on 28 August 1968. Defendant filed answer admitting issuance of the policy and death of the insured. In a further answer defendant denied liability on the grounds, first, that the insured made material misrepresentations in her application for the policy, and, second, that the policy did not take effect in that the insured was not in good health on the date the policy was issued and delivered. Plaintiff's replied, denying all allegations in the further answer.

At the trial defendant stipulated that it had issued the policy to Ruth Huffman on 6 March 1968 and that all premiums were paid through and including the date of her death on 28 August 1968. Plaintiffs introduced in evidence the policy, copy of which had been attached to their complaint as an exhibit, and introduced the paragraphs of the complaint and answer in which plaintiffs had alleged and defendant had admitted timely filing of proof of loss, demand by plaintiffs, and refusal to pay by defendant. Plaintiffs then rested.

The insurance policy contained the following:

"THE CONTRACT — This policy has been issued in consid-

eration of the application and of the payment of premiums as provided.

"The Policy and the application, copy of which is attached, constitute the entire contract."

The insurance policy, as attached to plaintiffs' complaint as an exhibit and as introduced in evidence by them, did not have attached thereto a copy of the application for the policy.

Defendant introduced in evidence the application for the life insurance, which was dated 26 February 1968, together with the testimony of defendant's agent that the insured answered the questions in the application as stated therein and after the answers were inserted, signed the application. Questions eleven and thirteen were answered as follows:

"11. Are you now in good health so far as you know? Yes

* * * * *

"13. Name below all causes for which you have consulted a physician in last seven years.

"Cause or Nature of Cause	No. of Attacks	Date	Severity and Duration
	"N O N E		

"Any Remaining Effects — Attending Physician's Name and Address

"N O N E"

The application also contained the following language:

"The Policy shall not take effect unless and until it is delivered to the insured and the first premium is paid during the Insured's good health."

Defendant also presented the testimony of a doctor, who testified: He had first seen the insured as a patient in his office on 12 June 1967. As a result of the examination which he made at that time, she was admitted as a patient at Grace Hospital. From examinations and tests conducted at the hospital, her condition was diagnosed as lung cancer. Subsequently, in late June or early July 1967, she transferred as a patient to Baptist Hospital in Winston-Salem. The doctor again saw her as his patient on 3, 7, 8 and 11 November 1967. On 22 January 1968 she was readmitted to Grace Hospital for a checkup, and she remained in the hospital until 27 January 1968. The doctor next saw her on 30 January 1968 and again on 2 and 9

February 1968. He also saw her as his patient on 4, 7 and 15 March 1968 and on 2 and 22 April 1968.

Defendant introduced in evidence a copy of the death certificate of Ruth Huffman indicating her death on 28 August 1968 as a result of cancer commencing fifteen months prior to death.

At the completion of all evidence defendant's motion for nonsuit was denied and the case was submitted to the jury. By consent of the parties, the jury answered the first three issues, relating to the issuance of the policy, payment of premiums, and filing due notice of death and proper claim forms, in plaintiffs' favor. Issues four through nine were answered as follows:

"4. Did the insured, Ruth Huffman, in the written application to the defendant, represent that she was in good health, so far as she knew?

"ANSWER: NO.

"5. Was the representation false?

"ANSWER:

"6. Did the insured, Ruth Huffman, represent in her written application to the defendant that she had not consulted a physician in the last seven (7) years?

"ANSWER: NO.

"7. Was said representation false?

"ANSWER:

"8. Was the insured, Ruth Huffman, not in good health on March 6, 1968, as alleged in defendant's further answer and defense?

"ANSWER: NO.

"9. What amount, if any, are the plaintiffs entitled to recover from the defendant?

"ANSWER: $3,700.00."

By stipulation, the parties had agreed that if the jury should answer issue No. 9 at all, the answer should be either "$3,700.00" or "None."

From judgment that plaintiffs recover $3,700.00 from defendant, defendant appeals.

Byrd, Byrd & Ervin, by Robert B. Byrd and John W. Ervin, Jr., for plaintiff appellees.

Allen, Steed & Pullen; and Patton & Starnes, by Thomas W. Steed, Jr., for defendant appellant.

PARKER, J.

[1] Defendant admitted issuance of the policy, death of the insured during the period for which premiums were paid, and that proof of death was duly submitted. Plaintiffs introduced the policy. The admissions and the policy made a *prima facie* case for the jury and placed on defendant the burden of showing legal excuse for refusing payment according to the terms of the policy. *Rhinehardt v. Insurance Co.*, 254 N.C. 671, 119 S.E. 2d 614; *Chavis v. Insurance Co.*, 251 N.C. 849, 112 S.E. 2d 574. Plaintiffs' evidence did not establish defendant's affirmative defenses as a matter of law, and defendant's assignment of error based on the court's refusal to grant nonsuit cannot be sustained.

[2, 3] When instructing the jury the court charged that if the jury should find from the evidence that the deceased had made false statements in answer to questions on the application for the insurance policy relating to her health and that the deceased knew at the time that such statements were false *"and that she made them for the purpose of misleading the defendant into entering into a contract of insurance"* then they should find for the defendant. (Emphasis added.) The court had previously instructed the jury that if they believed that the answer made by the deceased in her application for the insurance policy, even though untrue, was "made in good faith and without any intention to deceive, then, in that event the incorrect proof of said answer would not prevent the plaintiff from recovering." These instructions, in addition to being obscure, were erroneous. In order to avoid the policy on the grounds that the insured made false statements in her application for insurance as to her health, it was not necessary that the defendant insurance company show that the insured harbored any intent to deceive. "If insured made the statement and if it was false, the question as to whether it was fraudulently, knowingly or innocently made is of no importance. The statement in either case is material as a matter of law, and the policy will be avoided." *Rhinehardt v. Insurance Co., supra.* Appellees seek to distinguish the instant case from the *Rhinehardt* case on the ground that the application which insured signed in the instant case required the insured to answer if she was in good health *so far as she knew.* Appellees contend that the phraseology of the question necessarily injected the element of *scienter.* Even so, the court's charge was in error, since it required the defendant to

prove not only that the insured answered the question as to her knowledge of her state of health incorrectly, but that she did so with the specific intent to deceive and mislead the defendant into issuing the policy of insurance. The defendant was not required to carry such a burden in order to make good its defense.

In oral argument appellees' counsel also contended that any error in the charge could not have been prejudicial, since the effect of the jury's verdict in answering issues 4 and 6 was to find that the insured had not in fact answered questions 11 and 13 on the application in the manner disclosed by defendant's evidence, and therefore the jury could not have been concerned with any question as to whether the deceased harbored an intent to deceive. We do not agree. In the instant case, unlike the situation which was presented in *Chavis v. Insurance Co., supra,* there was no conflict in the evidence as to whether the insured had actually answered the questions on the application in the manner disclosed by defendant's evidence. All of the evidence indicated that she did. The charge considered as a whole was confusing, and the jury could well have been misled.

[4] Appellant's remaining assignments of error relating to the court's charge to the jury also have merit. In particular, the court failed to charge the jury properly as to the substantive law applicable to issue number 8, relating to the "good-health" clause contained in the application for the insurance policy. "Such a provision is valid and enforceable, and is generally considered a condition precedent to the policy's becoming effective, and it is immaterial in this respect that the insured was ignorant of his condition." 43 Am. Jur. 2d, Insurance, § 234, p. 295. Where, as was the case here, the policy is issued without a prior medical examination, a majority of jurisdictions which have considered the matter have adopted the view that a "good-health" clause of the type involved in this action will be construed literally as requiring good health of the insured at the time the policy is issued or delivered and will not be construed as applying only to changes in the applicant's health which have taken place since the making or acceptance of the application. 43 Am. Jur. 2d, Insurance, § 235, at p. 297; Annotations, 136 A.L.R. 1516, 1527; 60 A.L.R. 2d, 1429, 1440.

For the errors noted in the court's charge, there must be a

New trial.

MORRIS and HEDRICK, JJ., concur.

CHARLES FRANKLIN BATTLE v. STATE OF NORTH CAROLINA

No. 707SC219

(Filed 27 May 1970)

1. Criminal Law § 181— post-conviction hearing — error in trial — burden of proof

When a petitioner in a post-conviction proceeding alleges error in the investigatory procedures or trial, resulting in his sentence and imprisonment, the burden of proof is on him to show a denial of some right guaranteed to him by the State or the Federal Constitution.

2. Criminal Law § 181— post-conviction hearing — court as trier of fact

In a post-conviction hearing there is no trial by jury, but the judge holding the hearing shall hear the evidence and make appropriate factual findings as to all material issues or questions of fact raised by the petition and supported by the evidence.

3. Criminal Law § 181— post-conviction hearing — failure to make finding on material issue

The trial court in a post-conviction hearing committed error in failing to make a factual finding with respect to the material issue raised by the petitioner, that is, whether petitioner's plea of guilty at his trial on a charge of kidnapping was freely, understandingly and voluntarily entered. G.S. 15-221.

4. Criminal Law §§ 82, 181— attorney-client privilege — waiver in post-conviction hearing

A petitioner in a post-conviction hearing waived the benefit of the rule protecting privileged communications between himself and his court-appointed counsel at his trial on a charge of kidnapping, where (1) the petition of petitioner indiscriminately attacked the professional integrity and ability of his court-appointed counsel and (2) petitioner called the counsel as his witness in the hearing.

ON *certiorari*, at instance of Charles Franklin Battle, to review the judgment and proceedings before *Bundy, J.*, 22 August 1969 Session of Superior Court held in NASH County.

Charles Franklin Battle (petitioner) filed a petition under the provisions of North Carolina General Statutes, Chapter 15, Article 22, entitled "Review of Criminal Trials." In his petition filed 25 June 1969, he alleges, among other things, that on or about 20 May 1969 he entered a plea of guilty to the charge of kidnapping and was sentenced to life imprisonment; that he was arrested on 5 December 1968 and was thereafter questioned extensively without counsel being present and without being warned of his rights; that his plea of guilty should be considered an involuntary and coerced plea because he was kept separate and apart from another person charged

with the same crime; that the officers overpowered his will to resist, told him to make it easy on himself and confess; that his court-appointed counsel, "Bill Eldridge," had him sent to Cherry Hospital for mental examination; that after his return from Cherry Hospital about two days before his trial, while he was in a cell with his co-defendant, his court-appointed counsel told him that if he did not plead guilty to the kidnapping charge, he would get the gas chamber on a charge of rape; that he was told by counsel that if he pleaded guilty to kidnapping, the other charges against him would be "dropped"; that after telling him this, his court-appointed lawyer had him removed to a cell where he was alone; that by messages relayed to him, he was informed that his co-defendant was going to plead guilty and place the blame on him; that he was thus forced to enter a plea of guilty to the kidnapping charge rather than to insist upon his innocence and face the possible imposition of the death sentence for the rape charge; and that the plea of guilty was not entered freely and voluntarily but was entered as a result of coercion and threats of his receiving the death sentence on a charge of rape.

On 30 June 1969 Judge Hubbard entered an order, as requested, appointing an attorney to represent petitioner in the proceeding.

On 10 July 1969 the State filed an answer to the petition in which the material allegations therein were denied.

Under date of 22 August 1969, the following order was entered:

"This matter comes on to be heard upon a post-conviction hearing heretofore ordered and set to be heard at this term. The petitioner's main allegation and contention, and the only one concerning which he offered any evidence, was that he entered the plea of guilty of kidnapping at the May 1969 Session of this court because he was induced to do so by fraud and misrepresentations, was misled into it, and did so out of fear.

At the term at which he was tried, the petitioner defendant, along with his co-defendant Joseph Mozelle, was charged with rape, armed robbery, felonious assault and kidnapping. Both defendants entered a plea of guilty of kidnapping and the other cases were nol prossed with leave.

No one except the petitioner defendant and his co-defendant, Joseph Mozelle gave any testimony whatsoever in this hearing in support of the petitioner's allegations above stated, while a number of witnesses testified directly contrary to the allegations, including witnesses of the petitioner.

The court finds that every constitutional right of the petitioner

defendant was preserved at and in connection with his trial, and that there has been no violation of any constitutional right.

IT IS THEREFORE ORDERED that the petition be and the same is hereby denied.

A copy of this Order shall be forwarded to the petitioner at Central Prison, 835 W. Morgan Street, Raleigh, N. C., and a copy to Mr. Royal G. Shannonhouse, Attorney for Petitioner, and a copy to the N. C. Department of Correction, 835 W. Morgan St., Raleigh, N. C."

Petitioner excepted to the findings of fact, conclusions of law, and the entry of the order denying his petition for a new trial.

Attorney General Morgan and Staff Attorney Eatman for the State.

Battle, Winslow, Scott & Wiley by Samuel S. Woodley, Jr., for the petitioner appellant.

MALLARD, C.J.

Petitioner's first assignment of error is that the trial court committed error in failing to make separate findings of fact and conclusions of law as to each of the petitioner's contentions.

A hearing was held on the petition pursuant to the provisions of G.S. 15-221. The pertinent parts of this statute read:

"The court may receive proof by affidavits, depositions, oral testimony, or other evidence, and the court shall pass upon all issues or questions of fact arising in the proceeding without the aid of a jury. * * * When said hearing is completed, the court shall make appropriate findings of fact, conclusions of law thereon and shall enter judgment upon said hearing."

[1] When a petitioner in a proceeding of this nature alleges error in the investigatory procedures or trial, resulting in his sentence and imprisonment, the burden of proof is on him to show a denial of some right guaranteed to him by the Constitution of North Carolina or by the Constitution of the United States. *Branch v. State,* 269 N.C. 642, 153 S.E. 2d 343 (1967).

In the case before us, there was some evidence offered by the defendant which, if believed, would have justified the court in finding that the defendant's plea of guilty was coerced. However, the State offered evidence that the petitioner, in open court, entered a written plea of guilty to the crime of kidnapping. In the written

plea of guilty, there appears the sworn statement by the defendant that he was guilty. Judge May, the trial judge, made a finding which he caused to be spread upon the record that "the plea of guilty by the defendant is freely, understandingly and voluntarily made, and was made without undue influence." This record, together with other evidence that the defendant's plea was freely, understandingly, and voluntarily made, was before the trial court on this post-conviction review, and if believed, was ample to justify a finding by the court that the defendant's plea of guilty was not coerced but was freely, understandingly, and voluntarily made. The evidence offered was also ample (if the proper facts had been found as required by the above-quoted portion of the statute) to support the conclusion reached by the court on this post-conviction review that "every constitutional right of the petitioner defendant was preserved at and in connection with his trial, and that there has been no violation of any constitutional right." This finding is not a factual finding but is a conclusion of law which should be, but was not in this case, based upon proper findings of fact on all material issues or questions of fact raised by the petition and supported by the evidence. See *Yarborough v. State,* 6 N.C. App. 663, 171 S.E. 2d 65 (1969).

[2] The statute requires the court in this kind of proceeding to "pass upon all issues or questions of fact arising in the proceeding without the aid of the jury." We interpret this to mean that on this kind of proceeding, there is no trial by jury but that the judge holding the hearing shall hear the evidence and make appropriate factual findings as to all material issues or questions of fact raised by the petition and supported by the evidence.

On this proceeding, upon completion of the hearing, the court in the first paragraph of the order stated the main allegation and contention of the petitioner.

In the second paragraph of the order, the factual finding was made that the defendant was charged with rape, armed robbery, felonious assault and kidnapping; that he entered a plea of guilty to the charge of kidnapping; and that he was not tried on the other charges.

In the third paragraph of the order, there appears the finding, in substance, that there was a conflict in the evidence.

[3] There was no factual finding by the court on this post-conviction review as to whether the defendant's plea of guilty at his trial on the charge of kidnapping was freely, understandingly and voluntarily entered. This was the material issue or question of fact

raised by the petition and supported by some of the defendant's evidence. By failing to make a finding with respect thereto, the court committed error. Moreover, the facts found by the trial court on this post-conviction review do not support the conclusions of law or the judgment entered.

Petitioner also contends that he was effectively denied the benefit of counsel at his post-conviction review. In support of this contention, he argues that his counsel at the post-conviction review (who was the third court-appointed lawyer the defendant has had in this case) did not properly present his contentions; that he presented witnesses and "testimony which was highly prejudicial to the petitioner and in direct conflict with his contentions as testified to by petitioner"; and that "his counsel introduced highly incriminating communications made by petitioner to his counsel who previously represented him, when such evidence was clearly inadmissible against petitioner."

The record reveals that petitioner's counsel at this post-conviction review subpœnæd and presented the witnesses defendant requested. The hearing was on separate days at the same session of court. At the first session the petitioner did not desire to testify but asked that the case be continued so additional witnesses could be subpœnæd. This was done. On the next date when the hearing was resumed, the defendant chose to testify.

The fact that the testimony of some of defendant's witnesses differed from that which the defendant himself testified to is no indication, under these circumstances, that petitioner's counsel was ineffective.

In the petition filed herein by the defendant, prior to the time of the appointment of counsel to represent him in this post-conviction review, there was an indiscriminate attack upon the professional integrity and ability of the two court-appointed lawyers who had theretofore represented petitioner. These two lawyers were called by petitioner's attorney at the post-conviction review and put on the witness stand prior to the time the petitioner finally decided he would testify in the case. Some of the information elicited on this proceeding from petitioner's former counsel was obtained by them from sources other than the petitioner, some occurred in open court, and, of course, some was told to them by the petitioner.

In 3 Jones on Evidence, Fifth Edition, § 827, the general rule with relation to privileged communications between an attorney and client is stated as follows:

> "A familiar rule of the common law forbids an attorney or counselor at law, unless his client consents, from disclosing communications which have been made by the client or advice which he may have given to the client. * * *
>
> The rule excluding the testimony of the attorney or the client with respect to communications passing between them is a matter which is within the power of the legislature to change or even to abrogate entirely * * *."

However, the client may waive this privilege. Stansbury, N. C. Evidence 2d, § 62.

[4] In this proceeding we hold that when the petitioner filed the petition in which he attacked the professional integrity and ability of his court-appointed lawyers, he thereby waived the benefit of the rule with respect to privileged communications between him and his lawyers relating to the matters alleged in the petition. To hold otherwise would close the mouth of an officer of the court and thereby allow a fraud to be practiced upon the court in connection with all pleas of guilty where an attorney represented the defendant. To hold otherwise would also permit a direct attack to be made upon the professional integrity and ability of the lawyer, without permitting him to reply to such attack. Moreover, in this case when the petitioner called the lawyers as his witnesses, he waived the benefit of the rule.

In connection with practicing a fraud upon the State, attention is called to G.S. 8-52 which reads:

> "In cases where fraud upon the State is charged it shall not be a sufficient cause to excuse anyone from imparting any evidence or information legally required of him, because he came into the possession of such evidence or information by his position as counsel or attorney before the consummation of such fraud, and any person refusing for such cause to answer any question when legally required so to do shall be guilty of contempt, and punished at the discretion of the court or other body demanding such information: Provided, that it shall not be competent to introduce any admissions thus made on the trial of any persons making the same."

We have considered the entire record of this proceeding and are of the opinion and so hold that the petitioner was properly represented at the post-conviction review.

This case is remanded to the Superior Court of Nash County for findings of fact and conclusions of law based thereon in keeping

with the issues and questions of fact set forth in the petition and supported by the evidence which was introduced.

Error and remanded.

MORRIS and GRAHAM, JJ., concur.

STATE OF NORTH CAROLINA v. FRED BARNETTE

No. 7021SC213

(Filed 27 May 1970)

Assault and Battery §§ 8, 15— felonious assault — self-defense in repelling a nonfelonious assault — instructions

In a prosecution on indictment alleging an assault with a deadly weapon with intent to kill inflicting serious injury not resulting in death, the instructions of the trial court, which correctly charged the jury on defendant's right of self-defense in repelling a felonious assault, *held* not prejudicial in failing to charge on defendant's right of self-defense in repelling a nonfelonious assault, although there was evidence to support such an instruction, where the jury's verdict of guilty as alleged in the indictment established the defendant's intent to kill and thereby rendered unavailing his right to rely on self-defense in repelling a nonfelonious assault.

APPEAL by defendant from *Seay, J.*, 3 November 1969 Session, FORSYTH Superior Court.

Defendant was charged in two warrants with assault with a deadly weapon, to wit: pointing a pistol at one Betty Barnette, and pointing a pistol at one Irlo Shoaf. Defendant was also charged in a warrant with assault with a deadly weapon, to wit, a pistol, with intent to kill one Ernest Shaw inflicting serious bodily injury not resulting in death. Defendant was tried in the District Court upon the two warrants charging him with misdemeanor assaults and was convicted. From judgments entered upon the verdicts in the District Court, the defendant appealed to the Superior Court for trials *de novo*. Upon the warrant charging defendant with the felonious assault he was given a preliminary hearing in District Court at which time probable cause was found and he was bound over to Superior Court for trial. In the Superior Court the grand jury returned a true bill of indictment against the defendant for assault with a deadly weapon with intent to kill one Ernest Shaw inflicting serious bodily injury not resulting in death.

In the Superior Court the trial upon the indictment and the trials *de novo* upon the two misdemeanor warrants were consolidated for trial. The jury returned verdicts of guilty as charged in the two warrants and a verdict of guilty as charged in the bill of indictment. The two convictions of misdemeanor assault were consolidated for judgment and judgment imposing a sentence of six months was entered. Upon the verdict of guilty of the felonious assault a judgment of confinement for a period of 18 to 24 months was entered, this sentence runs concurrently with the six-month sentence.

Defendant appealed assigning as error certain portions of the judge's charge.

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

White, Crumpler & Pfefferkorn, by William G. Pfefferkorn, for defendant.

BROCK, J.

Defendant's sole assignment of error is that the judge's charge to the jury constituted prejudicial error in that its effect was to charge that defendant's right of self-defense could only be lawfully exercised if he were faced with an assault likely to cause his death or great bodily harm and thereby implying that the defendant had no right of self-defense if the assault upon him was nonfelonious or not likely to cause his death or great bodily harm.

In support of this contention, defendant excepted to and assigns as error among others the following portion of the charge:

> "If you find the defendant acted at a time when he had reasonable ground to believe and did believe that he was about to receive *great bodily harm* at the hands of the prosecuting witness and that he shot him under that apprehension and that that apprehension was reasonable, that he was about to *suffer death* or *great bodily harm* at the hands of the prosecuting witness, Ernest Shaw, and he used no more force than reasonably appeared necessary under the circumstances, the defendant Barnette would not be guilty of any criminal offense." (Emphasis added.)

This instruction as to defendant's right of self-defense is correct when defendant is faced with a felonious assault only; but, where there is also evidence tending to show defendant was faced with a nonfelonious assault, the trial judge should give appropriate instruc-

tions as to his right of self-defense to repel a nonfelonious assault. At no place in the charge are there instructions as to defendant's right of self-defense in repelling a nonfelonious assault.

The evidence offered by the State tended to show the defendant saw Betty Barnette, his wife, coming out of a house with Irlo Shoaf, Ernest Shaw and his wife Hattie Shaw and the Shaw's daughter. As Irlo Shoaf was opening the door to the car parked in front of the house, the defendant approached them with a gun in his hand and threatened to kill them all. Defendant kicked Betty Barnette and Irlo Shoaf and then shot Ernest Shaw in the jaw. Irlo Shoaf struggled with the defendant and the gun was taken away from him. By this time Ernest Shaw had obtained a gun from the house and he fired a few shots into the ground and told the defendant to stay where he was until help arrived. Defendant attempted to flee and Ernest Shaw shot him in the back.

The State's evidence tended to show an assault with a pistol upon the persons of Betty Barnette and Irlo Shoaf and a felonious assault with a pistol upon the person of Ernest Shaw inflicting serious injury not resulting in death. Defendant admitted the shooting, but testified he acted in self-defense.

Defendant's evidence tended to show that he approached the car where his wife and Irlo Shoaf were standing because he wanted to talk to his wife. At this time Ernest Shaw came around the car pointing at him an object which he (defendant) thought was a pistol. Defendant then pulled his pistol from his front pocket and fired at Ernest Shaw. Irlo Shoaf then grabbed the defendant and they fell to the ground struggling. Defendant subsequently freed himself and attempted to flee at which time he was shot in the back.

The question presented by this appeal is whether this failure to instruct the jury as to defendant's right of self-defense in repelling a nonfelonious assault constituted *prejudicial* error.

Defendant relies on the recent case of *State v. Fletcher,* 268 N.C. 140, 150 S.E. 2d 54, citing with approval *State v. Anderson,* 230 N.C. 54, 51 S.E. 2d 895, to support his contention that the failure to so instruct was prejudicial. We are of the opinion defendant's reliance is misplaced.

In *Fletcher* and *Anderson,* as in the case at bar, the defendants were charged with felonious assault with a deadly weapon with intent to kill inflicting serious injuries not resulting in death. In each case the defendants appealed assigning as error the failure of the court to instruct the jury with reference to the right of the defendant

to defend himself against a nonfelonious assault. In *Fletcher* and *Anderson* the failure to so instruct was held to be prejudicial error requiring a new trial. However, in *Fletcher* and *Anderson* the jury found defendants guilty of assault with a deadly weapon, a misdemeanor assault, and thereby established that defendants had acted without intent to kill the prosecuting witnesses. As the Court stated in *Anderson,* "It is quite conceivable that a verdict of acquittal would have been returned if the jury had been properly instructed with respect to the right of an accused to defend himself again (sic) nonfelonious assaults." With this observation we agree.

However, in the case at bar the jury returned a verdict of guilty of assault with a deadly weapon *with intent to kill* inflicting serious injury not resulting in death, a felonious assault, and thereby established defendant acted *with intent to kill* the prosecuting witness, Ernest Shaw.

The jury having found defendant assaulted Ernest Shaw *with intent to kill,* the following excerpt from *Anderson* is applicable:

> "It is undoubted law that a person cannot excuse taking the life of an adversary upon the ground of self-defense unless the killing is, or reasonably appears to be, necessary to protect himself from death or great bodily harm. (Citation omitted.) The defendant has not taken human life. It is alleged in the indictment, however, that he committed a felonious assault and battery upon the prosecuting witness with a deadly weapon in an unsuccessful attempt to kill the prosecuting witness contrary to G.S. 14-32. Both authority and logic declare that the law of self-defense in cases of homicide applies also in cases of assault with intent to kill, and that an unsuccessful attempt to kill cannot be justified unless the homicide would have been excusable if death had ensued. (Citation omitted.) It follows that where an accused has inflicted wounds upon another *with intent to kill* such other, he may be absolved from criminal liability for so doing upon the principle of self-defense *only* in case he was in *actual or apparent* danger of *death* or *great bodily harm* at the hands of such other. (Citations omitted.)" (Emphasis added.)

In *State v. Plemmons,* 230 N.C. 56, 52 S.E. 2d 10, decided at the same term as *Anderson,* the Court was faced with a factual situation more directly in point with the case at bar. The defendant was charged in an indictment with assault with a deadly weapon with intent to kill inflicting serious injury not resulting in death. Defendant was found guilty of assault with a deadly weapon *with intent to kill,* inflicting serious and permanent injury not resulting in death.

Defendant appealed assigning as error, among other things, the following charge of the Court with regard to his right of self-defense:

> "If the defendant was there at his place of business and an assault was made upon him he had a right to protect himself. It does not make any difference whether it was a felonious assault or a nonfelonious assault he would have a right to protest himself and use such force as was necessary or reasonably appeared to him to be necessary under the circumstances to protect himself *from death or great bodily harm.*" (Emphasis added.)

This instruction of the court was held not to afford defendant a valid assignment of error and was therefore deemed not to be prejudicial error.

The same is true in the case at bar. Defendant was not prejudiced by the instructions of the court as to his right of self-defense. Defendant could assault Ernest Shaw *with intent to kill* only if such force was necessary or reasonably appeared to him to be necessary under the circumstances to protect himself from death or great bodily harm. Likewise, defendant could be absolved from criminal liability for the assault with intent to kill only if he acted in self-defense when he was in actual or apparent danger of suffering death or great bodily harm. Since the jury found defendant did assault Ernest Shaw *with intent to kill,* the Court's error in failing to instruct as to defendant's right of self-defense to repel a nonfelonious assault was not prejudicial to defendant and does not constitute reversible error.

With regard to the two misdemeanor charges of assault with a deadly weapon, the verdicts and sentence imposed thereon, and the charge of the Court in regard thereto, we find no error. The evidence was sufficient for the jury to find the defendant guilty of assault with a deadly weapon by pointing a pistol at Betty Barnette and assault with a deadly weapon by pointing a pistol at Irlo Shoaf. The charge of the Court is sufficient and the sentence is within the statutory limits. These verdicts and the sentence imposed thereon are affirmed.

No error in the felonious assault charge.

No error in the two misdemeanor assault charges.

BRITT and HEDRICK, JJ., concur.

STATE OF NORTH CAROLINA v. JACK JAMES JORDAN

No. 7018SC32

(Filed 27 May 1970)

1. Criminal Law § 166— abandonment of assignment of errors

Assignment of error not brought forward and argued in defendant's brief is deemed abandoned. Court of Appeals Rule No. 28.

2. Criminal Law § 76— admission of confession — findings by trial court

Defendant's confession was properly admitted in evidence where, after an extensive *voir dire* hearing, the trial court found as a fact that defendant was properly warned of his constitutional rights and that the statements made by him were freely and voluntarily made, and there was sufficient competent evidence to support the findings of fact.

3. Criminal Law §§ 33, 42; Burglary and Unlawful Breakings § 10— confession renders articles admissible against defendant

In this prosecution for breaking and entering, larceny, possession of burglary tools, and safecracking, defendant's confession sufficiently connected defendant with the safe door and with tools dropped by a passenger who fled from defendant's car to render them admissible in evidence against defendant.

4. Searches and Seizures § 1; Criminal Law § 84— search of car without warrant — seizure of burglary tools

The warrantless seizure of burglary tools and other articles from defendant's car was lawful, and the tools and other articles were properly admitted in the trial of defendant for possession of burglary tools, where (1) defendant had been stopped and placed under arrest for running a red light, (2) a passenger in defendant's car had fled when officers approached, (3) the arresting officer observed burglary tools lying on the floorboard of the car and charged defendant with possession thereof, and (4) other articles admitted in evidence were thereafter discovered by search of the glove compartment.

5. Criminal Law § 118— exception to statement of contentions — failure to object at trial

Exceptions to portions of the charge wherein the court stated the contentions of the parties will not be considered on appeal where no objection was made at the time they were given.

6. Criminal Law § 163— broadside exception to charge

Assignment of error based upon exception to the entire charge is broadside and ineffective.

MALLARD, C.J., dissenting.

APPEAL by defendant from *Burgwyn, E.J.*, 26 May 1969 Session of GUILFORD Superior Court.

Defendant was charged in three separate bills of indictment with breaking and entering and larceny and receiving, possession of burglary tools and safecracking. The cases were consolidated for trial. The evidence for the State tended to show that on the morning of 28 March 1969 at approximately 3:20 a.m. two Greensboro police officers observed defendant's car occupied by the defendant and another white male and decided to check it out. After the police officers turned their car around, they witnessed the defendant's car run a red light at a high rate of speed and decided to give chase. About one block after running the red light, defendant's car slowed abruptly and the passenger jumped from the car and began running, dropping something to the ground as he ran. Officer Hightower jumped from the police car and began running after the passenger but was unable to catch him. After he lost sight of the person he was chasing, he returned to the area where the person had dropped something and found a small screwdriver, a pair of metal cutters, an adjustable wrench, a pair of brown cloth work gloves, a tool pouch containing punches and chisels and a brace and bit. He picked these items up and returned to the defendant's car where the defendant was standing with Officer Cooper outside the car. He then saw some other tools and a pistol lying in the floorboard of the car. The pistol was partially hidden under the front seat. The tools were visible from outside the car and included two metal flashlights, a pair of brown cloth work gloves, a metal pry bar about 18 inches long, a small crowbar about 12 inches long, and a large screwdriver about 13 inches long. At this time Officer Hightower placed defendant under arrest for illegal possession of burglary tools and carrying a concealed weapon. Officer Cooper had already arrested the defendant for running a red light. Officer Hightower then proceeded to search the glove compartment of the car and discovered approximately $50 in currency and change, a partially empty bottle of Vodka, a .22 calibre bullet, and a small punch. Some of the coins were in a wrapper marked "Florida Street Baptist Church". Officer Hightower also searched the trunk of the car but discovered nothing pertinent to this case. During this time the defendant was advised of his constitutional rights and right to counsel by both police officers. Defendant was placed in the back seat of the police car with Officer Cooper and taken to the police station. Officer Cooper testified that on the way to the police station the defendant told him that he wanted a lawyer. Defendant asked to use the telephone upon arrival at the police station and was permitted to make a call, which call was placed to his sister. Later the same morning the police department discovered that the Florida Street Baptist Church had been broken into during the

night, the safe broken open and approximately $50 stolen. During the trial, which included a rather extensive *voir dire* examination by the court, five police officers testified that they had individually, at different times, advised the defendant that he had the right to remain silent, that anything he said could and would be used against him, that he had the right to counsel and that the court would appoint one for him if he could not afford one. The three officers not in on the arrest testified that after they had advised the defendant of his rights at the police station, the defendant confessed the crime to each of them. The State introduced into evidence the items found in the car and the items found which were dropped by the fleeing passenger.

The defendant offered no evidence. The jury returned a verdict of guilty as to each charge and the defendant was sentenced to serve not less than five years nor more than ten years for the breaking and entering count, not less than five years nor more than ten years for the larceny count, not less than ten years nor more than twenty years for the safecracking count and ten years for the possession of burglary tools count. The breaking and entering and larceny sentences are to run consecutively and the safecracking and possession of burglary tools sentences are to run concurrently and at the expiration of the sentences for breaking and entering and larceny sentences.

Attorney General Robert Morgan by Assistant Attorney General William W. Melvin and Staff Attorney T. Buie Costen for the State.

Hubert E. Seymour, Jr., for defendant appellant.

MORRIS, J.

Defendant's court-appointed counsel requested and received an extension of time within which to docket his case on appeal but failed to docket the case within the extension period. This Court has nevertheless decided to review the case on its merits.

[1] Defendant's first assignment of error is directed to the failure of the trial court to allow his motion to quash the bills of indictment. This assignment of error was not brought forward and argued in defendant's brief and it is, therefore, deemed abandoned. Rule 28, Rules of Practice of the Court of Appeals of North Carolina.

[2, 3] By assignments of error Nos. 3, 4 and 5 defendant contends that it was error to admit evidence of his confession and that it was error to allow the introduction of the exhibits dropped by the

fleeing passenger and the safe door, because, without the confession, there was no evidence connecting defendant with these exhibits. Defendant urges that the confession was involuntary and under threat and after he had been denied counsel. The evidence is to the contrary. Defendant did not offer evidence on the *voir dire* examination. There was plenary evidence that defendant was adequately warned by more than one officer of his constitutional rights both at the time of the arrest and later. There is evidence that defendant made a request for a lawyer to one officer while en route to the police station. There is also evidence that he requested permission to use the telephone, that this request was granted, and he did use the telephone. There is no evidence that his request for a lawyer was ever repeated. After an extensive *voir dire,* the trial court found as a fact that defendant was properly warned of his constitutional rights, and the statements made by him were freely and voluntarily made. There is sufficient competent evidence to support the findings of fact and they are conclusive. *State v. Bell,* 270 N.C. 25, 153 S.E. 2d 741 (1967); *State v. Gray,* 268 N.C. 69, 150 S.E. 2d 1 (1966), cert. den. 386 U.S. 911, 17 L. Ed. 2d 784, 87 S. Ct. 860 (1967). We hold the statements of defendants to the officers were properly admitted. It follows, of course, that the exhibits which defendant argues could not otherwise be connected to him were properly admissible.

[4] Assignment of error No. 2 is directed to the admission of evidence obtained by Officer Hightower's search of the car. Defendant contends that the search was illegal because made without a search warrant, was not about the person of the defendant and not incident to a valid arrest. The conviction of defendant's passenger was affirmed by this Court [*State v. McCloud,* 7 N.C. App. 132, 171 S.E. 2d 470 (1970)] and by the Supreme Court [*State v. McCloud,* 276 N.C. 518, 173 S.E. 2d 753 (1970)]. The same question was there raised. The majority opinion was written by Branch, J. The dissenting opinion of Sharp, J., in which Bobbitt, C.J., joined was not directed to this question. We quote from the majority opinion of the Court:

> "Defendant assigns as error the admission into evidence of the tools and other exhibits taken from the Jordan automobile.
>
> The admission of defendant's confession destroys his contention that the evidence does not connect him with the exhibits offered in evidence. Thus the basic question presented by this assignment of error is whether the tools and exhibits were obtained by an unlawful search and seizure.

Search of a motor vehicle made in connection with a lawful arrest for a traffic violation is lawful when it is a contemporaneous search for the purpose of finding property, the possession of which is a crime, *i.e.*, burglary tools. Such search must be based on a belief reasonably arising from the circumstances that the motor vehicle contained the contraband or other property lawfully subject to seizure. *State v. Bell,* 270 N.C. 25, 153 S.E. 2d 741; *People v. Lopez,* 60 Cal. 2d 223, 384 P. 2d 16; *State v. Boykins,* 50 N.J. 73, 232 A. 2d 141; *Welch v. U. S.,* 361 F. 2d 214.

Seizure of contraband, such as burglary tools, does not require a warrant when its presence is fully disclosed without necessity of search. *State v. Giles,* 254 N.C. 499, 119 S.E. 2d 394; *State v. Bell, supra; Goodwin v. U. S.,* 347 F. 2d 793; *U. S. v. Owens,* 346 F. 2d 329; *State v. Durham,* 367 S.W. 2d 619. See also 10 A.L.R. 3d 314, for a full note and collection of cases concerning lawfulness of search of a motor vehicle following arrest for traffic violation.

In the instant case the owner of the automobile was lawfully under arrest. The arrest was accompanied by the extraordinary behavior of the passenger fleeing upon approach of the officers. After the driver's arrest, the contraband articles were observed, without necessity of search, lying on the floorboard of the automobile. Upon observing these articles, defendant was further charged with unlawful possession of burglary tools. Thereupon the officers immediately conducted further search and found other articles in the glove compartment. The further search was clearly based upon a belief reasonably arising from the circumstances that the motor vehicle contained other property subject to lawful seizure.

We note that the Court of Appeals questions the standing of defendant to raise objection to the search of Jordan's automobile, on the basis that defendant had no property right in the place alleged to have been invaded. We agree with the Court of Appeals that it is not necessary to decide this question since the search without warrant was legal. However, it should be noted that the long-recognized property right concept in relation to search and seizure has been greatly eroded by recent Federal decisions. *Jones v. U. S.,* 362 U.S. 257, 4 L. Ed. 2d 697; *Katz v. U. S.,* 389 U.S. 347, 19 L. Ed. 2d 576; *Mancusi v. DeForte,* 392 U.S. 364, 20 L. Ed. 2d 1154; *Bumper v. State of North Carolina,* 391 U.S. 543, 20 L. Ed. 2d 797."

Upon authority of *McCloud,* this assignment of error is overruled.

The overruling of assignments of error Nos. 2, 3, 4 and 5 *ipso facto* overrules assignments of error Nos. 6 and 10 which are based upon the alleged illegality of the search and inadmissibility of the confession.

[5, 6] Defendant's remaining assignments of error are directed to the court's charge to the jury. These assignments of error are based on exceptions Nos. 11 — 16. Exceptions Nos. 11 — 15 are to portions of the charge wherein the court stated the contentions of the parties. No objection thereto was made at the time they were given, objection being made for the first time on appeal, a procedure not approved by our Supreme Court. *State v. Baldwin,* 226 N.C. 295, 37 S.E. 2d 898 (1946). Additionally, the contentions stated are supported by competent evidence. *State v. Burnette,* 242 N.C. 164, 87 S.E. 2d 191 (1955). Exception No. 16 is to the entire charge. The assignments of error based on this exception state that the court failed to charge the jury on the law of search and seizure and voluntary confessions. The legality of the search and the voluntariness of the confession were questions of law which had already been determined by the court and were not questions for determination by the jury. The exception is broadside and ineffective. *Light Co. v. Smith,* 264 N.C. 581, 142 S.E. 2d 140 (1965).

Affirmed.

VAUGHN, J., concurs.

MALLARD, C.J., dissenting.

I agree with the majority opinion that the recent decision of *State v. McCloud* holds that the search without a warrant of the glove compartment of defendant's automobile was legal and the evidence obtained thereby admissible. However, that opinion does not discuss *Chimel v. State of California,* 395 U.S. 752, 23 L. Ed. 2d 685, 89 S. Ct. 2034, decided by the United States Supreme Court on 23 June 1969. It seems to me that application of the principles enunciated in *Chimel* to the facts of this case would necessarily result in the granting of a new trial, and I, therefore, dissent.

BARBARA MODE v. RONALD MODE

No. 7025DC26

(Filed 27 May 1970)

1. Divorce and Alimony § 16— alimony without divorce — abandonment of wife — evidence of wife's illness

In the wife's action for alimony without divorce instituted in 1969, the wife alleging that her husband had abandoned her because of her lengthy illness, it was competent and relevant for the wife to testify as to her physical condition from 1964 until the present, her hospital confinements and the number of doctors who treated her, the amount of hospital and medical bills incurred by her and the amount paid by her husband, and her reaction to her husband's infrequent visits and his statement that his feelings for her had changed.

2. Divorce and Alimony § 16; Evidence § 44— alimony without divorce — evidence of wife's health — nonexpert testimony

In the wife's action for alimony without divorce on the ground that her husband had abandoned her because of her illness, it was competent for a minister to testify that he had observed the wife in the hospital and in her parents' home and had found that she was unable to take care of herself.

3. Divorce and Alimony § 16— alimony without divorce — nonsuit

In the wife's action for alimony without divorce on the ground that her husband had abandoned her because of her lengthy illness, the wife's evidence was sufficient to withstand the husband's motion for nonsuit.

4. Appeal and Error § 50— instructions — error rendered harmless by jury verdict

When the jury returns answers to other issues which establish the rights of the parties irrespective of the answer to the questioned issue, or the rights of the parties are not dependent upon the answer to the issue returned by the jury, any error in the instructions upon such issue is harmless.

5. Divorce and Alimony § 16; Trial § 40— alimony without divorce — submission of issues — harmless error

Although the evidence in the wife's action for alimony without divorce was insufficient to justify the submission of an issue on whether the husband had offered such indignities to the wife as to render her condition intolerable and her life burdensome, the submission of such issue was not prejudicial to the husband where the jury's answer to the issue of abandonment effectively established the rights of the parties.

6. Divorce and Alimony § 16; Trial § 33— alimony without divorce — duty of husband to support wife — instructions

In the wife's action for alimony without divorce on the ground that her husband had abandoned her, the trial court, in the absence of a request by the husband, was not required to charge the jury that a husband is under a duty to support his wife only in the home he has provided.

APPEAL from *Snyder, District Judge,* June 1969 Session of BURKE County District Court.

This is an action for alimony without divorce under N.C.G.S. 50-16.2 et seq. instituted by the plaintiff, Mrs. Barbara Mode (Mrs. Mode) alleging that her husband, Ronald Mode (Mode) abandoned her. On 26 February 1969 a hearing was held and an order was entered awarding the plaintiff alimony pendente lite and attorney's fees. Answer was filed by the defendant on 14 March 1969, and the case came on for trial at the 23 June 1969 term of the District Court Division for Burke County.

The evidence for the plaintiff tended to show: The parties were married on 22 December 1963 and rented a house where they made their home until Mode entered military service in 1966. Mrs. Mode continued to rent the house until May, 1968, but did not reside in the house after December, 1967, following an illness and surgery. Mrs. Mode was hospitalized in 1964, 1965, 1967 and 1968 and had several operations for ulcerative colitis and regional enteritis. On 11 January 1968 Mode received a hardship discharge from the military service in order that he could return home to be with and care for his wife. Mrs. Mode testified that at the time he was discharged she was living with her parents and that he came and stayed there with her for a couple of weeks. She testified that he left her parents' home and went to live with his parents. After he left her parents' home he returned to visit her every few days and would stay for only a few minutes each time. He came to see her while she was hospitalized in March, 1968, but did not go to visit her when she was hospitalized in April, 1968. Mrs. Mode testified that she tried to talk with him about returning to their home after she was released from the hospital but that he would not discuss the situation with her at that time. She testified that following her release from the hospital he went to her parents' home and told her "that he did not have any feeling for me and that he could not go back and did not want to go back home with me." On cross-examination Mrs. Mode testified that her husband asked her to go to the home of his parents to recuperate but that she decided to remain in her parents' home since her mother had been instructed by the doctors as to her medication and care. Mrs. Mode requested that her husband give her some support but that he has refused to do so. The defendant has not been to visit his wife since May, 1968.

Following the presentation of the plaintiff's evidence, the defendant made a motion for judgment as of nonsuit, which motion was denied. The defendant presented no evidence.

The trial judge submitted two issues to the jury as follows:

"(1) Did the defendant abandon his wife?

"(2) Did the defendant offer such indignities to the plaintiff as to render her condition intolerable and life burdensome?"

The jury answered both issues in favor of the plaintiff and judgment awarding alimony without divorce was signed. The defendant appealed to the Court of Appeals assigning error.

Simpson and Martin, by Wayne W. Martin and Dan R. Simpson, for the defendant appellant.

Byrd, Byrd and Ervin, by Joe K. Byrd and John W. Ervin, Jr., for the plaintiff appellee.

HEDRICK, J.

[1] The appellant's first three assignments of error are all related to the admission of evidence offered by the plaintiff and for that reason will be considered together. The assignment is concerned with whether the court committed prejudicial error in allowing the plaintiff to testify regarding her physical condition from 1964 until the present, her hospital confinements and the number of doctors who treated her, the amount of hospital and medical bills incurred by her and the amount that had been paid on said bills by the defendant, and her reaction to her husband's infrequent visits and his telling her that his feelings for her had changed. We have examined this testimony and find no error.

> "The relevancy of evidence is frequently difficult to determine, because men's minds are so constituted that a circumstance which impresses one as having an important bearing on a controverted issue, appears to another to have no probative force. All the authorities are agreed that if the evidence is merely conjectural or is remote, or has no tendency except to excite prejudice, it should be rejected, because the reception of such evidence would unduly prolong the trial of causes, and would probably confuse and mislead the jury, but it is not required that the evidence bear directly on the question in issue, and it is competent and relevant if it is one of the circumstances surrounding the parties, and necessary to be known to properly understand their conduct or motives, or to weigh the reasonableness of their contentions." *Bank of Union v. Stack,* 179 N.C. 514, 103 S.E. 6 (1920).

In this action the evidence offered through the plaintiff's testimony is competent and relevant. Her action for alimony without

divorce was based upon the husband's abandonment. The causes leading to the abandonment are relevant and proper subjects for inquiry. The plaintiff alleged in her complaint that her illness was the main factor which caused her husband to abandon her. To prevent her from testifying about her illnesses, her hospitalization and the medical bills which accumulated during her illnesses would be to prevent her from proving her allegations.

In *Eggleston v. Eggleston,* 228 N.C. 668, 47 S.E. 2d 243 (1948), the wife instituted an action for alimony without divorce alleging that her husband had abandoned her. Her evidence showed repeated assaults and threats by her husband over a period of years culminating with the assault which resulted in her leaving her husband. In instructing the jury the trial judge limited them, in determining the question of abandonment, to the last incident when the assault occurred which caused the wife to leave the husband's domicile. Our Supreme Court held that such an instruction was erroneous. The plaintiff had the right to rely on the cumulative effect of many years of mistreatment by the husband and her testimony could not be limited to events which occurred immediately prior to the alleged abandonment. This reasoning is applicable to the present case. The illnesses which eventually caused the defendant to abandon his wife did not begin just prior to the separation. His wife had been suffering from these illnesses for many years. These illnesses were known to him and had, in fact, been the basis upon which the defendant asked for and was granted a hardship discharge from military service. The wife was entitled to have the cumulative effect of these illnesses before the jury in her action for alimony without divorce.

[2] The appellant's next assignment of error is that the defendant was prejudiced by the testimony of the witness Whitmeyer. The record disclosed that Mr. Whitmeyer was pastor of the Hopewell Baptist Church and that he had been this couple's pastor since just after they were married. While he was testifying he was asked the following question:

> "Q. Directing your attention from the date of Mr. Mode's discharge on January 10, 1968, up through May of 1968, please describe the condition of Mrs. Mode as you personally observed it to be?"

His response was that he visited her several times while she was in the hospital critically ill and that he also visited her in her parents' home after she was released from the hospital where he found that she was unable to take care of herself. It was not error for the court to admit this testimony. "So, the state of a person's

health, his ability to engage in work, his race, the emotions he displayed on a given occasion, whether he was drunk or sober and other aspects of his physical appearance, are proper subjects of opinion testimony by nonexperts." Stansbury, North Carolina Evidence, 2d Edition, Sec. 129.

[3] The next assignment of error is that the court committed error in overruling the defendant's motion for judgment as of nonsuit at the close of the evidence. It is an established rule in North Carolina that when passing upon a motion for nonsuit the court must consider the evidence in its light most favorable to the plaintiff. The evidence in the present case was clearly sufficient to carry the case to the jury and to withstand the motion for judgment as of nonsuit. The evidence was sufficient to show that the plaintiff had been ill during much of the marriage and that as a result of this illness the defendant abandoned her and has failed to provide any support for her. This assignment of error is overruled.

[4, 5] The appellant also assigns as error the submission to the jury of issue number two. The evidence was not sufficient for the court to submit an issue to the jury as to whether defendant offered such indignities to the plaintiff as to render her condition intolerable and life burdensome; however, we do not feel that this was prejudicial error. When the jury returns answers to other issues which establish the rights of the parties irrespective of the answer to the questioned issue, or the rights of the parties are not dependent upon the answer to the issue returned by the jury, any error in the instructions upon such issue is harmless. Strong, North Carolina Index 2d, Appeal and Error, sec. 50. This assignment is overruled.

The appellant contends that the court committed error in charging the jury on the issue of abandonment. We have examined the charge by the court and have found no prejudicial error. In *Overby v. Overby,* 272 N.C. 636, 158 S.E. 2d 799 (1968), the Court considered and approved a charge which was substantially similar to the charge in the present case. In that case the Court stated:

> "The court correctly placed the burden of proof on this issue and defined abandonment in accordance with decisions of this Court. *Pressley v. Pressley,* 261 N.C. 326, 134 S.E. 2d 609; *Caddell v. Caddell,* 236 N.C. 686, 73 S.E. 2d 923; *Hyder v. Hyder,* 215 N.C. 239, 1 S.E. 2d 540. Appellant's contention that abandonment imports willfulness is, in this case, an exercise in semantics. To the contrary, abandonment requires that the separation or withdrawal be done willfully and without just cause or provocation. The phrase was used in *Workman v. Workman,*

242 N.C. 726, 89 S.E. 2d 390, in holding that a complaint in an action for alimony without divorce under G.S. 50-16 was sufficient, when liberally construed, to withstand demurrer, and has no application here."

[6] The appellant also contends that the court erred in not charging the jury that a husband is under a duty to support his wife only in the home he has provided. The defendant did not make any request of the court that it charge the jury concerning the duty of the husband regarding support. "Where the court adequately charges the law on every material aspect of the case arising on the evidence and applies the law fairly to the various factual situations presented by the evidence, the charge is 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 instructions on a subordinate feature, or greater elaboration, to aptly tender a request therefor." 7 Strong, North Carolina Index 2d, Trial, sec. 33.

We have carefully considered the appellant's assignments of error and have found no prejudicial error. The judgment of the court below awarding the plaintiff alimony without divorce is affirmed.

Affirmed.

MORRIS and PARKER, JJ., concur.

STATE OF NORTH CAROLINA v. WILLIAM C. DRAKE

No. 708SC287

(Filed 27 May 1970)

1. Homicide § 21— first degree murder — sufficiency of circumstantial evidence

Circumstantial evidence offered by the State was sufficient to send the case to the jury on the issue of defendant's guilt of first degree murder of his wife, and to support a verdict of guilty of second degree murder, where it tended to show that deceased suffered a brutal beating and was shot three times while in the trailer home in which defendant and deceased lived, and a legitimate inference arises from the evidence that the shots came from defendant's pistol and that at least part of the beating was administered with a hoe handle that was ordinarily kept in defendant's workshop on the outside of the trailer.

2. Homicide § 14— intentional use of deadly weapon — presumptions of malice and unlawfulness

The intentional use of a deadly weapon, as a weapon, when death prox-

imately results from such use, gives rise to presumptions that the killing was (1) unlawful and (2) with malice.

3. Homicide § 24— use of deadly weapon — presumptions — instructions

In this homicide prosecution, the trial court erred in instructing the jury that once a killing is proven to have been done with a deadly weapon the law presumes malice, since in order for a presumption of malice to arise, it had to be established or admitted that the defendant *intentionally* used a deadly weapon, as a weapon, and inflicted wounds proximately resulting in death.

APPEAL by defendant from *Parker, J.*, September 1969 Criminal Session, LENOIR County Superior Court.

Defendant was tried under a bill of indictment charging him with the first degree murder of his wife on 1 November 1968.

The only evidence was that offered by the State and it tended to show as follows:

At the time of the alleged murder defendant and deceased lived with their four-year-old son in a trailer home in Lenoir County. Their nearest neighbors were deceased's uncle and his wife, Mr. and Mrs. Samuel Huggins. In the early morning hours of 1 November 1968, the Huggins received a telephone call from defendant and in response to the call they went immediately to the trailer. They entered the trailer at approximately 4:00 a.m. Mr. Huggins testified that he found the deceased lying on her back on the floor in the east bedroom. He pulled her to the door of the trailer so that she could get some air. Defendant was sitting or squatting near the telephone. He had on a pair of shorts and a T-shirt. The baby was sitting up in bed in a bedroom at the opposite end of the trailer from where the deceased was lying.

The sheriff and two deputies investigated the killing. They determined that Mrs. Drake was dead when they arrived. She was clothed in a reddish, short gown with a pair of pants. Blood was observed about the bed in the east bedroom and on the ceiling directly above the bed. Two pillows were saturated with blood. There was also blood on the mattress and sheets at the head of the bed and blood had run off the bed onto the floor. Blood was running down the left leg of a chair. Under the head of the bed there were three pieces of wood which when fitted together constituted a handle approximately 32¼ inches long. Blood and hair were embedded in the wood. The handle was identified by deceased's father as a hoe handle that was ordinarily kept in a workshop in back of the trailer.

The first deputy to arrive on the scene saw defendant standing in the east bedroom beside a chest of drawers. He was holding a shirt up to his side where he had been shot. The top drawer of the chest of drawers was open and an empty holster and several rounds of ammunition were inside. A woman's purse was found lying open on the floor of the living room with a dollar and 66 cents in change lying nearby. A man's billfold was on the counter separating the living room and dining room. A .38 caliber Smith and Wesson pistol, identified as belonging to defendant, was located on the ground 15 to 16 feet outside the front door of the trailer. Four empty cartridges and a single live bullet were in the cylinder which in this pistol could hold only 5 bullets. There was blood on the barrel.

Dr. John A. Parrott was stipulated to be an expert physician and surgeon, specializing in surgery. He performed an autopsy on the body of Mrs. Drake, starting at 3:00 p.m. on 1 November 1968. He found three bullet wounds about the body. Also: "[t]here were multiple wounds in the scalp and the scalp was real bloody and the hair was encrusted with blood. Apparently due to a blunt instrument the wound itself was rough and frayed. . . ." There were four abrasions just below the right knee on the immediate surface and three on the right foot, anterior surface. Severe bruises were on the right breast including five skin breaks on the left and two on the right. There were powder burns on the left front breast and the anterior neck; multiple bruises of the left scapular and hematoma formation; and the bone was fractured in the right forefinger. In the opinion of Dr. Parrott any of the three bullet wounds was sufficient to cause death, but in his opinion the bullet that did cause death passed through the anterior chest, the lung area, and severed the pulmonary vein resulting in severe hemorrhage. Two of the three bullets were recovered by Dr. Parrott from the body and turned over to the coroner. The third bullet was located by X-ray matted in the hair at the base of the deceased's skull and was given to a deputy sheriff.

A State Bureau of Investigation laboratory analyst testified that blood found on the deceased's nightgown, the pillow cases, mattress covers, bed sheet and pieces of carpet was human blood and of the "A" group, the same blood group as that of the deceased. Hair from the hoe handle was determined to be brown hair from a member of the Caucasian race.

Another State Bureau of Investigation agent, found by the court to be an expert specializing in firearms identifications and comparisons, testified that the three bullets taken from the body of deceased

and another bullet extracted from the wall of the trailer were fired from a .38 caliber Smith and Wesson pistol like the one belonging to defendant and found near the trailer. Because the bullets were in a distorted condition, the expert could not say whether they were actually fired from that particular weapon. He testified that based upon certain powder burn tests which he conducted, the pistol fired into the nightgown worn by deceased was fired from a distance of 16 to 24 inches and the pistol fired into the T-shirt worn by defendant was fired from a distance of 8 to 12 inches. The pistol belonging to the deceased fitted the holster found in the chest of drawers.

Mr. Paul T. Huggins, father of the deceased, testified that he visited his daughter's home two or three times a week. He went to her home on 31 October 1968 at approximately 9 o'clock in the evening. Defendant's car was parked in the driveway at the time with a flat tire. Defendant was there and reported that the deceased and young son had gone "trick or treating," as it was Halloween night. Huggins stated that he had never seen either the defendant's car or the deceased's car parked behind the trailer where they were found immediately after the killing. He also testified that he had seen the defendant strike the deceased on the shoulder on one occasion and had heard him at other times say "Damn it, Pat, do this" or "Damn it, do that." He further stated that on one occasion about a month before 1 November 1968 defendant told him, referring to deceased and the young son: "You can take both of them if you want to, I don't want them anyway."

The State offered evidence tending to show that on 22 October 1968 a policy of insurance was issued on the life of deceased in the sum of $2,400. On 25 October 1968 another policy was issued on the life of deceased in the same amount. On 31 October 1968 two accident policies were issued on the life of deceased, one in the amount of $1,000 and one in the amount of $1,200. Defendant applied for all of the insurance policies and he was named as beneficiary therein. They became effective when written and both of the accident policies contained a clause covering burglary. Similar accident policies had been written on the life of defendant with the deceased named as beneficiary.

The jury returned a verdict of guilty of murder in the second degree and judgment was entered sentencing defendant to imprisonment in the State's Prison for a period of 30 years. Defendant appealed.

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

Scott, Folger & Webster by A. D. Folger, Jr., and Brock & Gerrans by C. E. Gerrans for defendant appellant.

GRAHAM, J.

[1] In our opinion the evidence, though circumstantial in nature, was sufficient to send the case to the jury on the issue of defendant's guilt of murder in the first degree, and to support a verdict of guilty of murder in the second degree. The evidence shows that deceased suffered a brutal beating and was shot three times. A legitimate inference arises that the shots came from defendant's pistol and that at least part of the beating was administered with a hoe handle that was ordinarily kept in defendant's workshop on the outside of the trailer. No suggestion is offered anywhere in the record that anyone, other than defendant, had access to the hoe handle or pistol, or was present when the deceased met her tragic death. Defendant's motion of nonsuit was properly denied and his assignment of error relating thereto is overruled.

[3] Defendant assigns as error the following portions of the court's instructions to the jury:

> "Now the Court instructs you in regard to malice. Malice is not only hatred, ill will or spite, as those terms are ordinarily understood. To be sure, that is malice, but it also means that condition of mind which prompts a person to intentionally take the life of another without just cause, excuse or justification. It may be shown by evidence of hatred, ill will, or dislike, *and it is implied in law from the killing with a deadly weapon.* And the Court instructs you that a pistol or a gun is a deadly weapon. That is, Gentlemen of the Jury, *once a killing is proven to have been done with a deadly weapon the law presumes malice and therefore murder in the second degree at least.* Now premeditation and deliberation are issues of fact which the State must satisfy you from the evidence and beyond a reasonable doubt before you would be able to find murder in the first degree; that is, along with malice." (Emphasis added).

The above instructions contain prejudicial error requiring a new trial.

[2, 3] The intentional use of a deadly weapon, as a weapon, when death proximately results from such use, gives rise to two presump-

tions: (1) that the killing was unlawful, and (2) that it was done with malice. *State v. Mercer,* 275 N.C. 108, 165 S.E. 2d 328; *State v. Propst,* 274 N.C. 62, 161 S.E. 2d 560; *State v. Gordon,* 241 N.C. 356, 85 S.E. 2d 322. The presumptions do not arise from the mere use of a deadly weapon -- the use must be intentional. *State v. Debnam,* 222 N.C. 266, 22 S.E. 2d 562. And it is error where, as here, the court instructs that once a killing is proven to have been done with a deadly weapon the law presumes malice. *State v. Mercer, supra.* Nowhere in the instructions quoted above or anywhere else in the charge did His Honor explain to the jury that in order for a presumption of malice to arise, it had to be established or admitted that the defendant *intentionally* shot and killed deceased with the .38 caliber pistol.

The State contends that the court's omission was not prejudicial because the evidence so clearly established that if defendant shot deceased, he did so intentionally. We do not agree. To so hold would be to relieve the State of the burden of proving essential elements of the offense of murder in the second degree; namely, that the killing was unlawful and with malice. For these elements to be presumed present the burden is upon the State to satisfy the jury from the evidence beyond a reasonable doubt that the defendant *intentionally* used a deadly weapon, as a weapon, and inflicted wounds proximately resulting in death. See *State v. Mercer, supra,* and cases therein cited.

New trial.

MALLARD, C.J., and MORRIS, J., concur.

R. FRANK EVERETT, H. T. HIGHSMITH AND H. H. WORSLEY, CO-PARTNERS, TRADING AND DOING BUSINESS AS PLANTERS WAREHOUSE NO. ONE AND NO. TWO v. TOWN OF ROBERSONVILLE AND SEABOARD COAST LINE RAILROAD COMPANY

No. 702SC102

(Filed 27 May 1970)

1. Venue § 8.5— removal for fair trial — granting of subsequent motion after trial — change of circumstances

In plaintiffs' action against a town and a railroad to recover flood damages to their warehouse, the trial judge, subsequent to the conclusion of the trial, properly exercised his discretion in granting plaintiffs' motion to remove the action to an adjacent county for retrial on the ground that a fair and impartial trial could not be had in the county in which the

trial was held, notwithstanding another judge prior to the trial had denied plaintiffs' motion to remove on the same ground, where (1) the trial judge's discretion was exercised in the light of changed circumstances brought about by the trial itself, which had continued for two weeks in a county having only five weeks a year of regular superior court sessions, and (2) the trial court considered the entire record in the action, including the testimony of witnesses, and also considered the public discussion and interest generated by the trial.

2. Venue § 8.5— removal for fair trial — discretion of court

A motion for change of venue or, in the alternative, that a jury be summoned from another county, on the ground that a fair and impartial trial cannot be obtained in the county in which the petition is pending, is addressed to the sound discretion of the trial court. G.S. 1-84.

3. Venue § 8.5— removal for fair trial — significant change of circumstances

On motion for change of venue on the ground that a fair and impartial trial cannot be obtained, the court must exercise its discretion in the light of the situation existing when the decision is made; should thereafter some significant change occur, the trial court may be called upon again to exercise its discretion in the light of the changed situation.

4. Venue § 8.5— removal for fair trial — statutory and discretionary authority

Ordinarily, the power of the trial judge to remove an action in order to assure a fair and impartial trial is invoked pursuant to G.S. 1-84, but the trial judge also has the inherent discretionary power to order a change of venue *ex mero motu* when, because of existing circumstances, a fair and impartial trial cannot be had in the county in which the action is pending.

5. Venue § 9; Appeal and Error § 54— change of venue — the affidavit — appellate review

Where facts are set forth in the affidavit supporting a motion for change of venue, their sufficiency rests in the discretion of the judge and his decision upon them is final; but where no facts are stated in the affidavit as grounds for removal, the ruling of the trial court may be reviewed on appeal. G.S. 1-84, G.S. 1-85.

APPEAL by defendant, Town of Robersonville, from *Martin, Robert M., J.*, June 1969 Civil Session of MARTIN Superior Court.

This is a civil action instituted in the Superior Court of Martin County in which plaintiffs seek recovery of damages in the amount of $210,263.41 for injuries sustained by them from the flooding of their warehouse located in the Town of Robersonville. Plaintiffs alleged that such flooding was caused by negligence of the defendants. Each defendant answered and denied negligence. In apt time before trial plaintiffs moved that the cause be removed to another county for trial or in the alternative that a special venire be brought in

from another county on the ground it would be difficult to obtain an impartial jury in Martin County. After hearing on this motion at the April 1969 Session of Martin Superior Court, Judge Hubert E. May entered an order denying the motion and setting the cause for trial at the next civil session of court. The case came on for trial at the June 1969 Civil Session of Martin Superior Court and was tried before Judge Robert M. Martin and a jury. The trial commenced on Monday, 2 June 1969 and continued for two weeks, requiring the entry of orders extending the session of court. The jury returned verdict finding each of the defendants negligent and awarding damages in the amount of $8,000.00.

After return of the jury's verdict in open court, plaintiffs moved that the verdict on the issue of damages be set aside as contrary to the weight of the evidence, contending that the award of damages was grossly inadequate. Plaintiffs also renewed their motion, previously made pursuant to G.S. 1-84, to remove the case to an adjacent county for retrial upon the grounds that a fair and impartial trial could not be obtained in Martin County. Defendant Seaboard Coast Line Railroad Company moved that the verdict finding it negligent be set aside as contrary to the greater weight of the evidence, and defendant Town of Robersonville moved that in event the court should set aside the verdict on the issue of damages it also set aside the verdict finding defendant Town of Robersonville negligent and order a complete new trial on all issues. Arguments on these motions were made in open court upon the return of verdict at the trial in Martin County. Subsequently, by consent of all the parties, additional arguments were presented to Judge Martin in Cabarrus County on 20 October 1969, following which the court entered an order containing the following:

> "And at the conclusion of the arguments of counsel and upon consideration of the entire record in this case, including the testimony given by the witnesses during the trial at the June 2, 1969, Civil Session of Superior Court of Martin County and the events which transpired during the trial, the court is of the opinion that the verdict of the jury upon the third issue was and is clearly contrary to the greater weight of the evidence and that, therefore, the verdict upon that issue should be set aside, but the court is also of the opinion that there should be a complete new trial upon all of the issues in the case, and the court is further of the opinion, and finds as a fact, that a fair and impartial retrial of the case cannot now be obtained in Martin County and that, therefore, the case should be removed to an adjacent county for retrial;

"NOW, THEREFORE, in the exercise of the court's discretion, IT IS ORDERED that the aforesaid verdict of the jury returned at the June 2, 1969, Civil Session of Superior Court of Martin County shall be and the same is hereby set aside in toto and the parties are granted a new trial upon all issues arising in the case; AND IT IS FURTHER ORDERED, in the exercise of the court's discretion, that a copy of the record of the action be removed to the Superior Court of Edgecombe County for retrial, the court being of the opinion that a fair and impartial trial cannot be had by a retrial of the case in the Superior Court of Martin County."

To the portion of said order removing the cause from Martin County to Edgecombe County for retrial, defendant Town of Robersonville excepted and appealed.

Wilkinson & Vosburgh; and Jordan, Wright, Nichols, Caffrey & Hill, by Welch Jordan and Mickey A. Herrin, for plaintiff appellees.

Paul D. Roberson, Clarence W. Griffin; and Connor, Lee, Connor & Reece, by Cyrus F. Lee and J. M. Reece, for defendant appellant, Town of Robersonville.

Rodman & Rodman, by Edward N. Rodman, for defendant appellant, Seaboard Coast Line Railroad Company, filed brief concurring in the brief of the Town of Robersonville.

PARKER, J.

[1] Appellant contends that Judge May having denied plaintiffs' motion to remove which was entered prior to the trial, Judge Martin was without authority thereafter to enter the order appealed from. We do not agree.

Appellant cites the well established rule that ordinarily one superior court judge may not overrule or reverse the judgment of another superior court judge previously made in the same action. *Neighbors v. Neighbors,* 236 N.C. 531, 73 S.E. 2d 153. This rule, however, is not applicable to the situation presented by the present appeal.

[1-3] A motion for change of venue or, in the alternative, that a jury be summoned from another county, on the ground that a fair and impartial trial cannot be obtained in the county in which the action is pending, is addressed to the sound discretion of the trial court. G.S. 1-84; *State v. Porth,* 269 N.C. 329, 153 S.E. 2d 10. Of necessity the court must exercise that discretion in the light of the

situation existing when the decision is made. Should thereafter some significant change occur, it may become necessary, in the interest of assuring a fair trial, that the trial court be called upon again to exercise its discretion. In such case the discretion should be exercised in the light of the changed situation, and we see nothing in the statute, G.S. 1-84, or in the rule which limits the power of one superior court judge to reverse a judgment of another, which prevents that this be done. In the present case a significant change occurred after Judge May's order was entered and prior to the time Judge Martin entered the order appealed from. The trial of this action was in itself sufficient to bring about a significant change in circumstances in the county in which the action was pending. This trial consumed approximately two full weeks of the court's time in a county which had only five weeks of regularly scheduled civil sessions of superior court during the entire year. Judge Martin had himself presided at that trial and had an opportunity to observe the extent of the public interest and discussion which the trial itself generated. It was proper for him to exercise his discretion in the light of the changed circumstances brought about by the trial itself.

Rutherford College v. Payne, 209 N.C. 792, 184 S.E. 827, cited by appellant, is distinguishable and is not here controlling. In that case the motion to remove was made as a matter of right on the ground that the principal office of the plaintiff corporation was not in the county in which the action was instituted; obviously this presented a question which, when once decided by one superior court judge, could not be reviewed by another superior court judge in the same action.

[4, 5] Appellant's additional contention that Judge Martin's order must be reversed because not based upon affidavits as referred to in G.S. 1-85 is also without merit. Ordinarily the power of the trial judge to remove an action in order to assure a fair and impartial trial is invoked pursuant to G.S. 1-84. That statute requires the suggestion to be made on oath or affirmation and the order to be entered "after hearing all the testimony offered on either side by affidavits." The affidavits should set forth "particularly and in detail the ground of the application," and "[i]t is competent for the other side to controvert the allegations of fact in the application, and to offer counter affidavits to that end." G.S. 1-85; *Patrick v. Hurdle,* 6 N.C. App. 51, 169 S.E. 2d 239. Where facts are set forth in the affidavit, their sufficiency rests in the discretion of the judge and his decision upon them is final; but where no facts are stated in the affidavit as grounds for removal, the ruling of the trial court may be reviewed on appeal. *Gilliken v. Norcom,* 193 N.C. 352, 137 S.E. 136; *Phillips v. Lentz,*

83 N.C. 240. In addition, however, to the express statutory authority granted in G.S. 1-84, the judge of superior court has the inherent discretionary power to order a change of venue *ex mero motu* when, because of existing circumstances, a fair and impartial trial cannot be had in the county in which the action is pending. *English v. Brigman,* 227 N.C. 260, 41 S.E. 2d 732. Such was the case here. Judge Martin's order recites that it was entered "upon consideration of the entire record in this case, including the testimony given by the witnesses during the trial at the June 2, 1969, Civil Session of Superior Court of Martin County and the events which transpired during the trial." These events occurred in Judge Martin's presence. The sworn testimony of witnesses at the trial and the court's own observation of the events transpiring at the trial furnished sufficient basis for the court to invoke its inherent discretionary power to order the removal in the furtherance of justice. The fact that plaintiffs had filed and later renewed a motion to remove would not, under the circumstances of this case, compel the court to proceed only under the statutory authority and to forego exercise of its inherent judicial power. Nothing in the record indicates, and appellant does not contend, that it was denied full opportunity to be heard.

The order appealed from is

Affirmed.

CAMPBELL and VAUGHN, JJ., concur.

SHARON E. ANDERSON, BY HER NEXT FRIEND, EMERY ANDERSON v. RAWLEIGH W. ROBINSON, D/B/A ROBINSON BROTHERS MOTOR COMPANY AND JAMES A. JENKINS

No. 7028SC155

(Filed 27 May 1970)

1. Automobiles §§ 68, 92— defective brakes — negligence of driver — sufficiency of evidence

Evidence offered by plaintiff guest passenger *is held* sufficient to go to the jury on the issue of defendant driver's negligence in operating a vehicle with defective brakes where it tends to show that, at the time of the accident, the brakes on defendant's automobile were defective and did not meet the requirements of G.S. 20-124, and that defendant had actual knowledge prior to the accident of some defect in the brakes.

2. Automobiles §§ 6, 93— negligence of used car dealer — failure to have vehicle inspected — defective brakes

In this action by plaintiff automobile passenger against defendant used car dealer to recover for personal injuries sustained when an automobile left the road and wrecked shortly after it was purchased by the driver, plaintiff's evidence *is held* sufficient for the jury where it tends to show that defendant dealer sold the automobile to the driver without having it inspected as required by G.S. 20-183.2 and after a defective condition of the brakes had been called to the attention of defendant's salesman by an earlier prospective purchaser, and that the brakes failed, a wreck ensued, and plaintiff was injured.

3. Automobiles §§ 6, 23— failure of dealer to have vehicle inspected — negligence per se

The retail sale of an automobile by a dealer without first having the official inspection required by G.S. 20-183.3 is negligence *per se* and is actionable if it proximately causes injury.

4. Negligence § 8— proximate cause — jury question

What is the proximate cause of an injury is ordinarily a question for the jury.

APPEAL by plaintiff from *Ragsdale, S.J.*, 18 August 1969, Civil Session of BUNCOMBE Superior Court.

The plaintiff instituted this action to recover for injuries she sustained while a passenger in a 1962 Chevrolet operated by defendant Jenkins. Allegations in plaintiff's complaint were to the effect that on 19 July 1966 Jenkins purchased the automobile from defendant Robinson, a used car dealer. Plaintiff alleged that at the time of the sale of the automobile, the brakes thereon were defective and that this fact was known by the dealer or by the exercise of reasonable care, should have been known in that the defect had been called to his attention by an earlier prospective purchaser and would have been disclosed by a reasonable inspection or by the official inspection required in the statute. Plaintiff further alleged that the dealer had failed to comply with G.S. 20-183.2 which requires motor vehicle dealers, prior to the sale of a vehicle, to have the same inspected at an approved inspection station and have affixed thereto an approved inspection sticker. Plaintiff alleged in substance that Jenkins was negligent in operating a vehicle not equipped with brakes as required by G.S. 20-124 and was negligent in the manner in which he drove the automobile. As a result of the alleged negligence of both defendants, plaintiff contends that she sustained serious injuries when the automobile, shortly after its purchase from Robinson, ran off the highway and wrecked.

At the conclusion of the plaintiff's evidence the motion of each

defendant for a judgment of involuntary nonsuit was allowed. From the judgments of involuntary nonsuit, the plaintiff appeals.

Gudger, Erwin and Crow by James P. Erwin, Jr., for plaintiff appellant.

Van Winkle, Buck, Wall, Starnes and Hyde by O. E. Starnes, Jr., and Scott N. Brown, Jr., and Uzzell and DuMont by Harry DuMont for defendant appellee Robinson.

Williams, Morris and Golding by J. N. Golding for defendant appellee Jenkins.

VAUGHN, J.

[1] Every motor vehicle, when operated upon the highway shall be equipped with brakes that are maintained in good working order and conform to the regulations prescribed by statute. G.S. 20-124; *Austin v. Austin,* 252 N.C. 283, 113 S.E. 2d 553. Plaintiff's evidence was clearly sufficient to show that, at the time of the accident, the brakes on defendant Jenkins' automobile were defective and did not meet the requirements of this statute. Where the plaintiff has shown the defendant's brakes to be defective, which is negligence *per se,* our Supreme Court has stated the correct rule to be as follows:

> "The true rule is, we think, clearly and accurately stated in *Wilson v. Shumate,* 296 S.W. 2d 72. There plaintiff was driving defendant's automobile at his request. She was injured because of the failure of the brakes on the car. The Court said: 'Plaintiff's testimony heretofore noted, that the brake pedal went clear to the floor as she 'again and again' used it in an attempt to stop the automobile, that it had failed to slow or stop but ran into the embankment, was sufficient evidence from which a jury reasonably could find that defendant's automobile was not equipped with two sets of brakes in good working order during the time plaintiff was driving and that the defective foot brake contributed to cause the collision. Defendant's failure to observe the duty or standard of care prescribed by the statute constituted negligence. In recognition, however, of the principle that the statutes must be reasonably construed and applied, defendant could offer proof of legal excuse of avoidance of his failure to have observed the duty created by the statute, i.e., proof that an occurrence wholly without his fault made compliance with the statute impossible at the moment complained of and which proper care on his part would not have avoided.

> Upon adducing the substantial evidence tending to so prove, it was then a jury question as to whether the defendant was negligent for failure to have provided a foot brake in good working order.' " *Stephens v. Oil Co.*, 259 N.C. 456, 131 S.E. 2d 39.

In the case before us, the plaintiff went further and offered evidence which, when taken to be true as it must be on a motion for judgment as of nonsuit, supports the inference that defendant, prior to the accident, had actual knowledge of some defect in the brakes. There was evidence tending to show that shortly before the accident he parked the automobile on an incline. It began to roll. The defendant then said, "I jumped back into the car and attempted to put on the brake. The car wouldn't stop. The brake pedal went to the floor but it didn't stop it." He stopped the automobile finally by putting it in gear. Some fifteen or twenty minutes later the plaintiff got in the automobile with the defendant, who, despite the earlier malfunction of the brakes, then proceeded to operate his automobile on the highway without further inspection or repair. The wreck occurred very soon thereafter. There was other evidence tending to show negligence on the part of the defendant Jenkins in the actual operation of the vehicle. We hold that plaintiff's evidence was sufficient to withstand defendant's motion for a judgment as of nonsuit and that a new trial must be ordered in plaintiff's action against the defendant Jenkins.

[2-4] We now reach the appeal relating to the defendant Robinson, the dealer who shortly before the accident, sold the vehicle in which plaintiff was injured. We agree with plaintiff's contention that there was evidence from which the jury could have found that this defendant did not comply with the provision of G.S. 20-183.2 which requires all motor vehicle dealers, prior to the retail sale of a vehicle, to have such vehicle inspected by an approved station and have affixed thereto an approved inspection certificate. The statute requires that the vehicle must be found to possess, among other things, brakes that are in a safe operating condition. G.S. 20-183.3. The retail sale of an automobile by a dealer, without first having the official inspection required by this statute, is negligence *per se*. This is the general rule as to statutes enacted for the safety and protection of the public. In such cases, the only remaining question is whether such negligence was a proximate cause of the injury for which recovery is sought. *Byers v. Products Co.*, 268 N.C. 518, 151 S.E. 2d 38; *Reynolds v. Murph*, 241 N.C. 60, 84 S.E. 2d 273. Proximate cause is an inference of fact. "It is only when the facts are all admitted and only one inference may be drawn from them that the court will declare whether an act was the proximate cause of an

injury or not. But that is rarely the case. *Taylor v. Stewart,* 172 N.C., 203, 90 S.E., 134. Hence, 'what is the proximate cause of an injury is ordinarily a question for the jury . . . It is to be determined as a fact in view of the circumstances of fact attending it.'" *Conley v. Pearce-Young-Angel Co.,* 224 N.C. 211, 29 S.E. 2d 740.

[2] Plaintiff also offered testimony tending to show that on Saturday, prior to the sale of the vehicle to defendant Jenkins on the following Tuesday, a prospective buyer drove the vehicle. As a witness for plaintiff this person testified as follows: "When I turned up Old Hall Street I put the brakes on and the brakes pulled and felt spongy and just barely did stop the car. So I took it back." He later told one of defendant's salesmen "what was wrong with it."

Plaintiff's evidence further tended to show that Jenkins purchased the automobile shortly after noon and that about two hours later, after the vehicle had been driven a total distance of approximately 35 to 40 miles from the time it left defendant's lot, the brakes would not stop the vehicle at the Allen home; that a few miles and shortly thereafter a full depression of the brake pedal did not result in the application of any braking force to the wheels; a wreck ensued and plaintiff was injured. In *Austin v. Austin, supra,* the evidence indicated that defendant was enroute from Washington, D. C. to Salisbury, North Carolina. Near Danville, Virginia, he noticed that when he put his foot on the pedal it would go down farther than it should. He caused fluid to be added to the master cylinder. He had no further difficulty with the brakes between Danville, Virginia and Salisbury, a distance of about 100 miles. He then turned his automobile over to plaintiff's intestate in order that she might drive it to Charlotte. Nothing was said about the difficulty he had had with the brakes. Enroute to Charlotte plaintiff's intestate attempted to apply the brakes and found that she had none. This occurred less than five hours after the fluid had been added in Danville. The Supreme Court of North Carolina reversed the judgment of nonsuit which had been entered at the close of the plaintiff's evidence. The Court held that defendant's knowledge that the fluid became low near Danville, Virginia, imposed a duty upon him to inspect the vehicle and determine the cause. In the case before us, in addition to the evidence of notice of some defect, the duty to inspect was required by statute.

From the facts reported in the opinion, *Jones v. Chevrolet Co.,* 217 N.C. 693, 9 S.E. 2d 395, appears to present a factual situation

similar to the case at bar. The following statement from the opinion would seem to be appropriate here.

> "There was evidence tending to show that the plaintiff Jerry A. Jones was an invited guest in an automobile, that because of defective brakes the automobile was wrecked resulting in injury to the plaintiff, that the defendant Raney Chevrolet Company was an automobile dealer and sold the automobile, second-hand, to the owner thereof with whom the plaintiff was riding, and that the dealer represented to the owner that the automobile was equipped with good, reliable brakes when it knew, or by the exercise of due care could have known, that the automobile had defective brakes, and that the defects would naturally result in the brakes becoming applied in an emergency manner in the ordinary operation of the automobile, causing the operator to lose control over the automobile.
>
> " 'A retail dealer who takes a used truck in trade and undertakes to repair and recondition it for resale for use upon the public highways owes a duty to the public to use reasonable care in the making of tests for the purpose of detecting defects which would make the truck a menace to those who might use it or come in contact with it and in making the repairs necessary to render the truck reasonably safe for use upon the public highways, and is charged with knowledge of defects which are patent or discoverable in the evercise of due care.' *Egan Chevrolet Co. v. Bruner,* 102 F. (2d), 373, 122 A.L.R., 987. We think that the foregoing is a clear and concise statement of the law applicable to the case at bar, and that the Superior Court erred in entering judgment as in case of nonsuit."

We, of course, express no opinion as to what, if anything, the evidence does prove. We do decide that when the evidence is taken as true and when all conflicts therein are resolved in the light most favorable to the plaintiff and when there is extended to the plaintiff the benefit of every fair inference which would reasonably be drawn therefrom, an issue of fact for the jury is presented.

The judgment of nonsuit as to each defendant is reversed.

Reversed.

MALLARD, C.J., and MORRIS, J., concur.

STATE OF NORTH CAROLINA v. LARRY DONALD MIDGETT, BRADLEY JOHNSON, DONNIE BLOUNT, MARTIN WAYNE COLLINS, LONNIE GIBBS, VAN GRAY GIBBS, HENRY VANDERBILT JOHNSON, JR., SAMMY LEE BRYANT, FELTON GIBBS, ALVIN SPENCER, CLARENCE COWARD AND BENJAMIN PHELPS

No. 702SC54

(Filed 27 May 1970)

1. Criminal Law § 138— punishment — increased sentence in superior court

It is settled law in this State that the imposition in a given case of a greater sentence in the Superior Court Division upon trial *de novo* than was imposed in the District Court Division is constitutionally permissible.

2. Jury § 7— motion to quash jury venire

The motion to quash the supplemental jury venire is directed to the sound discretion of the trial court, and in the absence of evidence of abuse of discretion will not be disturbed on appeal.

3. Schools § 15— interruption of school — prosecution — sufficiency of evidence

In a prosecution charging that defendants unlawfully and wilfully interrupted a public school in violation of G.S. 14-273, the issue of defendants' guilt was properly submitted to the jury, where the State's evidence tended to show that (1) the defendants entered the office of the secretary to the principal and told her that they were going to interrupt the school that day; (2) the defendants locked the secretary out of her office, moved furniture about, scattered papers, and dumped books on the floor; (3) the secretary and several teachers were kept away from their jobs or classes by these actions; (4) the defendants also occupied the principal's office and operated the bells that normally signalled the change of classes; and (5) the principal, as a result of the commotion, was forced to dismiss school prior to the regular closing hour. G.S. 14-273.

4. Schools § 15— interruption of public school — instructions — conspiracy — harmless error

In a prosecution charging that defendants unlawfully and wilfully interrupted a public school in violation of G.S. 14-273, charge of the trial court cited by defendants as improperly raising the question of conspiracy *held* not prejudicial to defendants where the evidence showed that each defendant was present in the locked office of the principal and participated in the conduct complained of, that "they" said "they" were going to interrupt the operation of the school, and that they did so.

APPEAL by defendants from *Fountain, J.*, 9 June 1969 Session of HYDE Superior Court.

The 12 defendants were charged with and convicted by a jury of unlawfully and willfully interrupting and disturbing a public school and defacing school furniture, a violation of G.S. 14-273, on 5 De-

cember 1968. Another charge in violation of G.S. 14-132 was dismissed by the trial judge.

The charges arose from a disturbance created when the named defendants entered the office of the secretary to the principal of O. A. Peay School in Swan Quarter. The testimony, in summary, tends to show: The defendants and others entered the office of the secretary while the principal, Mr. Simmons, was away from the school; the secretary knew or recognized most of the boys who were there; they informed her that "they were going to interrupt us that day" and she could either leave or stay in the room, but that she could not pass in and out as she normally did; and that if she stayed she could make such telephone calls as she wished. The secretary telephoned Mr. Simmons and then went to get Mr. Hunter, who normally was in charge in Mr. Simmons' absence. While she was gone, her room was locked, and she was not permitted to return to her office. According to the testimony, filing cabinets and tables were moved against the doors and interior windows to further bar entry.

Daniel Williams testified that he was teaching a class across the hall from the office at the time of the incident. He stated that he left that class to investigate the incident at the office and did not resume teaching that day.

Principal Simmons testified that when he returned to the school a little before 12 noon, he found that the office doors were locked and the bell system was being actuated manually from within the office. He determined that the "presence of persons who were not enrolled" and "commotion" necessitated the dismissal of school, and therefore he ordered the children walked to the buses and sent them home a little after noon and prior to the usual closing.

Officers were directed to remove the occupants of the principal's office. Upon the defendants' refusal to leave, the door to the office was forced open, the table pushed against it was moved, and the defendants arrested. Inside, furniture was in some disarray, water was on the floor, some books from the adjacent book storage room were lying in the water, papers were scattered about and the defendants had wet towels around their necks (apparently unnecessarily anticipating the use of tear gas by officers to gain entry).

Some shouting by the defendants was noted by Officer Parrish of the State Highway Patrol. He said that he saw defendants Sammy Bryant and Bradley Johnson move a file cabinet. He stated that other youths were shouting and clapping their hands in and about the building. There was no evidence that the children in the office made loud noises prior to the arrival of officers.

All of the defendants were tried in District Court, 6 on 11 December 1968, 5 on 18 December 1968 and 1 on 21 January 1969. Each was sentenced to 4 months in jail, suspended for 2 years on payment of $100 fine and on condition that each defendant be at his residence by 11:30 p.m. each night. All appealed to the Superior Court Division of the General Court of Justice at Hyde County.

A trial *de novo* was held in the Superior Court upon each defendant's plea of not guilty. A nonsuit was granted by the judge as to the count charging a violation of G.S. 14-132. The jury returned a verdict of guilty as charged in the other count. Judgment was entered imposing 12 months' imprisonment.

Defendants appeal to this Court assigning as error (1) that the sentences imposed in Superior Court Division were improperly in excess of those imposed in the District Court Division; (2) that the trial court improperly refused to grant a motion to quash the supplemental jury venire and to allow defendants time to prepare an evidentiary showing in support of their motion; (3) that the court erred in denying defendants' motion for nonsuit; and (4) that the trial judge erred in his charge to the jury.

Attorney General Robert Morgan by Staff Attorney Burley B. Mitchell, Jr., for the State.

Chambers, Stein, Ferguson & Lanning by James E. Ferguson, II, for defendant appellants.

CAMPBELL, J.

[1] It is settled law in North Carolina that the imposition in a given case of a greater sentence in the Superior Court Division upon trial *de novo* than was imposed in the District Court Division is constitutionally permissible. *State v. Spencer*, 7 N.C. App. 282, 172 S.E. 2d 280 (1970), (Affirmed, North Carolina Supreme Court, 13 May 1970). This assignment of error has no merit.

[2] The motion to quash the supplemental jury venire is directed to the sound discretion of the trial court, and in the absence of evidence of abuse of discretion will not be disturbed on appeal. *State v. Oxentine*, 270 N.C. 412, 154 S.E. 2d 529 (1967). The record discloses the following:

> "MR. FERGUSON: Now, your Honor, I have a motion to quash the Order for supplementary jurors. The defendants through their counsel make a motion to quash the Order for

supplementary jurors and to dismiss the panel which was drawn from Dare County on the grounds that black persons were systematically and arbitrarily excluded from the jury panel and that the population of Dare County does not reflect the racial makeup of Hyde County.

THE COURT: RULING: Upon the making of the motion the court asked defendants' counsel if he wishes to offer further evidence in support of motion and the court was advised by defendants' counsel that he did not at this time and a request was made for a delay to procure evidence in support of his motion.

The court finds that the Order for supplementary jurors was entered on May 24, 1969, after conferring with defendants' counsel and the solicitor, and a copy of the Order was immediately sent to the defendants' counsel, therefore, the request to delay the proceedings is denied. The motion to quash is ordered ruled denied.

MR. FERGUSON: The defendants except."

This assignment of error is without merit.

[3] On a motion of nonsuit, the evidence is taken in the light most favorable to the State. *State v. Goines,* 273 N.C. 509, 160 S.E. 2d 469 (1968). In that light, the evidence tends to show that the defendants entered the office of the secretary to the principal and told her "they were going to interrupt us that day." They locked the secretary out of her office, moved furniture about, scattered papers and dumped some books on the floor. She, Mr. Hunter and Mr. Williams were drawn or kept away from their jobs or classes by this action. School was dismissed because of the "presence of non-students" (both in and about the school and in the principal's office), disruption and "commotion," which included the occupying of the principal's office by the defendants and their operation of the bells which normally were used to signal change of classes and other scheduled events. None of the defendants had permission to occupy the office and none made any attempt to allow the proper officials to enter the office.

In *State v. Wiggins,* 272 N.C. 147, 154, 158 S.E. 2d 37 (1967), the elements of a violation of G.S. 14-273 were enumerated:

"Giving the words of G.S. 14-273 their plain and ordinary meaning, it is apparent that the elements of the offense punishable under this statute are: (1) Some act or course of conduct by the defendant, within or without the school; (2) an actual, material interference with, frustration or of confusion in, part

or all of the program of a public or private school for the instruction or training of students enrolled therein and in attendance thereon, resulting from such act or conduct; and (3) the purpose or intent on the part of the defendant that his act or conduct have that effect. . . ."

We feel the evidence amply makes out all of the elements of the misdemeanor defined in G.S. 14-273.

[4] The portion of the charge of the trial court cited by the defendants as improperly raising the question of conspiracy was not prejudicial to the defendants. *State v. Donnell,* 202 N.C. 782, 164 S.E. 352 (1932). The evidence showed that each defendant was present in the locked office and participated in the conduct complained of. *They* said *they* were going to interrupt the operation of the school, and they did.

We find no error.

Affirmed.

PARKER and VAUGHN, JJ., concur.

STATE OF NORTH CAROLINA v. JAMES EDWARD GREEN

No. 7017SC197

(Filed 27 May 1970)

1. Constitutional Law § 32; Bastards § 1— willful failure to support illegitimate child — right to counsel

The offense of willful failure to support an illegitimate child is not a serious misdemeanor requiring the appointment of counsel or an intelligent waiver thereof. U. S. Constitution, Amendments VI and XIV; G.S. 49-2; G.S. 49-8.

2. Bastards § 1; Constitutional Law § 32; Criminal Law § 142— willful failure to support illegitimate child — right to counsel — support payments — fines

In a prosecution for willful failure to support an illegitimate child, the support payments that a convicted defendant must pay to his illegitimate children as a condition of his probation are not in the nature of a fine and are therefore not determinative on the question of defendant's right to counsel under the U. S. Constitution.

APPEAL from *Godwin, S.J.,* November 1969 Session, ROCKINGHAM Superior Court.

The defendant, James Edward Green, was arrested on a warrant in which he was charged with willful failure to support his two minor illegitimate children. Trial was held on 7 November 1966 in the Reidsville Recorder's Court and the defendant pleaded "not guilty". The defendant was convicted of violating G.S. 49-2 in that he did willfully refuse to support and maintain his two minor illegitimate children. Judgment entered by the court provided a sentence of six months suspended for two years on good behavior of the defendant, on payment of costs, and on the further condition that the defendant pay into the court on or before 12 November 1966 the sum of $10.00 for the support of his two illegitimate children and $10.00 per week thereafter.

On 29 November 1967 the defendant was again brought before the Reidsville Recorder's Court where it was found that he had failed to make support payments as ordered. He was given a prison sentence of eighteen months which was suspended upon certain conditions. On 9 January 1969 the court, having found that the defendant had failed to make support payments as previously ordered, invoked the sentence imposed on 29 November 1967 of eighteen months' imprisonment. The defendant appealed to the Superior Court of Rockingham County from the invocation of the suspended sentence. Judge Godwin at the 3 November 1969 session of Superior Court of Rockingham County held that the sentence of eighteen months was invalid and remanded the case to the Reidsville Recorder's Court.

On 3 April 1969 the defendant filed an application for a Writ of Error Coram Nobis in the Superior Court of Rockingham County. The defendant's application was heard at the 3 November 1969 Session of Superior Court, and on 5 November 1969 the court made the following findings of fact and order:

"And the court finds the following facts from evidence considered during the consideration of the defendant's aforesaid petition, viz:

"1. That the defendant was brought to trial in the Reidsville Recorder's Court in Rockingham County, North Carolina, on November 7, 1966, on a warrant issued on October 29, 1966, which charged the defendant with failure to adequately support, '. . . his illegitimate children . . .,' who were alleged to have been born on April 10, 1952, and September 28, 1966, respectively, in violation of General Statute 49-2.

"2. That the defendant entered a plea of not guilty to the charge against him.

"3. That upon his aforesaid trial a verdict of guilty was returned against the defendant.

"4. That the court entered judgment confining the defendant in the Rockingham County jail for a term of 6 months, and suspended the execution of the jail term upon the conditions that the defendant pay the cost of court and thereafter make certain periodic payments for the benefit of the children named in the warrant.

"5. That the maximum punishment provided by law under General Statutes 49-2 was, on the 7th day of November, 1966, a jail sentence of six months.

"6. That General Statutes 49-2 did not, on November 7, 1966, define a serious misdemeanor.

"The court makes the following conclusions of law:

"1. That the defendant was not entitled as a matter of right to be furnished legal counsel by the court upon his aforesaid trial.

"IT IS THEREFORE ORDERED AND DECREED that the application of the defendant, James Edward Green, for writ of error coram nobis be, and the same is hereby denied.

"This the 5th day of November, 1969.

"/s/ A. Pilston Godwin, Jr.
Judge Presiding"

From the entry of the order denying the defendant's application for writ of error coram nobis the defendant appealed to the Court of Appeals.

Robert Morgan, Attorney General, Jean A. Benoy, Deputy Attorney General, and Maurice W. Horne, Special Assistant, for the State.

Alston, Pell, Pell and Weston, by E. L. Alston, Jr., for defendant appellant.

HEDRICK, J.

[1] The only question to be considered on this appeal is whether a charge of willful failure to support illegitimate children is a "serious misdemeanor" requiring the appointment of counsel or an intelligent waiver thereof under the Sixth and Fourteenth Amendments to the United States Constitution. We think not.

Under the provisions of G.S. 49-2 the State must establish two facts in order for the defendant to be found guilty: (1) That the defendant is the parent of the illegitimate child in question and (2) that the defendant has willfully neglected or refused to support and maintain such illegitimate child. *State v. Coffey,* 3 N.C. App. 133, 164 S.E. 2d 39 (1968). The primary purpose of prosecution under the provisions of G.S. 49-2 is to insure that the parent does not willfully neglect or refuse to support his or her illegitimate child. *State v. Ellis,* 262 N.C. 446, 137 S.E. 2d 840 (1964). "The mere begetting of the child is not a crime. The question of paternity is incidental to the prosecution for the crime of nonsupport — a preliminary requisite to conviction." *State v. Ellis, supra.* The law in North Carolina further provides that once the question of paternity has been determined, the accused is not entitled to have the question of paternity re-litigated upon a subsequent prosecution for later willful neglect or refusal to support his illegitimate children. *State v. Ellis, supra.*

In order to determine whether the accused parent is entitled to the appointment of counsel, we must look to the provisions of the statute which imposes the punishment upon a parent for willful neglect or refusal to support his or her children. G.S. 49-8, in pertinent part, is as follows:

> "Upon the determination of the issues set out in the foregoing section [§ 49-7] and for the purpose of enforcing the payment of the sum fixed, the court is hereby given discretion, having regard for the circumstances of the case and the financial ability and earning capacity of the defendant and his or her willingness to cooperate, to make an order or orders upon the defendant and to modify such order or orders from time to time as the circumstances of the case may in the judgment of the court require. The order or orders made in this regard may include any or all of the following alternatives:
>
> "(1) Commit the defendant to prison for a term not to exceed six months;
>
> "(2) Suspend sentence and continue the case from term to term;
>
> "(3) Release the defendant from custody on probation conditioned upon the defendant's compliance with the terms of the probation and the payment of the sum fixed for the support and maintenance of the child; . . . ."

This statute establishes as the maximum punishment a prison

term of not more than six months. The question then becomes whether the defendant was denied a fundamental guarantee under the Constitution when the court failed to appoint counsel to represent him at his trial on 7 November 1966 in the Reidsville Recorder's Court. The North Carolina Supreme Court has recently considered the question of when a misdemeanor becomes "serious" and requires the appointment of counsel to indigent defendants. In *State v. Morris,* 275 N.C. 50, 165 S.E. 2d 245 (1969), the Court stated:

> "Although the United States Supreme Court has not stated precisely where the line falls between crimes and punishments that are 'petty' and those that are 'serious,' *Cheff* makes it clear that a six months' sentence is short enough to be petty while *Duncan* and *Bloom* make it equally clear that a crime punishable by two years in prison is a serious offense. In the federal system petty offenses are defined by statute as those punishable by not more than six months in prison and a $500 fine. 18 U.S.C. § 1. Hence, any federal crime the authorized punishment for which exceeds six months in prison and a $500 fine is a serious offense which entitles the offender to trial by jury under Article III, Sec. 2, of the Federal Constitution and under the Sixth Amendment . . . A serious offense is one for which the authorized punishment exceeds six months' imprisonment and a $500 fine. The cases of *State v. Hayes, supra* (261 N.C. 648, 135 S.E. 2d 653 (1964)), and *State v. Sherron, supra* (268 N.C. 694, 151 S.E. 2d 599 (1966)), are no longer authoritative."

[1, 2] The record on appeal in the present case shows that there has been an adjudication by the lower court that the defendant is the father of these illegitimate children. The record also shows that the defendant on several occasions has been ordered to pay child support for these children and that he has repeatedly neglected and refused to make the payments ordered. The maximum possible sentence under the terms of G.S. 49-8(1) is six months' imprisonment. No fine is authorized and none is levied against the defendant. The support payments ordered by the court are to be paid for the support of the defendant's minor children and are not in the nature of a fine. Since the punishment authorized by G.S. 49-8(1) is not in excess of six months' imprisonment, the offense involved in the present case is not a serious offense requiring the appointment of counsel.

The order of the court below denying the defendant's application for a writ of error coram nobis is affirmed.

Affirmed.

BROCK and BRITT, JJ., concur.

STATE OF NORTH CAROLINA v. GROVER CLEVELAND NORMAN

No. 7025SC173

(Filed 27 May 1970)

1. Constitutional Law § 30— speedy trial — delay between arrest and trial

A defendant who was arrested in February 1969 and tried in September 1969 was not denied his constitutional right to a speedy trial, although several terms of court elapsed from the date of arrest to the date of trial, where the delay partly resulted from the length of the docket and the quashal of a count in the indictment returned against him, and where there was no showing that the delay was due to neglect or wilfulness on the part of the prosecution.

2. Constitutional Law § 30— right to speedy trial

The fundamental law of this State secures to every defendant the right to a speedy trial.

3. Constitutional Law § 30— speedy trial — good faith delays

The guarantee of a speedy trial does not impose limitations upon delays which occur in good faith and which are necessary in order that the State may prepare its case.

4. Criminal Law § 166— the brief — abandonment of assignments

Assignments of error not supported by reason or authority in defendant's brief will be deemed abandoned. Rule of Practice in the Court of Appeals No. 28.

5. Criminal Law § 98— defendant in handcuffs — accidental viewing by jurors

The accidental viewing of the defendant in handcuffs by three jurors who had momentarily returned to the courtroom following the adjournment of court for the day, *held* not prejudicial to the defendant.

APPEAL from *Thornburg, S.J.*, 15 September 1969 Criminal Session, CATAWBA Superior Court.

The defendant, Grover Cleveland Norman, was charged in a valid bill of indictment with conspiring to utter and publish as true

certain forged and counterfeit checks on Broyhill Industries. The defendant was arrested on 23 February 1969 under a warrant charging him with conspiring with others to make, forge and counterfeit certain checks drawn on Broyhill Industries. He was arraigned and counsel was appointed for him on 25 February 1969.

At the trial of the case the defendant did not put on any evidence. At the close of all the evidence the defendant moved for a judgment as of nonsuit, which motion was denied. Upon verdict of guilty and pronouncement of sentence of ten years, the defendant appealed to the Court of Appeals.

Robert Morgan, Attorney General, and Christine Y. Denson, Staff Attorney, for the State.

Butner and Gaither, by James M. Gaither, Jr., for the defendant appellant.

HEDRICK, J.

[1] The defendant's first assignment of error is that the court erred in finding that he was not denied the right to a speedy trial. The record on appeal shows the following sequence of events: The defendant was arrested on 23 February 1969 under a warrant charging him with conspiring to make, forge and counterfeit checks drawn on Broyhill Industries. A bill of indictment was returned by the Grand Jury at the regularly scheduled March term of superior court. The defendant was not brought to trial at this term of court, and, on 19 June 1969, he filed a motion alleging that his right to a speedy trial had been denied. The motion was heard by Judge Bailey and was denied upon the ground that the State's delay was for good cause shown. The defendant's case was then docketed for the next regularly scheduled term of superior court. However, due to the length of the docket and the taking of the pleas of the co-conspirators in this case, the defendant's case was not heard. The case was then docketed for the next regular session of superior court. When the case was called, and before any pleas were entered, the bill of indictment was quashed as to the count which alleged conspiracy to forge and conspiracy to utter. Thereafter the Grand Jury returned a true bill of indictment which charged the defendant with unlawfully conspiring with others to utter and publish certain false, forged and counterfeited checks. Following the return of this bill of indictment, the defendant was tried and found guilty by the jury.

[2] "The fundamental law of this State secures to every defendant the right to a speedy trial. *State v. Lowry,* 263 N.C. 536, 139 S.E. 2d

870; *State v. Patton*, 260 N.C. 359, 132 S.E. 2d 891; *State v. Webb*, 155 N.C. 426, 70 S.E. 1064." *State v. Hollars*, 266 N.C. 45, 145 S.E. 2d 309 (1965). "*Speedy* is a word of indefinite meaning, *State v. Webb, supra* at 429. Neither the constitution nor the legislature has attempted to fix the exact time within which a trial must be had." *State v. Hollars, supra.*

In *State v. Johnson*, 275 N.C. 264, 167 S.E. 2d 274 (1969), Sharp, J., speaking for the Court, listed principles established by cases in this jurisdiction with respect to the right of a defendant to a speedy trial:

"1. The fundamental law of the State secures to every person *formally accused* of crime the right to a speedy and impartial trial, as does the Sixth Amendment to the Federal Constitution (made applicable to the State by the Fourteenth Amendment, *Klopfer v. North Carolina*, 386 U.S. 213, 18 L. Ed. 2d 1, 87 S. Ct. 988 (1967).

"2. A convict, confined in the penitentiary for an unrelated crime, is not excepted from the constitutional guarantee of a speedy trial of any other charges pending against him.

"3. Undue delay cannot be categorically defined in terms of days, months, or even years; the circumstances of each particular case determine whether a speedy trial has been afforded. Four interrelated factors bear upon the question: the length of the delay, the cause of the delay, waiver by the defendant, and prejudice to the defendant.

"4. The guarantee of a speedy trial is designed to protect a defendant from the dangers inherent in a prosecution which has been negligently or arbitrarily delayed by the State; prolonged imprisonment, anxiety and public distrust engendered by untried accusations of crime, lost evidence and witnesses, and impaired memories.

"5. The burden is on an accused who asserts the denial of his right to a speedy trial to show that the delay was due to the neglect or willfulness of the prosecution. A defendant who has himself caused the delay, or acquiesced in it, will not be allowed to convert the guarantee, designed for his protection, into a vehicle in which to escape justice. (Citations omitted)."

[1, 3] The guarantee of a speedy trial does not impose limitations upon delays which occur in good faith and which are necessary in order that the State may prepare its case. *State v. Johnson, supra.* "Neither a defendant nor the State can be protected from prejudice

which is an incident of ordinary or reasonably necessary delay. The proscription is against purposeful or oppressive delays and those which the prosecution could have avoided by reasonable effort. *Pollard v. United States,* 352 U.S. 354, 1 L. Ed. 2d 393, 77 S. Ct. 481 (1957)." *State v. Johnson, supra.* We have examined the record in the present case and have not found a denial of the defendant's right to a speedy trial. The defendant has not shown that the delay was due to neglect or willfulness on the part of the prosecution. The defendant has failed to carry his burden on this question.

[4] The defendant's second and third assignments of error related to the refusal of the court below to grant his motion for a continuance and his motion for judgment as of nonsuit. The defendant, in his brief, set out his assignments of error and the exceptions upon which they were based; however, he failed to offer any reason or argument for these assignments of error and he has not cited any authority in support thereof. Therefore, these assignments of error are deemed abandoned. Rule 28, Rules of Practice in the Court of Appeals of North Carolina.

[5] The appellant's last assignment of error is that the court erred in refusing to grant the defendant's motion for mistrial after he was seen by some of the jurors being handcuffed and led from the courtroom. The facts regarding this incident are as follows: The presentation of the State's evidence was completed as the court day drew to a close. The defendant stated that he would present no evidence and made a motion for judgment as of nonsuit. Court was adjourned until the following morning when final arguments would be held. The jury had been sent to the jury room prior to adjournment so various motions could be made. A deputy sheriff was sent to advise the jury that court had adjourned and that they were to return the following morning. While he did this, other deputies began to handcuff the defendant in order to return him to jail. As he was being led from the courtroom, three jurors came back into the courtroom for articles of clothing they left in the jury box prior to being sent to the jury room. The defendant contends that this was prejudicial and that he should have been granted a mistrial.

> "The trial court has discretionary power to order defendant into custody during the progress of the trial, and its action in so doing in the absence of the jury, without anything to indicate in the presence of the jury that defendant was in custody, or its action in so doing in the presence of the jury when it was apparent that the jury understood the reason for the court's action and it could not be regarded by them as a reflection on

the credibility of defendant as a witness, will not be held prejudicial." 2 Strong, N.C. Index 2d, Criminal Law, sec. 98. See also *State v. Mangum,* 245 N.C. 323, 96 S.E. 2d 39 (1957).

The defendant has failed to show in what manner he was prejudiced when the jurors accidentally saw him being led away in handcuffs. The record does not disclose any intimation that the jury was in any way prejudiced by this act. This viewing could not have had any prejudicial effect on the defendant's credibility as a witness since he did not testify in his own behalf and had, only moments before, announced in open court that he would offer no evidence and that he would not take the witness stand in his own behalf. Any accidental viewing of the defendant in handcuffs by members of the jury in the present case was not prejudicial to the defendant.

We have carefully examined the record on appeal in this case and have found no error.

No error.

MORRIS and PARKER, JJ., concur.

ELIZABETH B. HADDOCK v. RONALD LASSITER

No. 703SC281

(Filed 27 May 1970)

1. Negligence § 59— licensee — invited guest in home

An invited guest in the home of another person is a licensee and not an invitee.

2. Negligence § 59— homeowner's liability to invited guest — baseball bat on steps — wanton negligence

Allegation in the complaint that the defendant homeowner knew that a baseball bat had been left on the front steps of defendant's home after the plaintiff had entered the home as an invited guest, and that the defendant failed to remove the bat or to warn the plaintiff of the danger before she left the premises that night, *held* insufficient to show the degree of wilfulness or wantonness necessary to hold the defendant liable for plaintiff's injuries received when she stepped on the bat, lost her balance, and fell to the ground.

BROCK, J., dissenting.

APPEAL from *Parker, J.,* 23 February 1970 Civil Session, PITT County Superior Court.

This is an action to recover compensation for personal injuries allegedly sustained by the plaintiff when she fell while she was leaving the defendant's home where she had been as an invited guest. The material allegations in the plaintiff's complaint are as follows:

"THIRD: That, on or about October 26, 1968, plaintiff was an invited guest in the home of defendant in the County of Pitt and State of North Carolina and that, as plaintiff was leaving defendant's said home around ten o'clock P.M., plaintiff stepped on a baseball bat on the steps of defendant's residence leading from the porch of said residence to the ground and which said baseball bat plaintiff was unable to see and said bat caused plaintiff to lose her balance and to fall to the ground thereby sustaining the personal injuries more fully hereinafter described.

"FOURTH: That, on the date and at the time and place as aforesaid, defendant was negligent in that he failed to exercise reasonable care to keep said residence premises and in particular the front steps thereof, in a reasonably safe condition and he knew that plaintiff had entered said home by the use of said front porch steps and he further knew that at the time that plaintiff entered said home, said baseball bat was not on said steps and he further knew that at the time that plaintiff left said residence that the front porch light did not shine on the front porch steps and defendant further knew that since plaintiff had entered said home said baseball bat had been left on one of the steps of said front porch and defendant failed either to warn plaintiff of the premises of said baseball bat and defendant further failed to remove said bat from said steps when he knew that plaintiff would use said steps and would be likely to step on said baseball bat and that personal injury was likely to be caused to plaintiff by reason of said bat being left on said steps by defendant."

On 7 November 1969 the defendant filed a demurrer to plaintiff's complaint and from an order dated 23 February 1970 sustaining the demurrer, the plaintiff appealed to the North Carolina Court of Appeals.

M. E. Cavendish for plaintiff appellant.

James, Speight, Watson and Brewer, by W. W. Speight, for defendant appellee.

HEDRICK, J.

In their briefs, the parties stipulated that this Court could consider and determine this appeal on its merits under the appropriate rule of the North Carolina Rules of Civil Procedure. Rule 12(b)(6), North Carolina Rules of Civil Procedure, is as follows:

> "(b) *How presented.*—Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, crossclaim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defense may at the option of the pleader be made by motion:
>
> * * *
>
> "(6) Failure to state a claim upon which relief can be granted, ..."

[1] In North Carolina an invited guest in the home of another person is a licensee and not an invitee. *Murrell v. Handley,* 245 N.C. 559, 96 S.E. 2d 717 (1957). In the present case, the plaintiff was an invited guest in the home of the defendant. The general rule in North Carolina in regard to the duty owed by an owner to a licensee is best stated in 6 Strong, N.C. Index 2d, Negligence, § 59, as follows:

> "The owner or the person in possession of the premises is not under a duty to a licensee to maintain the premises in a safe or suitable condition or to warn him of hidden dangers or perils of which the owner has actual or implied knowledge. The owner of land owes to a licensee only the duty to refrain from injuring him wilfully or through wanton negligence, and from increasing the hazard while the licensee is on the premises, by active and affirmative negligence, and is not liable for injuries not resulting from wanton negligence or from so increasing the hazard. . . ."

The degree of "willfullness" or "wantonness" necessary to impose liability upon a landowner in the case of injury to a licensee was defined and set forth for us by Parker, J. (later C.J.), in *Waggoner v. R. R.,* 238 N.C. 162, 77 S.E. 2d 701 (1953), as follows:

> "'An act is wanton when, being needless, it manifests no rightful purpose, but a reckless indifference to the interests of others; and it may be culpable without being criminal.' *Wise v. Hollowell,* 205 N.C. 286, 171 S.E. 82. 'An act is wanton when it is done of wicked purpose, or when done needlessly, manifesting a reckless indifference to the rights of others.' *Foster v. Hyman,* 197 N.C. 189, 148 S.E. 36.

"'The term "wanton negligence" . . . always implies something more than a negligent act. This Court has said that the word "wanton" implies turpitude, and that the act is committed or omitted of willful, wicked purpose; that the term "willfully" implies that the act is done knowingly and of stubborn purpose, but not of malice . . . Judge Thompson says: "The true conception of willful negligence involves a deliberate purpose not to discharge some duty necessary to the safety of the person or property of another, which duty the person owing it has assumed by contract or which is imposed on the person by operation of law. Willful or intentional negligence is something distinct from mere carelessness and inattention, however gross. We still have two kinds of negligence, the one consisting of carelessness and inattention whereby another is injured in his person or property, and the other consisting of a willful and intentional failure or neglect to perform a duty assumed by contract or imposed by operation of law for the promotion of the safety of the person or property of another." Thompson on Neg. (2d Ed.), Sec. 20, *et seq.' Bailey v. R. R.*, 149 N.C. 169, 62 S.E 912.

"To constitute willful injury there must be actual knowledge, or that which the law deems to be the equivalent of actual knowledge, of the peril to be apprehended, coupled with a design, purpose, and intent to do wrong and inflict injury. A wanton act is one which is performed intentionally with a reckless indifference to injurious consequences probable to result therefrom. Ordinary negligence has as its basis that a person charged with negligent conduct should have known the probable consequences of his act. Wanton and willful negligence rests on the assumption that he knew the probable consequences, but was recklessly, wantonly or intentionally indifferent to the results. *Everett v. Receivers*, 121 N.C. 519, 27 S.E. 991; *Ballew v. R. R.*, 186 N.C. 704, 120 S.E. 334; *Foster v. Hyman, supra; S. v. Stansell*, 203 N.C. 69, 164 S.E. 580; 38 Am. Jur., negligence, Sec. 48."

[2] In the present case, no facts are alleged which are sufficient to show that the defendant was affirmatively or actively negligent in the management of his property. The allegation in the complaint that the defendant knew that the baseball bat had been left on the front steps of defendant's home after the plaintiff had entered, and that the defendant failed to remove the bat or warn the plaintiff of the danger before the plaintiff left the premises, is not a sufficient allegation to show the degree of willfullness or wantonness necessary to hold him liable for the plaintiff's injuries.

The plaintiff has failed to state a claim for relief and this action should properly be dismissed under Rule 12(b)(6), North Carolina Rules of Civil Procedure. The action of the court below is affirmed.

Affirmed.

BRITT, J., concurs.

BROCK, J., dissenting.

In my view the allegations in the "FOURTH" paragraph of the complaint to the effect that the defendant knew that the baseball bat was not on the steps at the time the plaintiff entered; that defendant knew that after she entered the home the baseball bat was left on one of the steps; that defendant knew that the steps were not lighted; and that defendant knew that plaintiff would use the steps as she was leaving, are sufficient allegations of fact from which it can be inferred that defendant's failure to warn the plaintiff was wanton negligence. This should be sufficient to withstand a motion to dismiss for failure to state a claim upon which relief can be granted.

I vote to reverse the order of the trial court which sustained the demurrer to the complaint.

REBECCA YAVORSKY DEVANE v. THE TRAVELERS INSURANCE COMPANY AND BETTY VERBEE DEVANE YOUNG

No. 705DC134

(Filed 27 May 1970)

1. Insurance § 29; Husband and Wife § 11— separation agreement — effect on designation of wife as life insurance beneficiary

Separation agreement in which the former wife of deceased relinquished all her right, title and interest in deceased's property, *held* not to constitute a revocation of the designation of the former wife as beneficiary under a group life and accidental death policy furnished deceased by his employer, deceased's failure to exercise his right to change the beneficiary having indicated that he did not wish to effect such a change, and the separation agreement having furnished no clear expression of intent to the contrary.

2. Insurance § 29— absolute divorce — effect on designation of former wife as life insurance beneficiary

Under group insurance plan which included accidental death coverage for employees and surgical and medical benefits for employees and their

dependents, the term "dependent" related only to those sections of the certificate setting out medical benefits and did not limit the term "beneficiary"; consequently, absolute divorce obtained by deceased from his former wife did not revoke the designation of the former wife as beneficiary under the life and accident policy even though she was no longer his "dependent."

3. Insurance § 29— absolute divorce — effect on designation of former wife as life insurance beneficiary

Neither G.S. 50-11 which provides that "all rights arising out of the marriage shall cease and determine," nor G.S. 31A-1 which bars "rights or interests in the property of the other spouse" discloses a legislative intent that divorce should annul or revoke the beneficiary designation in a life and accident policy.

APPEAL by plaintiff from *Burnett, District Judge,* at the October 1969 Session of NEW HANOVER District Court.

In this civil action, plaintiff, as the widow and administratrix of Bobby K. DeVane, seeks to recover group life and accidental death benefits under a policy written by Travelers Insurance Company (Travelers) and furnished to Bobby K. DeVane (Bobby) by his employer. The parties waived trial by jury and the trial court made, *inter alia,* findings of fact summarized as follows:

On and prior to 8 June 1961, Bobby was married to the feme defendant (Betty). As a part of Timme Corporation's normal hiring procedure, Bobby furnished certain dependent information to Timme and designated in writing that his then wife, Betty, be the beneficiary under his group life and accidental death insurance plan. Subsequently, Bobby was issued a certificate of insurance setting forth the various coverages afforded to the employees of Timme under the two Travelers group policies and designating the method by which the beneficiary could be changed. In 1964 Bobby and Betty separated pursuant to a separation agreement which agreement did not expressly refer to the aforementioned insurance benefits but provided, in part, that Betty "relinquishes and quitclaims unto the said Bobby Knox DeVane all her right, title and interest in and to the property of the said (Bobby) whether now owned or hereafter acquired by him, except the right to demand and receive the monthly payments hereinbefore specified to be paid by (Bobby) for the support of his children." On 7 July 1965, Bobby obtained an absolute divorce from Betty. On 11 July 1965, Bobby married plaintiff and was living with her at the time of his death. On or about 16 July 1965, Bobby cancelled his dependent's medical insurance on Betty and named plaintiff as beneficiary of that insurance. At that time Bobby was asked if he wished to change the beneficiary designated under his group

life and accidental death plan from Betty to plaintiff, but he did not request such change at that time and stated, "I'll see you later." On 17 November 1965, Bobby named plaintiff his beneficiary under his profit sharing plan. On 8 August 1966, Bobby died from injuries sustained in an automobile accident on 7 August 1966. At the time of his death, Bobby had not changed the beneficiary under his group life and accidental death plan.

The court concluded that neither the separation agreement nor the absolute divorce revoked the designation of Betty as beneficiary under the group life and accidental death plan, and that accordingly Betty is the person entitled to the contested benefits. From these conclusions and judgment based thereon, plaintiff appealed to this Court.

Aaron Goldberg and Herbert P. Scott for plaintiff appellant.

Marshall, Williams & Gorham by A. Dumay Gorham, Jr., for defendant appellee, Travelers Insurance Company.

BRITT, J.

Plaintiff raises two questions on appeal: (1) Did the separation agreement constitute a revocation of the designation of Betty as beneficiary under the group life and accident policy? (2) Did the absolute divorce obtained by Bobby operate as a revocation of the designation of Betty as beneficiary under the group life and accident policy? We answer both questions in the negative.

[1] (1) In *Zachary v. Trust Co.*, 4 N.C. App. 221, 166 S.E. 2d 495 (1969), the court explained that "while the failure of the husband to exercise his power to change the beneficiary ordinarily indicates that he does not wish to effect such a change, each case must be decided upon its own facts." The separation agreement in the instant case did not expressly refer to the insurance benefits, but provided, in part, that Betty "relinquishes and quitclaims unto the said Bobby Knox DeVane all her right, title and interest in and to the property of the said Bobby Knox DeVane, whether now owned or hereafter acquired by him, except the right to demand and receive the monthly payments hereinbefore specified to be paid by the said Bobby Knox DeVane for the support of his children, and covenants and agrees well and truly to perform and abide by this contract."

In *Tobacco Group Ltd. v. Trust Co.*, 7 N.C. App. 202, 171 S.E.

2d 807 (1970), the court quoted the prevailing rule of construction as expressed in 4 Couch on Insurance 2d, § 27:114, p. 655:

> "General expression or clauses in a property settlement agreement between a husband and a wife, however, are not to be construed as including an assignment or renunciation of expectancies, and a beneficiary therefore retains his status under an insurance policy if it does not clearly appear from the agreement that in addition to the segregation of the property of the spouses it was intended to deprive either spouse of the right to take under an insurance contract of the other * * *."

The court in that case held that the general language of a separation agreement by which each party released all rights in the property of the other did not reveal a clear intent that the wife therein relinquished rights which she later acquired as beneficiary under a pension plan established by her husband's employer. Parker, J., at page 205, explained the position taken by the court:

> "* * * Appellant and her husband were the only parties, and by executing the agreement neither of them relinquished any rights which either then had or thereafter acquired as against the petitioner under its pension plan. The fact that at the date of the separation agreement the husband had certain vested rights under the plan lends no support to the * * * conclusion that the wife, by executing the separation agreement, thereby relinquished such separate rights as she either then had or might thereafter acquire against petitioner under the provisions of the plan. Her rights under the pension plan were not included in the property of the 'other party,' her husband, which she relinquished by the separation agreement."

The record discloses that Bobby had the right to change the beneficiary by filing a written request for such a change with his employer. As the separation agreement furnishes no clear expression of intent to the contrary, we are of the opinion that, as was suggested in *Tobacco Group Ltd.* and *Zachary,* "his failure to exercise it would indicate that he did not wish to effect such a change," and we will not read such an intent into the general language of this separation agreement.

[2] (2) Plaintiff contends that the absolute divorce operated so as to revoke the designation of Betty as beneficiary of the group life and accident policy. The contention proceeds along the following lines: (a) protection is provided for dependents of the employee, (b) "dependent" as used in the policy is limited to "the Employee's wife or husband, as the case may be," (c) dependents cease to be

covered "[w]hen such person ceases to be a Dependent of the Employee" and (d) Betty was no longer a dependent at the time of Bobby's death, therefore, she is not entitled to receive the proceeds of this insurance policy.

An examination of the policy, however, discloses that the terms "beneficiary" and "dependent" are not interchangeable. The certificate included accidental death coverage for employees as well as surgical and major medical benefits for employees and their dependents. The term "dependent" is material and pertinent only as it relates to those sections of the certificate setting out medical benefits; the policy discloses no intent that the term "dependent" should operate as a limitation on the term "beneficiary."

[3] Although the legislature has provided in G.S. 58-281 that absolute divorce automatically annuls the designation of a husband or wife as beneficiary in a policy issued by a fraternal order or society, policies of that type are *sui generis*. There is no similar provision applicable to insurance policies generally. Neither G.S. 50-11 which provides that "all rights arising out of the marriage shall cease and determine," nor G.S. 31A-1 which bars rights to "[a]ny rights or interests in the property of the other spouse" discloses a legislative intent that divorce should annul or revoke the beneficiary designation in a garden-variety insurance certificate.

For the reasons stated, the judgment of the district court is

Affirmed.

BROCK and HEDRICK, JJ., concur.

IN RE: AMY HOPE MOORE, A MINOR

No. 702DC267

(Filed 27 May 1970)

1. Divorce and Alimony § 24; Infants § 9— child custody — discretion of court

While the welfare of the child is the paramount consideration in determining child custody, wide discretion is necessarily vested in the trial judge who has the opportunity to see the parties and hear the witnesses, and his decision ought not to be upset on appeal absent a clear showing of abuse of discretion.

2. Divorce and Alimony § 24; Infants § 9— child custody order — necessity for findings of fact

While findings of the trial court in regard to the custody of a child are conclusive when supported by competent evidence, custody order must be vacated and the case remanded for detailed findings of fact when the trial court fails to find facts so that the appellate court can determine that the order is supported by competent evidence and the welfare of the child subserved.

3. Divorce and Alimony § 24; Infants § 9— child custody order — failure to find facts

Order entered by the court in this child custody proceeding instituted by the child's paternal aunt must be vacated and the cause remanded for detailed findings of fact, where the trial court found no facts but merely concluded that petitioner's evidence would not support the relief prayed for and "confirmed" the child's custody in her maternal grandparents.

APPEAL by petitioner from *Ward, District Judge,* 29 December 1969 Session, BEAUFORT District Court.

This is a habeas corpus proceeding instituted by the filing of a petition alleging substantially as follows: Petitioner, Mrs. Sue Riggs, is a resident of Durham County, North Carolina, and the paternal aunt of Amy Hope Moore (Amy), three years old. Respondent is a resident of Beaufort County, North Carolina, and is Amy's maternal grandmother. Amy is one of three children (all girls) born to the marriage of Sam Nick Moore and JoAnn Woolard; the said mother died in March 1968 from gunshot wounds and the said father is serving a prison sentence for her murder. In September 1968 in a superior court proceeding involving custody of the two older children, Cowper, J., granted petitioner full and complete custody and control of those two children; Amy was not included when the superior court proceeding was instituted but Judge Cowper set forth in his order that it would be in the best interest of all three of the children to live together but that Amy's custody was not before him. Since September 1968, the two older children have lived with petitioner and her husband in their home near Durham and Amy has resided with her maternal grandparents in Beaufort County. Amy is being reared separately from her two sisters and it would be in her best interest to live in petitioner's home and be reared with her sisters. Although petitioner has asked respondent to permit Amy to "come and live with her sisters," respondent refused. There is considerable animosity between the families of the parents of the children and it would be best that neither of the three reside in Beaufort County. The growth of strong ties between the sisters compels they should all live in the same home and petitioner is well qualified to assume the additional

responsibility of Amy's custody and prays that she be granted full custody of Amy.

The district court entered an order commanding respondent to bring Amy before the court "to the end that the court may inquire as to the custody of Amy Hope Moore and make such orders as may be suitable and proper."

Respondent filed answer containing the following pertinent allegations (summarized): Amy's father was twice convicted of first-degree murder of her mother. Although petitioner was granted custody of the two older children, the petitioner has proven unfit to have custody of either of the children and not only should petitioner not be granted custody of Amy but the custody of the two older children should be transferred to respondent as soon as possible. Animosity exists between the families of Amy's parents and respondent has tried to improve the relationship but petitioner's family has refused to cooperate and continues to criticize and verbally abuse respondent's family. Respondent has been a second mother to the three children from the time of their birth and she is qualified by character and resources to provide a suitable home not only for Amy but for her sisters as well. Respondent prayed (1) that petitioner's request that she be awarded Amy's custody be denied, (2) that respondent be allowed to retain Amy's custody, and (3) that the custody of the other two children be transferred from petitioner to respondent.

Following a hearing, the trial court entered an order denying petitioner the relief prayed for and "confirmed" Amy's custody in her maternal grandparents, Oscar and Mary Woolard. Petitioner appealed from the order.

Frazier T. Woolard for petitioner appellant.

Wilkinson & Vosburgh by John A. Wilkinson for respondent appellee.

BRITT, J.

Petitioner contends that the trial court erred in signing the order appealed from, arguing that its error was in "failing to act in the best interests" of the minor and in refusing to place the minor with her two sisters in the home of petitioner. We think the trial court erred but for reasons other than those argued.

The following legal principles regarding child custody have been well established in this jurisdiction for many years:

[1] 1. The welfare of the child in controversies involving cus-

tody is the polar star by which the courts must be guided in awarding custody. *Chriscoe v. Chriscoe*, 268 N.C. 554, 151 S.E. 2d 33 (1966).

2. While the welfare of a child is always to be treated as the paramount consideration, the courts recognize that wide discretionary power is necessarily vested in the trial courts in reaching decisions in particular cases. *Swicegood v. Swicegood*, 270 N.C. 278, 154 S.E. 2d 324 (1967).

3. The decision to award custody of a child is vested in the discretion of the trial judge who has the opportunity to see the parties in person and to hear the witnesses, and his decision ought not 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 (1968).

[2] 4. The findings of the trial court in regard to the custody of a child are conclusive when supported by competent evidence. *Swicegood v. Swicegood, supra.*

5. When the trial court fails to find facts so that the appellate court can determine that the order is adequately supported by competent evidence and the welfare of the child subserved, then the order entered thereon must be vacated and the case remanded for detailed findings of fact. *Crosby v. Crosby*, 272 N.C. 235, 158 S.E. 2d 77 (1967).

[3] The petition in the case before us was filed 15 December 1969, therefore, was subject to Chapter 1153 of the 1967 Session Laws (G.S. 50-13.1, et seq.) which became effective 1 October 1967. But, this enactment by the General Assembly did not alter either of the principles above stated. *In re Custody of Pitts, supra; Greer v. Greer*, 5 N.C. App. 160, 167 S.E. 2d 782 (1969). The institution of the present proceeding invoked the jurisdiction of the District Court of Beaufort County to inquire into the custody of Amy Hope Moore, to determine what custodial arrangement would best serve her welfare, to make findings of fact based on competent evidence with respect thereto, and enter an order awarding her custody 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). The order appealed from found no facts; it merely concluded that petitioner's evidence "would not support the relief prayed for and that in the absence of further evidence that the request of petitioner for custody of Amy Hope Moore should be denied and the same is herewith denied and the custody of the child, Amy Hope Moore, is confirmed in her maternal grandparents, Oscar and Mary Woolard."

For the reasons stated, the order appealed from is vacated and this cause is remanded for further proceedings consistent with this opinion. We observe that in the former trial all evidence was presented by affidavits; upon a retrial the judge and counsel would be well advised to consider what was said by this Court in the case of *In re Custody of Griffin*, 6 N.C. App. 375, 170 S.E. 2d 84 (1969).

Error and remanded.

BROCK and HEDRICK, JJ., concur.

WILLIAMS LUMBER COMPANY, A CORPORATION v. J. T. TAYLOR, JR., AND WIFE, DORA W. TAYLOR

No. 702DC221

(Filed 27 May 1970)

1. Judgments § 34— motion to set aside judgment — conclusiveness of findings

Findings of fact by the trial court upon the hearing of a motion to set aside a judgment are conclusive on appeal when supported by any competent evidence.

2. Judgments § 25— default judgment — defendant's excusable neglect

Where a defendant employs a reputable attorney and is guilty of no neglect himself, and the attorney fails to appear and answer, the law will excuse defendant and afford relief.

3. Judgments § 25— default judgment — defendant's excusable neglect — reliance on attorney

The trial court properly set aside a default judgment on the ground that the failure of defendant's to file answer was occasioned by their excusable neglect in relying upon the assurance of their attorney that he would prepare the necessary defensive pleadings or obtain an extension of time in which to do so, where there was evidence that defendants not only mailed the complaint to their attorney with a request that he prepare answer, but also outlined in a letter to him the facts relied upon as their defense, conferred with him personally concerning the preparation of a defense, and obtained the attorney's personal commitment that he would prepare the pleadings or obtain an extension of time.

4. Arbitration § 2— agreement to arbitrate as bar to contract action

An executory agreement to arbitrate controversies which might arise under a contract does not bar a legal action on the contract.

5. Judgments § 29; Arbitration § 2— default judgment — defendants' meritorious defense — effect of arbitration agreement in contract

In a hearing to set aside a default judgment, the fact that the contract

sued upon by the corporate plaintiff contained an arbitration provision did not preclude the defendants from asserting a breach of the contract as a meritorious defense to the plaintiff's action, especially where the plaintiff in its complaint had raised the issue of the performance of the contract.

APPEAL by plaintiff from *Ward, District Judge,* 31 October 1969 Session of WASHINGTON County District Court.

Plaintiff filed complaint on 30 January 1969 seeking to recover from defendants $5,000 deposited by plaintiff as security for its performance of a contract for the cutting of timber from certain land owned by defendants. Plaintiff alleged full compliance with the contract. Summons issued on 28 January 1969, and both defendants were served on 3 February 1969.

Defendants did not answer or otherwise plead, and on 3 April 1969 the Clerk of Court entered judgment against them by default final. Three weeks later defendants filed a motion in the cause seeking to have the judgment set aside. On 22 October 1969, their motion was amended, by leave of the court, to more specifically set forth allegations of an affirmative defense. The motion as amended alleged in substance the following: The day following service of the complaint defendants sent the pleadings, together with a letter to David S. Henderson, Attorney at Law, requesting that he answer the complaint and inquire into the matter of proper venue. The pleadings were placed in the attorney's files and through his inadvertence and excusable neglect the expiration date for the filing of answer was overlooked. On the question of a meritorious defense, the motion alleged the failure of plaintiff to comply with the contract in several material respects and denied the right of plaintiff to have the deposit returned.

Affidavits were offered in support of the motion and on 31 October 1969, Judge Hallett S. Ward made written findings from which he concluded that the neglect of defendants in failing to file an answer was excusable and that they had a meritorious defense. He thereupon ordered the default judgment vacated and allowed defendants ten days in which to file answer or otherwise plead. Plaintiff appealed from this order.

Norman, Rodman & Hutchins by R. W. Hutchins for plaintiff appellant.

Robert G. Bowers for defendant appellees.

GRAHAM, J.

The sole question raised by this appeal is whether the court erred in determining that the failure of defendants to file answer or otherwise plead was occasioned by their excusable neglect, and that they have a meritorious defense to the action.

[1] Findings of fact by the trial court upon the hearing of a motion to set aside a judgment are conclusive on appeal when supported by any competent evidence. *Moore v. Deal,* 239 N.C. 224, 79 S.E. 2d 507; *Hodge v. First Atlantic Corp.,* 6 N.C. App. 353, 169 S.E. 2d 917. On the question of excusable neglect the court made the following findings:

> "1. The complaint in this cause was served on the defendants on or about the 3rd day of February, 1969; that on or about the 4th day of February, 1969, the defendant, J. T. Taylor, Jr., sent the pleadings, together with a letter, to David S. Henderson, a regular practicing attorney of New Bern, North Carolina, requesting that he answer the subject complaint; that said letter, copy of which is attached to the defendant's affidavit, contained information concerning the circumstances of this law suit and the defendants' defense; that thereafter the defendant, J. T. Taylor, Jr., conferred personally with said Attorney regarding the preparation of his defense to said suit, and said Attorney agreed to represent said defendants and to prepare the necessary defensive pleadings or obtain an extension of time, if the same became necessary; that subsequently said defendant and his attorney conferred again regarding the defense of said suit; that on or about the 3rd day of April, 1969, the plaintiff applied for and secured a judgment by default; that the inadvertance on the part of said Attorney to file defensive pleadings or obtain extension of time to file pleadings within the time allowed, is not imputed to the said defendants."

[2, 3] The above findings are fully supported by an affidavit of the male defendant which was introduced at the hearing. It is well settled in this jurisdiction that where a defendant employs a reputable attorney and is guilty of no neglect himself, and the attorney fails to appear and answer, the law will excuse defendant and afford relief. *Brown v. Hale,* 259 N.C. 480, 130 S.E. 2d 868; *Moore v. Deal, supra; Rierson v. York,* 227 N.C. 575, 42 S.E. 2d 902; *Gunter v. Dowdy,* 224 N.C. 522, 31 S.E. 2d 524; *Stallings v. Spruill,* 176 N.C. 121, 96 S.E. 890. "When an attorney is licensed to practice in a state it is a solemn declaration that he is possessed of character and sufficient legal learning to justify a person to employ him as a lawyer."

Moore v. Deal, supra. Here defendants not only mailed the complaint to their attorney with a request that he prepare answer, they outlined in a letter to him the facts relied upon by them as their defense, conferred with him personally concerning the preparation of a defense and obtained a personal commitment from him that he would prepare the necessary defensive pleadings or obtain an extension of time. In our opinion defendants were entitled to rely upon the assurance of the attorney that he would prepare the necessary defensive pleadings or obtain an extension of time in which to do so. The attorney's neglect in failing to carry out this duty which he had assumed is not imputable to defendants absent some neglect on their part. See *Hodge v. First Atlantic Corp., supra,* and cases therein cited.

[4, 5] The finding by the court that defendants have a meritorious defense to the action is also fully supported by the evidence. Plaintiff contends, however, that the contract, which provides that any dispute arising thereunder be submitted to arbitration, precludes defendants as a matter of law from asserting the breach of the contract by plaintiff as the defense to this action and thereby leaves defendants without any possible meritorious defense. Such is not the case. An executory agreement to arbitrate controversies which might arise under a contract does not bar a legal action on the contract. *R. R. v. R. R.,* 240 N.C. 495, 82 S.E. 2d 771; *Skinner v. Gaither Corp.,* 234 N.C. 385, 67 S.E. 2d 267; *Hargett v. DeLisle,* 229 N.C. 384, 49 S.E. 2d 739. Moreover, the issue of the performance of the contract was raised here by plaintiff in its complaint. Under the contract plaintiff is entitled to recover the $5,000 deposited with defendants less any damages to which the defendants may be entitled because of plaintiff's failure to perform its obligation under the contract. Plaintiff alleges in its complaint that it has fully complied with the terms of the contract. If the arbitration provision would bar defendants from claiming as a defense in this action that the contract was breached, it would also bar plaintiff from alleging that it has been properly performed.

Defendants' motion to vacate the judgment was filed and heard pursuant to G.S. 1-220 which was repealed on 1 January 1970. The provisions of G.S. 1-220 are now incorporated in G.S. 1A-1, Rule 60.

The order appealed from is affirmed.

MALLARD, C.J., and MORRIS, J., concur.

WAKE COUNTY HOSPITAL SYSTEM, INC., AND FORSYTH MEMORIAL HOSPITAL v. NORTH CAROLINA INDUSTRIAL COMMISSION; J. W. BEAN, CHAIRMAN; FORREST H. SHUFORD, II, MEMBER; AND WILLIAM F. MARSHALL, JR., MEMBER, NORTH CAROLINA INDUSTRIAL COMMISSION

No. 6910SC240

(Filed 27 May 1970)

1. Master and Servant § 85— workmen's compensation — jurisdiction of Commission — challenge to schedule of hospital charges

Action by nonprofit hospitals which challenged the validity of the schedule of hospital charges approved by the Industrial Commission in the treatment of workmen's compensation cases presented a question arising under the Compensation Act which was determinable by the Commission. G.S. 97-91.

2. Master and Servant § 85— compensation cases — jurisdiction of Commission

The section of the Workmen's Compensation Act providing that all questions arising under the Act shall be determined by the Industrial Commission is not limited in its application solely to questions arising out of an employer-employee relationship or in the determination of rights asserted by or on behalf of an injured employee. G.S. 97-91.

3. Master and Servant § 85; Administrative Law § 2— compensation case — challenge to hospital charges — exhaustion of remedies before Commission

Nonprofit hospitals which sought to challenge the validity of hospital charges approved by the Industrial Commission in the treatment of workmen's compensation cases were not entitled to maintain their action in the superior court on the ground that they had exhausted their administrative remedies before the Commission, where it was apparent from the hospitals' amended complaint that they had not sought and been denied Commission approval of any specific charge made by them for hospital services in a compensation case, as provided by Rule VIII of the Commission; therefore, the superior court properly sustained the Commission's demurrer to the complaint for failure of the hospitals to exhaust their remedies before the Commission.

4. Administrative Law § 2— exclusiveness of administrative remedy

When the legislature has provided an effective administrative remedy, it is exclusive.

APPEAL by plaintiffs from *McKinnon, J.*, February 1969 Regular Civil Session of WAKE Superior Court.

Plaintiffs are nonprofit corporations operating general hospitals on a nonprofit basis in Wake and Forsyth Counties, North Carolina. Defendants are the North Carolina Industrial Commission (the Commission) and its members. Plaintiffs filed this civil action in

Wake Superior Court seeking to enjoin enforcement by the Commission of so much of its rules and regulations as limit payment to plaintiff hospitals for hospital services rendered by them in Workmen's Compensation cases to amounts which plaintiffs allege are "below those normally charged by the plaintiff hospitals, and are less than the charges that prevail in the plaintiffs' respective communities for similar treatment of injured persons of a like standard of living when such treatment is paid for by the injured person." Plaintiffs allege that the defendant Commission is "without legal authority to adopt rules and regulations limiting the amount that can be paid to hospitals in North Carolina, including plaintiff hospitals, in Workmen's Compensation cases, below that customarily charged by hospitals in the community for like services." In an amended complaint plaintiffs further allege that review of the rates was "requested by the plaintiffs and a hearing was held at which time information was offered and additional information has been provided to the defendants," but that the "Commission has refused and continues to refuse to make a decision in regard to said rates."

From order sustaining defendants' demurrer interposed upon the grounds that plaintiffs failed to exhaust administrative remedies available under the provisions of the Workmen's Compensation Act, plaintiffs appealed.

Hollowell & Ragsdale, by Edward E. Ragsdale, for plaintiff appellant, Wake County Hospital System, Inc.

Roddey M. Ligon, Jr., for plaintiff appellant, Forsyth Memorial Hospital.

Attorney General Robert Morgan and Staff Attorney (Mrs.) Christine Y. Denson for defendant appellee.

PARKER, J.

[1] By this action plaintiffs seek to challenge the validity of the schedule of hospital charges approved by defendant Commission in the treatment of compensation cases subject to the provisions of the North Carolina Workmen's Compensation Act. That Act, in G.S. 97-91, provides:

> "All questions arising under this article if not settled by agreements of the parties interested therein, with the approval of the Commission, shall be determined by the Commission, except as otherwise herein provided."

[2] Charges of hospitals for hospital and nursing services under

the Workmen's Compensation Act are, by G.S. 97-90(a), expressly made subject to the approval of the Commission. G.S. 97-90(b) provides that any person who receives any fee or other consideration on account of services so rendered, unless such consideration is approved by the Commission, shall be guilty of a misdemeanor. It is, therefore, apparent that plaintiffs' action presents "questions arising under" the North Carolina Workmen's Compensation Act, which, by virtue of G.S. 97-91, "shall be determined by the Commission." G.S. 97-91 is not limited in its application, as appellants contend, solely to questions arising out of an employer-employee relationship or in the determination of rights asserted by or on behalf of an injured employee. *Clark v. Ice Cream Co.*, 261 N.C. 234, 134 S.E. 2d 354, did not so hold. On the contrary the North Carolina Supreme Court has held in *Worley v. Pipes*, 229 N.C. 465, 50 S.E. 2d 504, and in *Matros v. Owen*, 229 N.C. 472, 50 S.E. 2d 509, that the sole remedy of a physician to recover for services rendered to an injured employee in cases where the employee and his employer are subject to the Workmen's Compensation Act is by application to the Industrial Commission in accordance with the Act, with right of appeal to the courts for review, and that this remedy is exclusive. These decisions are equally applicable to charges for hospital services rendered to employees in Workmen's Compensation cases.

[3, 4] Appellants further contend that, even if it be conceded that their action presents a question arising under the Workmen's Compensation Act, they are nevertheless entitled to maintain their action because the allegations of their amended complaint establish that plaintiffs have exhausted their administrative remedies before the Commission. We do not agree. In their amended complaint plaintiffs alleged that "review of the North Carolina Industrial Commission rates was requested by the plaintiffs and a hearing was held at which time information was offered and additional information has been provided to the defendants," and that the Commission "has refused and continues to refuse to make a decision in regard to said rates." Even accepting these allegations as true, it is apparent from plaintiffs' amended complaint that they have not sought and been denied Commission approval of any specific charge made by either of them for hospital services rendered in a Workmen's Compensation case. Under the authority of G.S. 97-80(a), the Commission has adopted rules for carrying out the provisions of the Workmen's Compensation Act. Rule VIII of the Industrial Commission refers to the adoption of fee schedules fixing maximum fees which may be charged for medical, surgical, hospital, nursing, dental and other treatment rendered to injured employees coming within the pro-

visions of the Act. That rule expressly provides that: "Persons who disagree with the allowance of such fees in any case may make application for and obtain a full review of the matter before the Commission as in all other cases provided." The rule further provides that the fees prescribed shall govern, "except that in special hardship cases where sufficient reason therefor is demonstrated to the Commission, fees in excess of those so published may be allowed." Plaintiffs' amended complaint contains no allegation indicating that they have, in this or any other case, followed, much less exhausted, the administrative procedures available to them. "[W]hen the legislature has provided an effective administrative remedy, it is exclusive." *King v. Baldwin,* 276 N.C. 316, 172 S.E. 2d 12. For plaintiffs' failure to exhaust available administrative remedies, defendants' demurrer was properly sustained.

Affirmed.

MALLARD, C.J., and BRITT, J., concur.

STATE OF NORTH CAROLINA v. CHARLES W. BRITT, JR.

No. 703SC270

(Filed 27 May 1970)

1. Constitutional Law §§ 20, 30— denial of free transcript of prior trial

In this homicide prosecution, indigent defendant was not denied a basic essential of his defense at his second trial by the trial court's denial of his motion that he be provided a free transcript of the evidence presented at his first trial, which ended in a mistrial, where defendant does not allege that the court reporter who took the evidence at the first trial was not available to him as a witness, the second trial occurred only a month after the first, he was represented at both trials by the same attorneys, and there was no argument by the solicitor relating to discrepancies in the testimony.

2. Criminal Law § 60; Homicide § 20— fingerprints found on murder weapon

In this homicide prosecution, the trial court did not err in the denial of defendant's motion *in limine* that the State be prohibited from introducing evidence of defendant's fingerprints found on the butcher knife used to stab the deceased, the knife having been found in the home of deceased after her death and the evidence being competent.

3. Criminal Law § 60; Homicide § 20— fingerprints found on murder weapon

In this homicide prosecution, evidence that defendant's fingerprint was found on the knife used to stab deceased was competent to corroborate testimony by a State's witness that defendant had used the knife in stabbing deceased in the back, notwithstanding defendant was shown to have been at the crime scene earlier that day and there was an unidentifiable fingerprint on the knife.

4. Criminal Law § 112; Homicide § 24— instructions on presumptions and burden of proof

In this homicide prosecution, the trial court did not err in failing to give the jury specific instructions as to the importance of the presumption of innocence, the manner in which the jury should consider inferences, or that each juror must decide the case upon his own opinion of the evidence, where defendant made no written request for instructions on any particular phase of the case, and the court properly charged that defendant was presumed to be innocent and that the State had the burden of proving defendant's guilt beyond a reasonable doubt.

5. Homicide § 21— first degree murder — sufficiency of evidence

In this first degree murder prosecution, the trial court did not err in the denial of defendant's motion for nonsuit where the State's evidence tended to show that defendant killed deceased by stabbing her in the back with a knife and beating her with an iron poker and a frying pan.

APPEAL by defendant from *Fountain, J.*, 18 December 1969 Session of Superior Court held in CRAVEN County.

The defendant was tried upon a bill of indictment charging him with murder in the first degree of Janie Banks.

The evidence for the State tended to show that the defendant went to the home of Janie Banks on 24 March 1969 and stabbed her in the back with a knife. Then "(h)e threw the knife down on the floor and put his arm around her mouth so she couldn't holler, and grabbed an iron poker beside the heater. He beat her in the back and across the shoulder and beat her down to the floor. Then he went out of the front room toward the kitchen and came back in with this frying pan here. Just as he got back in the front room, she had started to get up; she was trying to make it up off the floor. He started beating her with the frying pan. He beat her until he beat her brains out." Thereafter, the defendant ransacked the house before leaving. The defendant offered no evidence.

The defendant, an indigent, was represented at the November 1969 trial, at the December 1969 trial, and on this appeal by the same two attorneys who were appointed on 3 June 1969 to represent him.

The first trial ended in a mistrial on 14 November 1969 when the jury could not agree on a verdict.

The second trial ended on 18 December 1969 after the jury had found the defendant guilty of murder in the second degree and the court had sentenced him to the State Prison for a term of thirty years.

Defendant, in apt time, gave notice of appeal.

Attorney General Morgan and Staff Attorney Denson for the State.

Robert G. Bowers and E. Lamar Sledge for the defendant appellant.

MALLARD, C.J.

On this record, the defendant entered 89 exceptions. In his assignments of error, he refers to only 26 of them. The other 63 are deemed abandoned. Rule 28 of the Rules of Practice in the Court of Appeals. These 26 exceptions are considered under the five questions presented on this appeal.

[1] 1. Defendant asserts that the trial judge committed error in refusing to order that the defendant be furnished with a transcript of the first trial. The only reason asserted by the defendant in his motion for a transcript was that because a non-indigent defendant could purchase a transcript, that he, an indigent, was entitled to a transcript of the evidence and testimony given at the first trial which resulted in a mistrial. He does not allege that the court reporter who took the evidence at the first trial was not available to him as a witness. He was represented at both trials by the same lawyers. *Forsberg v. United States,* 351 F. 2d 242 (9th Cir. 1965). The second trial took place about a month after the first trial. There was no showing that the cross-examination by the defendant of the State's witnesses was restricted in any way. There was no argument by the solicitor relating to discrepancies in the testimony as there was in *United States ex rel. Wilson v. McMann,* 408 F. 2d 896 (2d Cir. 1969). The defendant had the right to use the court reporter if there was a conflict in the State's testimony. We think that the cases cited by the defendant in support of his contentions are distinguishable.

In the case of *Nickens v. United States,* 323 F. 2d 808 (1963), *cert. den.,* 379 U.S. 905, 13 L. Ed. 2d 178, 85 S. Ct. 198 (1964), the Court said:

"There is no absolute right to have the transcript of a prior trial against the contingency, now urged, that some witness at the second trial may give inconsistent testimony. Any inconsistency in testimony arising at the second trial could readily be dealt with by calling the reporter of the prior trial to read the earlier testimony. Appellant had the same counsel at both trials. The District Court did not abuse its discretion in denying appellant's bare demand for a transcript in these circumstances."

We are of the opinion and so hold that the factual situation here does not reveal such a need for the transcript of the evidence at the first trial that the denial thereof was a deprivation of a basic essential of the defendant's defense. *State v. Keel,* 5 N.C. App. 330, 168 S.E. 2d 465 (1969).

[2] 2. Defendant asserts that the trial judge committed error in refusing to instruct the prosecution as requested in his motion *in limine.* By this preliminary motion, the defendant sought to prohibit the introduction of evidence of the defendant's fingerprint. The defendant's fingerprints were found on the butcher knife used to stab the deceased. The butcher knife was found in the home of the deceased after her death. We think that this evidence was competent, and, therefore, the denial of defendant's motion was proper.

[3] 3. Defendant contends that the trial court committed error in admitting the fingerprint evidence (1) because the defendant was shown to have been at the scene of the crime earlier that day and (2) there was at least one fingerprint on the knife which was unidentifiable. The cases cited by defendant in support of this contention are distinguishable. We hold that the fingerprint evidence was competent. It tended to corroborate the testimony of the State's witness that the defendant had used the knife in stabbing the deceased in the back.

[4] 4. The defendant contends that the trial court committed error by failing to instruct the jury that "each must decide the case upon his own opinion of the evidence, that the defendant was entitled to every inference in his favor and that where there were two inferences one consistent with innocence and one inconsistent, the defendant is entitled to the inference which is consistent with innocence; and as to the importance of the presumption of innocence under our law." The defendant made no written request for instructions on any particular phase of the case. The court properly charged that the defendant was presumed to be innocent and that "(t)he burden of proof is upon the State to satisfy you on the evidence and beyond a reasonable doubt of the defendant's guilt." Thus, the court properly re-

quired that in order to convict, the State must prove the defendant guilty from the evidence and beyond a reasonable doubt. We hold that no error is made to appear in the charge of the court to the jury.

[5] 5. The defendant contends that the trial court committed error in failing to allow his motion for nonsuit. There was ample evidence of the defendant's guilt to require the submission of the case to the jury. The exceptions to the denial of the motion for judgment as of nonsuit cannot be sustained.

In the trial we find no error.

No error.

MORRIS and GRAHAM, JJ., concur.

IN THE MATTER OF VINCENT INGRAM, JUVENILE

No. 703DC156

(Filed 27 May 1970)

1. Criminal Law § 75; Infants § 10; Schools § 15— confession by eight-year-old boy — voluntariness — admissibility — injury to school property

In the absence of a determination that a confession by an eight-year-old boy was voluntary and that the boy was advised of his *Miranda* rights, the confession, which was made to a school official in the boy's home in the absence of his parents, was inadmissible in a juvenile hearing on the charge that the boy wilfully and wantonly injured school buses belonging to a county board of education.

2. Criminal Law § 74— definition of a confession

An extra-judicial statement of an accused is a confession if it admits defendant's guilt of the offense charged or an essential part of the offense.

3. Criminal Law § 75— admissibility of confession — voluntariness

A confession is admissible against a defendant when, and only when, it was in fact voluntarily and understandingly made.

4. Criminal Law § 76— admissibility of confession — determination by court

When a confession is offered in evidence and challenged by objection, the court should determine whether the confession was free and voluntary.

5. Criminal Law § 76— general objection to confession

A general objection is sufficient to challenge the admissibility of a confession.

6. Criminal Law § 75; Infants § 10; Constitutional Law § 30— confession by eight-year-old child — admissibility — due process

The admissibility of an extra-judicial confession by an eight-year-old child should be governed by the same principles that protect an adult accused of the same criminal act.

7. Infants § 10— juvenile proceedings — due process

Juvenile proceedings must meet the requirement of due process.

APPEAL by respondent from *Phillips, District Judge,* 8 September 1969 Session of CARTERET County District Court.

This case arose out of a petition charging the respondent Ingram, an eight-year old male child, with wantonly and wilfully injuring the personal property of the Carteret County Board of Education. The proceeding is controlled by G.S. Chapter 110, Article 2 as it existed prior to the enactment of Chapter 911 of the Session Laws of 1969 which rewrote the Article and revised the jurisdiction and procedures applicable to children in the district court.

From an order committing him to the Samuel Leonard Training School in McCain, North Carolina, respondent appeals.

Attorney General Robert Morgan by Assistant Attorney General R. S. Weathers for the State.

Wheatley and Mason by L. Patten Mason for respondent appellant.

VAUGHN, J.

[1] The evidence tended to show the following. On 27 July 1969 the maintenance supervisor of the Carteret County Garage went to the fenced compound where the county school buses and trucks were parked. Keys had been left in the vehicles. He discovered that several of the vehicles had been damaged. The court then heard testimony from a witness who identified himself as Director of Special Services for the County Board of Education. He described his duties as follows:

> ". . . My job encompasses counselling with students and making investigations into the home circumstances of students in schools in the Beaufort, North Carolina, area. I also check on truants and make general investigations for the school. Part of

> my job is to investigate any damage, destruction, vandalism or malicious damage done to school property and to attempt to find those persons causing any damage or destruction to school property."

During the course of his investigation and as a result of a conversation with one James he went to the home of the respondent and had a conversation with him. Neither of respondent's parents were present and no "*Miranda* warning" was given. The child confessed to having driven three of the vehicles around in the compound, during the course of which they were scratched, dented and glass was broken. In apt time respondent objected to the introduction of the confession. This motion was overruled, and the confession was received into evidence without any inquiry by the court on the question of whether the confession was voluntarily and understandingly made. No other evidence tending to connect the child with the offense charged or relating to his habits, surroundings, conditions or tendencies appears in the record.

[2-5] The defendant's objection to the admission of the confession was made for "failure of Randolph Johnson (the investigator) to advise the juvenile and the juvenile's parents of his rights as set out in the *Miranda* decision." The State argues that since the juvenile was not in custody or otherwise deprived of his freedom, such advice was not required. Even if we were to concede, *arguendo,* this to be so as to an eight-year old child, it is clear that long before the decision in *Miranda v. Arizona,* 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602, the Courts of this State enunciated well-established precepts as to confessions. An extra-judicial statement of an accused is a confession if it admits defendant's guilt of the offense charged or an essential part of the offense. *State v. Hamer,* 240 N.C. 85, 81 S.E. 2d 193. A confession is admissible against a defendant when, and only when it was, in fact, voluntarily and understandingly made. *State v. Fox,* 274 N.C. 277, 163 S.E. 2d 492. This has been the law of the State since its beginning. *State v. Roberts,* 12 N.C. 259. When a confession is offered in evidence and challenged by objection, the court should determine whether the confession was free and voluntary. The trial judge should find the facts which disclose the circumstances and conditions surrounding the making of the incriminating admissions. *State v. Barnes,* 264 N.C. 517, 142 S.E. 2d 344. The objection in the present case was sufficient to raise the issue. A general objection is sufficient to challenge the admissibility of a confession. *State v. Vickers,* 274 N.C. 311, 163 S.E. 2d 481.

[6] The legality of any reason for the indefinite restraint of this

juvenile depends solely upon the truth or falsity of the allegation that he wilfully and wantonly injured personal property in violation of G.S. 14-160. The petition does not allege nor does the record disclose that the child is neglected, dependent, beyond the control of his parents or would, by any other provisions of G.S. 110-21 as it existed at the time of the institution of the proceeding be subject to the jurisdiction of the juvenile court. Under these circumstances we perceive no sound reason why the admissibility of an extra-judicial confession by an eight-year old child should not be governed by the same principles that protect an adult accused of the same criminal act.

[7] Historically wide differences have existed between the procedural rights of adults and those accorded juveniles. Quite properly there remain many sound distinctions between a juvenile proceeding and a criminal trial. Juvenile proceedings must, however, meet the requirements of due process. In *In Re Burrus,* 275 N.C. 517, 169 S.E. 2d 879, Justice Huskins summarizes as follows:

> ". . . So long as proceedings in the juvenile court meet the requirements of due process, they are constitutionally sound and must be upheld. This means that: (1) The basic requirements of due process and fairness must be satisfied in a juvenile court adjudication of delinquency. *Kent v. United States, supra* (383 U.S. 541, 16 L. ed 2d 84, 86 S. Ct. 1045 (1966)); *In Re Gault, supra,* (387 U.S. 1, 18 L. ed 2d 527, 87 S. Ct. 1428 (1967)). (2) The Fourteenth Amendment applies to prohibit the use of a coerced confession of a juvenile. *Haley v. Ohio,* 332 U.S. 596, 92 L. ed 224, 68 S. Ct. 302 (1948). *Gallegos v. Colorado,* 370 U.S. 49, 8 L. ed 2d 325, 82 S. Ct. 1209, 87 A.L.R. 2d 614 (1962). (3) Notice must be given in juvenile proceedings which would be deemed constitutionally adequate in a civil or criminal proceeding; that is, notice must be given the juvenile and his parents sufficiently in advance or scheduled court proceedings to afford them reasonable opportunity to prepare, and the notice must set forth the alleged misconduct with particularity. *In Re Gault, supra.* (4) In juvenile proceedings to determine delinquency which may result in commitment to an institution in which the juvenile's freedom is curtailed, the child and his parents must be notified of the child's right to counsel and, if unable to afford counsel, to the appointment of same. *In Re Gault, supra.* (5) Juvenile proceedings to determine delinquency, as a result of which the juvenile may be committed to a state institution, must be regarded as 'criminal' for Fifth

Amendment purposes of the privilege against self-incrimination. The privilege applies in juvenile proceedings the same as in adult criminal cases. *In Re Gault, supra.*"

In a decision on 31 March 1970 the Supreme Court of the United States appears to have concluded that proof beyond a reasonable doubt is among the "essentials of due process" required during the adjudicating stage when a juvenile is charged with an act which would constitute a crime if committed by an adult. *In Re Winship,* 397 U.S. 358, 25 L. Ed. 2d 368, 90 S. Ct. 1068.

For the reasons we have assigned, the order appealed from is reversed.

Reversed.

CAMPBELL and PARKER, JJ., concur.

STATE OF NORTH CAROLINA v. JOHN HAMLIN RENNICK

No. 7020SC179

(Filed 27 May 1970)

1. Automobiles § 127— drunken driving — sufficiency of evidence

The State's evidence was sufficient to be submitted to the jury on the issue of defendant's guilt of drunken driving where it tended to show that defendant was driving his automobile partially off the pavement, that defendant appeared to be in a dazed condition, and that defendant had an odor of some intoxicating beverage about him and was in a staggering condition.

2. Automobiles § 126; Criminal Law § 99— expression of opinion by the court — question as to whether defendant took breathalyzer

In this drunken driving prosecution, the trial judge did not express an opinion when he asked a witness whether defendant took the breathalyzer test, the question serving only to clarify the testimony of the witness.

3. Criminal Law § 114; Automobiles § 129— instructions — expression of opinion

In this drunken driving prosecution, the trial court did not express an opinion by statement in the instructions that "the offense charged here was committed against the peace and dignity of the State" where the court was reading the warrant upon which defendant was being tried.

4. Criminal Law § 168— instructions — jury's recollection of evidence — harmless error

Statement by the court in its instructions that "if your recollection of

the testimony is different from what somebody says, then you take your own recollection, yours as determined from the evidence," *held* not to constitute prejudicial error when considered in context, it appearing from previous portions of the charge that "somebody" referred to defendant's attorney and the solicitor.

5. Criminal Law § 118; Automobiles § 129— expression of opinion — instructions on contentions of the State

In this drunken driving prosecution, the trial court did not express an opinion that certain facts were fully proven in portion of the charge in which the court reviewed the State's contentions where the court clearly informed the jury that it was stating the State's contentions and reviewing the State's evidence.

APPEAL from *Crissman, J.*, 3 November 1969 Criminal Session, UNION County Superior Court.

This was a criminal action in which the defendant, John Hamlin Rennick, was charged with driving an automobile on the public highway while under the influence of intoxicating liquor and with using profane and indecent language. The defendant was tried and convicted on both charges in the District Court of Union County, and from the judgment of the said District Court, he appealed to the Superior Court of Union County. In the Superior Court defendant was found guilty by a jury of both charges. Motion in arrest of judgment was allowed in Superior Court in the case charging the defendant with the use of profane and indecent language. From the judgment of the Superior Court in the case wherein the defendant was charged with operating a motor vehicle on a public highway while under the influence of an intoxicating beverage, the defendant appealed to the Court of Appeals assigning error.

Robert Morgan, Attorney General, William W. Melvin, Assistant Attorney General, and T. Buie Costen, Staff Attorney, for the State.

W. B. Nivens for the defendant.

HEDRICK, J.

[1] The defendant assigns as error the court's overruling his motion for judgment as of nonsuit. It is elementary law in this jurisdiction that upon consideration of a motion for judgment as of nonsuit the evidence will be taken in the light most favorable to the State with the State entitled to every reasonable inference deducible therefrom. Jerry Dove, a North Carolina Highway Patrolman, in summary testified that he first saw the defendant driving his automobile on U.S. Highway #74 in Union County, and that he followed the

defendant's motor vehicle for about one-tenth of a mile along Highway #74 until it turned into rural paved road #1196; that the automobile was being driven by the defendant partially off the pavement, and that when the automobile stopped he observed the defendant who appeared to be in a dazed condition. The patrolman further testified that he observed an odor of some intoxicating beverage about the person of the defendant and that the defendant was in a staggering condition. The officer testified that in his opinion the defendant was under the influence of some intoxicating beverage when he saw him operating the automobile on U.S. Highway #74. The evidence was clearly sufficient to carry the case to the jury over the defendant's motion for judgment as of nonsuit.

[2] The appellant contends that the trial judge committed prejudicial error by expressing an opinion on the evidence, in violation of G.S. 1-180, when he asked "Did the defendant take it (the breathalyzer)?" It is proper, and often necessary, that judges ask questions of witnesses which are designed to obtain a proper understanding and clarification of the witnesses' testimony. *State v. Colson*, 274 N.C. 295, 163 S.E. 2d 376 (1968). We have examined the question asked in the present case and in our opinion it served only to clarify the testimony of the witness and did not amount to an expression of opinion by the judge.

[3] The defendant took exception to several portions of the judge's charge. We have examined each portion of the charge to which the defendant objected and have found no prejudicial error. The judge charged the jury as follows:

> ". . . the other is case #69-1634, which charge is in the District Court by warrant as follows: The undersigned, J. D. Dove, being duly sworn, deposes and says that at and in the county named above, on or about the 21st day of March 1969, the defendant named above did unlawfully use profane and indecent language in the Monroe Police Department in a loud and boistrous (sic) manner in front of two or more persons.
>
> "The charge . . . the offense charged here was committed against the peace and dignity of the State, in violation of the law."

The judge in this case was obviously reading the warrant upon which the defendant was being tried. This cannot be held to be an expression of opinion by the trial judge. This instruction constitutes merely a discharge of the court's duty to declare and explain the law of the case. G.S. 1-180. This is analogous to the situation in

State v. Butler, 269 N.C. 733, 153 S.E. 2d 477 (1967), where the court, in charging the jury, read the statute upon which the indictment was based and pointed out the material parts of the statute which applied to the charge against the defendant. Our Supreme Court held in that case that "[t]his instruction was in keeping with the requirements of G.S. 1-180 which makes it the duty of the judge to declare and explain the law of the case."

[4] The appellant excepted to the following portion of the court's charge:

> "3If your recollection of the testimony is different from what somebody says, then you take your own recollection, yours as determined from the evidence.4"

The foregoing quotation is lifted out of context. It is obvious from reading the portion just prior to that objected to that the "somebody" referred to in the last paragraph was the defendant's attorney or the solicitor. This portion of the charge is without prejudicial error. *State v. Biggerstaff,* 226 N.C. 603, 39 S.E. 2d 619 (1946).

[5] Finally, the appellant contends that the court erred when it charged the jury as follows:

> "The State says and contends that this is a clear cut case of a person being out on a highway late at night while highly intoxicated. The State says and contends that all the evidence tends to show that the defendant was drinking of alcohol on this occasion and that he did not appear to be under control of his mental or bodily faculties and that as a result he was driving in that condition on the highway and that as a result of it he used profane and loud, boistrous (sic) language in front of two or more people in the presence of two or more people in a public place, in the police station on that night; and the State says and contends that he is guilty."

This exception is without merit. In *State v. Jessup,* 219 N.C. 620, 14 S.E. 2d 668 (1941), the North Carolina Supreme Court held that a charge which reviews the State's evidence cannot be held erroneous as an expression of opinion that certain facts were fully proven when it appears that the court categorically indicated to the jury it was reviewing the State's evidence. This is applicable to the present case. The court clearly indicated to the jury that it was stating the State's contentions and reviewing the State's evidence.

We have considered all appellant's exceptions and assignments

of error and conclude that the defendant had a fair trial free of prejudicial error.

No error.

BROCK and BRITT, JJ., concur.

PATRICK HINTON JOHNSON v. VIVIEN ASHE JOHNSON

No. 701SC170

(Filed 27 May 1970)

1. Automobiles § 92— injury to child of the parties — fall from moving truck — negligence of mother — nonsuit

In an action by a father against the mother to recover medical expenses and damages sustained when their minor daughter fell out of the cab of a moving pickup truck being driven by the mother, issue of the mother's negligence in proximately causing the injury was improperly submitted to the jury, where the father's evidence left open to conjecture whether the door was opened by the child or by the physical force created when the truck rounded a curve.

2. Automobiles § 44— res ipsa loquitur — injury to child falling from moving truck

The doctrine of *res ipsa loquitur* was inapplicable in a father's action against the mother to recover medical expenses and damages sustained when their minor daughter fell out of the cab of a moving pickup truck being driven by the mother.

APPEAL by defendant from *Mintz, J.*, October 1969 Civil Session of GATES County Superior Court.

This is an action by the husband of the defendant to recover medical expenses and damages sustained as the result of an injury to the minor daughter of the parties when she fell out of the cab of a moving pickup truck being driven by defendant. At the time of the accident the child was four years and ten months old, alert, obedient and showed promise of being industrious, intelligent and helpful to her parents. Since the accident she has difficulty seeing, drags her foot, is generally not as alert and industrious and the vision in her left eye is greatly impaired. Plaintiff's evidence, based in part on defendant's testimony as an adverse witness, is uncontroverted and tends to show that the defendant mother and her daughter had been to the grocery store and had driven about one-

half mile from the store when the accident occurred. The vehicle in which they were riding was a two-door pickup truck, not equipped with safety belts. Though plaintiff testified that the door lock was in the handle, and defendant testified it was on the top of the door, both testified that the door could be opened from the inside whether it was locked or unlocked. The door handles were located eight inches to one foot above the level of the seat and approximately one foot in front of the seat, "about middle way of the door in each direction." Defendant testified that the door handle was behind the child when she was standing on the floorboard. Both plaintiff and defendant testified that nothing was mechanically wrong with the door handle or lock on the passenger side, that it had never come open before and that they had never seen the child attempt to open the door to any moving vehicle, though plaintiff testified that the child could open the door and that he had seen her open it before. Plaintiff testified that he checked the door after the accident and could find no mechanical defects. Defendant testified that both she and the child entered the truck from the driver's side and that she did not check the door on the passenger's side on that day to see if it was properly closed or locked and she did not say anything to the child about the door. She did not at any time hear the door rattle as if it were not properly closed; if she had she would have stopped and closed the door. She had driven about two miles without hearing any noises to indicate that the door was not securely closed, one and one-half miles from her house to the store and the one-half mile from the store to the accident location. As they were riding they were singing, with the child standing on the floorboard of the truck. A State Highway Patrolman testified that the speed limit at the place of the accident was 55 miles per hour and the defendant testified she had slowed down to 40 miles per hour going into a curve. She testified that "When I went around the curve I happened to look over and I saw she was falling, going out, and I throwed on brakes, and she was out, and I went to pick her up." She further testified that the child "did not cry out before she fell out of the door. I had warned her earlier on other occasions about opening doors of cars . . .", and that she did not know what caused the door to come open.

A State Highway Patrolman testified that the road at the place of the accident curves to the left, that it was elevated so that "a car making a left turn would be leaning to the left."

Defendant's motions for nonsuit, made at the close of plaintiff's case and renewed after defendant had introduced one exhibit, were denied by the court.

By consent the case was tried before a judge sitting without a jury and the findings of facts pertinent to this appeal were these:

"3. That on Friday, the 1st day of September, 1967, at about 3:00 P.M., the defendant was operating a pickup truck in a northerly direction on Rural Paved Road 1200 and had entered a curve when the door on the right side of the pickup came open and Cecilia Denise Johnson fell out of the moving vehicle onto the pavement, causing the child to suffer serious personal injuries."

"5. That the injuries to the child proximately resulted from the failure of Vivien Ashe Johnson to properly supervise the child while she was driving along the public highway by allowing the child to stand next to the door while the defendant drove the pickup along and sang songs, and the further failure of the defendant to check the right door to determine whether or not the same had been securely fastened before she undertook to drive down the road with the child inside the pickup truck."

The court then ordered that plaintiff recover of defendant a total of Five Thousand, Six Hundred Forty-Seven Dollars ($5,647.00).

Defendant appealed.

Jones, Jones and Jones by L. Bennett Gram, Jr., for plaintiff appellee.

Leroy, Wells, Shaw, Hornthal and Riley by L. P. Hornthal, Jr., for defendant appellant.

MORRIS, J.

[1, 2] Defendant brings forward two assignments of error, the first related to the court's failure to grant her motion for nonsuit and the second to the signing and entry of the judgment. After reviewing the evidence, we are of the opinion that defendant's motion for nonsuit at the close of plaintiff's evidence should have been granted. We are in agreement with counsel for both parties that the doctrine of *res ipsa loquitur* does not apply under the facts of this case.

Neither the evidence nor the findings of fact by the court offers a sufficient explanation of why the door of the truck came open. Looking at the evidence of the plaintiff in the light most favorable to him and giving him the benefit of every doubt and reasonable inference, we are still left with two possible explanations of why the door came open — either it was not securely closed and opened as a result of

the physical force created when the truck began negotiating the curve or it was opened, accidentally or on purpose, by the child. This, at best, leaves the trier of the facts with a choice of possibilities or a finding based on conjecture, which is insufficient to support a finding that the defendant's negligence, if any, was the proximate cause of the injury to the child. As was said in *Powell v. Cross*, 263 N.C. 764, 140 S.E. 2d 393 (1965):

> "The sufficiency of the evidence in law to go to the jury does not depend upon the doctrine of chances. However confidently one in his own affairs may base his judgment and as a basis for the judgment of the court, he must adduce evidence of other than a majority of chances that the fact to be proved does exist. It must be more than sufficient for mere guess and must be such as tends to actual proof." (citations omitted.)

See also *Jones v. Smith*, 3 N.C. App. 396, 165 S.E. 2d 56 (1969); 65A C.J.S., Negligence, § 244(2).

Reversed.

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

LUCILLE WIGGINS SEIBOLD v. MUTUAL BENEFIT HEALTH AND ACCIDENT ASSOCIATION (MUTUAL OF OMAHA)

No. 708SC275

(Filed 27 May 1970)

Insurance § 44— action on disability policy — back injuries — total loss of time — sufficiency of evidence

In an action to recover benefits under a disability policy, plaintiff's evidence *held* sufficient to support a jury finding that the objective and subjective complaints of the plaintiff resulted from back injuries sustained in a fall and the treatment therefor, and that these complaints led to the total loss of time by the plaintiff from any occupation.

APPEAL by defendant from *Hubbard, J.*, October 1969 Session, LENOIR Superior Court.

This action was instituted by summons issued 9 September 1966 to recover benefits allegedly due the plaintiff under a disability insurance policy issued by the defendant. Defendant admitted issuance of the policy and that it was in full force and effect when this action was instituted but denied that any benefits were due thereunder.

Plaintiff offered testimony tending to show that in May 1962 she sustained an accident when she started out of the library in Kinston, North Carolina, and was descending the front steps. She reached the second step and, at that point, caught her heel in a crevice, turned a somersault and landed on her back on the brick walk in front. She was hospitalized for five days before returning to her work which consisted of running a restaurant and a boarding house. After undertaking her work duties for a day, she suffered so much pain that she sought additional medical help. She was examined by an orthopedic specialist in Raleigh and thereafter was placed in cervical traction in the Craven County Hospital in New Bern for several months. Thereafter, she was examined by a neurosurgeon in Raleigh and placed in Rex Hospital for two weeks. An unsuccessful myelogram was attempted in Raleigh for the purpose of diagnosing her difficulty.

The plaintiff continued to consult various doctors and in February 1963 consulted a neurosurgeon in Washington, D. C. at the Georgetown University Hospital. At this time a successful myelogram was performed, and it was determined that the plaintiff was suffering from arachnoiditis as well as a ruptured disc at the L-4 and L-5 veretbræ. On 25 March 1963 plaintiff underwent a hemilaminectomy for the removal of a ruptured intervertebral disc. Thereafter, the plaintiff continued to suffer pain which disabled her from performing any of her ordinary duties. She took various drugs in order to control her pain. In December 1965 plaintiff underwent a spinal fusion. Plaintiff has remained under medical treatment and has spent some 90% — 95% of her time in bed.

At the conclusion of all of the evidence, the trial court submitted issues to the jury which are set out in the following judgment which was entered:

"JUDGMENT

THIS CAUSE COMING ON TO BE HEARD AND BEING HEARD before his Honor Howard H. Hubbard, Judge Presiding, and a Jury at the October 14, 1969 Term of the Superior Court of Lenoir Court; and the Jury having answered the Issues submitted to them as follows:

1. Did Mrs. Lucille Wiggins Seibold suffer a total loss of time as defined in the policy as a result of her injuries of May 11, 1962 so as to prevent her from engaging in any gainful work or service for which she was reasonably fitted by education, training or experience from and after June 14, 1965?

ANSWER: Yes.

2. If so, during what period or periods of time since June 14, 1965 has she sustained total loss of time?

ANSWER: June 14, 1965 to October 17, 1969

And it having been stipulated by counsel for plaintiff and counsel for the defendant that the Second Issue should be submitted to the Jury in a manner so that the same could be answered in a period of time rather than a sum of money and that the Court would . . . based upon the Answer made by the Jury to said Issue . . . compute the monetary sum to the plaintiff under her health-and-accident policy.

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the plaintiff have and recover of the defendant the sum of Ten Thousand Two Hundred Nineteen Dollars and Seventy-Three Cents ($10,219.73) . . . being fifty-two months, three days — less thirty days' elimination period — at the rate of Two Hundred Dollars ($200.00) per month . . . together with interest at the rate of six per-cent per annum to October 17, 1969 in the sum of One Thousand Three Hundred Thirty Dollars and Eleven Cents ($1,330.11) by reason of her contract of health-and-accident insurance with the defendant, together with the costs of this action which shall be taxed by the Court.

It has been agreed by and between the parties hereto that this Judgment may be signed out of Term and out of the County.

This 28 day of October, 1969.

s/ HOWARD H. HUBBARD
Judge Presiding"

Defendant appeals to this Court, assigning error in disallowance of the motion of nonsuit.

Turner and Harrison by Fred W. Harrison for plaintiff appellee.

Whitaker, Jeffress & Morris by A. H. Jeffress for defendant appellant.

CAMPBELL, J.

The appellant's brief recites that the question involved here is, "Does the record contain evidence legally sufficient to support the

verdict and judgment that plaintiff suffered a total loss of time due to disability caused by the injuries she sustained in May 1962?" It is further stated: "As all the assignments of error deal with the sole question involved in this appeal, and present one question of law for decision by the Court, all the assignments of error will be argued together." This broadside reference to the errors assigned by counsel does not conform with Rule 28 of the Rules of Practice of this Court. A motion was made to amend the brief in order to conform with Rule 28. Whether this motion is allowed or not, this record presents only the single question as to whether there was sufficient evidence to withstand defendant's motion of nonsuit and to require the case to be submitted to the jury.

We hold that there was sufficient evidence in the record, taken in the light most favorable to the plaintiff, [*Aaser v. Charlotte,* 265 N.C. 494, 144 S.E. 2d 610 (1965)], from which a jury could find that the objective and subjective complaints of the plaintiff resulted from the injuries sustained in the fall and the treatment therefor, and that these complaints have lead to the total loss of time by the plaintiff from any occupation.

While the defendant offered testimony from Dr. Pfeiffer that "[i]t is my opinion that the fall did not have anything to do with the subsequent arachnoiditis," the testimony of the plaintiff, together with the other medical testimony, raised a question for the jury. The medical testimony meets the test laid down in *Lockwood v. McCaskill,* 262 N.C. 663, 138 S.E. 2d 541 (1964).

All assignments of error to the charge of the trial judge have been abandoned under Rule 28 (*supra*). The factual situation was presented to the jury by the trial judge in a fair and impartial charge unexcepted to. In law we find

No error.

PARKER and VAUGHN, JJ., concur.

STATE OF NORTH CAROLINA v. JAMES DAVIS SCOTT, ALIAS RAYMOND EDDIE HAIRSTON

No. 7021SC172

(Filed 27 May 1970)

1. Constitutional Law § 32— defendant's dissatisfaction with court-appointed counsel

Trial court's refusal to allow court-appointed counsel to withdraw from the case was proper where (1) defendant's chief complaint was that counsel had not arranged reasonable bail and (2) there was nothing in the record to indicate that counsel failed to provide defendant with proper representation.

2. Criminal Law § 91— continuance

A motion for a continuance is ordinarily addressed to the discretion of the trial court, and its ruling thereon is not subject to review absent abuse of discretion.

3. Criminal Law § 91— continuance — missing witness

Refusal of the trial court to grant defendant's motion for continuance until his witnesses could be found was not reversible error, where (1) several months had elapsed between time of the offense and time of the trial, (2) an attorney had been appointed for defendant more than a month prior to trial, and (3) two of the witnesses had been subpœnæd several days prior to trial but could not be located by the police.

APPEAL by defendant from *Gambill, J.*, 13 October 1969 Session, FORSYTH Superior Court.

In a bill of indictment returned at the 25 August 1969 Session of Forsyth Superior Court, defendant was charged with feloniously breaking and entering a building occupied by Ed Owens Chrysler-Plymouth, Inc. Defendant pleaded not guilty.

Evidence for the State tended to show that defendant and another man were found by police around 2:00 a.m. in the place of business named in the indictment; the building had been entered through a window and the office area had been thoroughly ransacked, with papers and other personalty scattered all over the place.

Defendant testified as a witness for himself. He admitted being in the building when police arrived but denied ransacking the office or disturbing any property in the building, contending that the building had been entered earlier that night and that he and his companion entered by a window broken by previous intruders. He further testified that he was intoxicated at the time, had been in the building only five minutes when apprehended, and had no intention of stealing anything from the building. Police officers testi-

fied that defendant was not intoxicated when they found him in the building.

In submitting the case, the trial judge instructed the jury that they might find the defendant guilty as charged, guilty of non-felonious breaking and entering, or not guilty. The jury returned a verdict of guilty as charged and from judgment imposing prison sentence of from three to six years, defendant appealed.

Attorney General Robert Morgan and Staff Attorney Thomas B. Wood for the State.

Deal, Hutchins & Minor by Richard Tyndall for defendant appellant.

BRITT, J.

[1] Defendant first assigns as error the court's refusal to allow court-appointed counsel to withdraw from the case. When the case was called for trial, Attorney Tyndall stated to the court, "Prior to pleading to the bill of indictment, I think the defendant has some comments he would like to make to the court." The jury was excused from the courtroom and an extended inquiry by the court followed. Defendant stated that he wanted another attorney, that he was not satisfied with Mr. Tyndall, that "I don't think he's working right on my case." The inquiry revealed that sixteen cases were pending against the defendant and his chief complaint against his attorney was that he had not arranged for reasonable bond to be set; the required bond at time of trial was $14,000. Attorney Tyndall moved for and insisted on an order allowing him to withdraw but the trial judge denied the motion, stating his doubt that defendant would be satisfied with any lawyer that the court might appoint.

In *State v. Moore,* 6 N.C. App. 596, 170 S.E. 2d 568 (1969), this Court, in an opinion by Graham, J., said:

> "* * * The defendant did not suggest to the court that counsel was not professionally competent nor did he express a desire to represent himself. An expression by a defendant of an unfounded dissatisfaction with his court appointed counsel does not entitle him to the services of another court appointed attorney. *People v. Terry,* 36 Cal. Rptr. 722. It is well settled that an indigent defendant must accept counsel appointed by the court, unless he desires to present his own defense. *State v. Alston,* 272 N.C. 278, 158 S.E. 2d 52; *State v. Morgan,* 272 N.C. 97, 157 S.E. 2d 606; *State v. Elliott,* 269 N.C. 683, 153 S.E. 2d

330; *State v. McNeil*, 263 N.C. 260, 139 S.E. 2d 667; *Campbell v. State of Maryland*, 231 Md. 21, 188 A. 2d 282; *Brown v. United States*, 105 U.S. App. D.C. 77, 264 F. 2d 363. * * *"

There is nothing in the record to indicate that Attorney Tyndall failed to provide defendant with proper representation. In fact, the record suggests that defendant had fared quite well because of the high quality of Mr. Tyndall's representation. The assignment of error is overruled.

[2, 3] Defendant's next assignment of error is to the refusal of the court to continue the case until defendant's witnesses could be found. It is well settled that a motion for a continuance is ordinarily addressed to the discretion of the trial court, and its ruling thereon is not subject to review absent abuse of discretion. 2 Strong, N.C. Index 2d, Criminal Law, § 91, p. 620. The record discloses that the offense complained of was committed on 8 March 1969, that defendant absented himself from the state for several months, that he was indicted by the grand jury on or about 25 August 1969, that an attorney was appointed for him on 8 September 1969 and that his case was called for trial on or after 13 October 1969. When defendant moved for a continuance on the ground that he wanted certain witnesses, the trial judge made due inquiry as to what defendant proposed to prove by the witnesses; the reply was that he wanted to show that he was an alcoholic and was drinking heavily a few hours before he was apprehended. Subpœnas for two of the desired witnesses were issued several days before the trial but the police were unable to locate the witnesses. We are of the opinion, and so hold, that no abuse of discretion by the trial judge has been shown, therefore, the assignment of error is overruled.

The two remaining assignments of error relate to the court's instructions to the jury. Reading the charge contextually, we find no reasonable cause to believe that the jury was misinformed or misled by the manner in which the law of the case was presented to them. *State v. Leach*, 272 N.C. 733, 158 S.E. 2d 782 (1968). The assignments of error are overruled.

The defendant received a fair trial, free from prejudicial error, and the sentence imposed was well within the limits provided by statute.

No error.

BROCK and HEDRICK, JJ., concur.

J. T. DUNN, T/A J. T. DUNN HEATING CO. v. J. C. BROOKSHIRE

No. 7026SC199

(Filed 27 May 1970)

1. Trial § 51— motion to set aside verdict — discretion of court — appellate review

A motion to set aside the verdict is addressed to the sound discretion of the trial court, and the refusal to grant the motion is not appealable in the absence of manifest abuse of discretion.

2. Trial § 51; Contracts § 27— action on contract — sufficiency of evidence to support verdict

In this action for the difference between the reasonable value of heating and cooling units installed by plaintiff and the amount received from defendant, verdict for plaintiff was supported by plaintiff's evidence as to the amount of time spent on the job, materials used, incidental work done at defendant's request, and the reasonable value of the materials and services for which he contends defendant agreed to pay.

3. Appeal and Error § 24— necessity for objection or motion to strike

When there is no objection to an offer of evidence or a motion to strike after its admission, any objection or exception is waived.

4. Trial § 42— verdict allowing recovery by both parties — consistency

Jury's verdict answering amounts which each party was entitled to recover from the other is not inconsistent where plaintiff's recovery was for the balance owed by defendant for the installation of heating and air conditioning units, and defendant's recovery upon his counterclaim was for a loan made to plaintiff and for a stud gun which plaintiff took and failed to return, which was separate and distinct from plaintiff's claim.

5. Trial § 40— necessity for submitting several issues to jury

When the pleadings and evidence raise several issues, the submission of a single issue as to the amount each party is entitled to recover is not good practice.

6. Appeal and Error § 31— error in recapitulation of evidence

Assignment of error that in recapitulating the evidence the trial court erroneously used the figure $11,500 instead of $11,000 is overruled where appellant did not suggest any correction to the court and the court charged the jury to use their own recollection of the evidence.

APPEAL by defendant from *Hasty, J.*, 3 November 1969 Schedule D Jury Session of MECKLENBURG Superior Court.

The plaintiff commenced this action on 25 February 1969 by filing a complaint in which he alleged that he had entered into a contract with the defendant in November 1967 by which the plaintiff was to furnish and install six Janitrol heating and cooling combination rooftop units on buildings owned by the defendant and that de-

fendant agreed to pay plaintiff the reasonable value therefor. Plaintiff further alleged that the installation was completed pursuant to the contract and accepted by the defendant. Plaintiff prayed for judgment in the amount of $10,100.00; this being the difference between the alleged reasonable value of his services, $21,600.00 and the amount he has received from the defendant, $11,500.00.

The defendant, J. C. Brookshire, answered denying the existence of the contract as stated in the complaint. As a further answer and defense he alleged a written contract dated 13 November 1967 which was subsequently modified by two separate oral agreements. Defendant further alleged that under the contract as modified, the total sum to have been paid by defendant was $10,922.55 and that defendant paid plaintiff $11,000.00.

In defendant's further answer and counterclaim against the plaintiff it is alleged that plaintiff failed to service the units as he agreed to do which damaged defendant in the amount of $100.00, that defendant was due a refund in the amount of $77.45 for overpayment on the contract, that defendant was due $82.40 for a stud gun which plaintiff took and failed to return, and that plaintiff had used a defective thermostat in one of the units which defendant replaced at a cost of $35.00. As a second cause of action in his counterclaim, defendant alleged that in August 1969 he loaned the plaintiff $500.00 which plaintiff has failed to repay. Defendant sought damages in the amount of $294.85 in his first cause of action and $500.00 in his second.

Two issues, as agreed upon by counsel, were presented to the jury, which were as follows:

> "1. What amount, if any, is the defendant indebted to the plaintiff? Answer.....
>
> 2. What amount, if any, is the plaintiff indebted to the defendant? Answer....."

The first issue was answered in the amount of $3,625.00; the second, $582.40. Defendant moved to set aside the verdict as being contrary to the weight of the evidence. The motion was denied. Defendant appeals.

Ray Rankin for plaintiff appellee.

Kurtz and Ashendorf by William H. Ashendorf for defendant appellant.

VAUGHN, J.

[1-3] Defendant's first assignment of error is that the trial judge committed error in his failure to set aside the verdict because plaintiff failed to present any probative or substantive evidence tending to show that the reasonable value of his services amounted to more than that already paid to the plaintiff and that the verdict was, therefore, contrary to the weight of the evidence. A motion to set aside the verdict is addressed to the sound discretion of the trial court, *Watson v. Stallings,* 270 N.C. 187, 154 S.E. 2d 308, and the refusal to grant the motion is not appealable in the absence of manifest abuse of discretion. *Williams v. Boulerice,* 269 N.C. 499, 153 S.E. 2d 95; 7 Strong, N.C. Index 2d, Trial, § 51, p. 369. No abuse of discretion appears from the record of this trial. Without a lengthy recital of the evidence, it suffices to say that the plaintiff presented evidence as to the amount of time spent on the job, materials used, incidental work done at the defendant's request and evidence as to the reasonable value of the materials and services for which he contends defendant agreed to pay. The plaintiff also offered a paperwriting which was read to the jury. It was a letter from D. A. Lamb of the Daughtry Sheet Metal Company, Charlotte, North Carolina, in which Lamb, upon inspection of the work performed by the plaintiff, estimated the value of the job at $19,140.00. This evidence was presented without objection, and defendant now contends that the paperwriting was inadmissible as not being properly authenticated and therefore of no probative value. When there is no objection to an offer of evidence or a motion to strike after its admission, any objection or exception is lost. Unless objection is made at the proper time, it is waived. Stansbury, North Carolina Evidence, § 27, p. 49. A rule of evidence not invoked is waived. *Cotton Mills v. Local 578,* 251 N.C. 218, 111 S.E. 2d 457, and cases cited. The credibility, probative force, and weight of the evidence is a matter for the jury. *Coach Co. v. Lee,* 218 N.C. 320, 11 S.E. 2d 341.

[4, 5] The defendant also contends that the jury's answer to the two issues submitted constituted an inconsistent verdict. This contention is without merit. The verdict makes it clear that the jury believed the evidence of the plaintiff tending to show that the plaintiff had not been paid in full for his materials and labor and therefore returned a verdict in his favor upon the first issue. It is equally clear that the jury believed the evidence of defendant supporting a part of his claim, which was separate and distinct from plaintiff's claim. When the pleadings and evidence raise several issues, the submission of a single issue as to the amount each party is entitled to recover is not good practice. *Yates v. Body Co.,* 258 N.C. 16, 128

S.E. 2d 11. In this case, however, the parties stipulated as to the issues which the trial judge should submit to the jury, and defendant does not now complain of the number or form of the issues. Despite the shortcomings of the issues, his honor's charge clearly delineated the controversy and properly instructed the jury on the several claims. The jury's answers on the issues were entirely consistent.

[6] Assignments of Error 4 and 5 are directed to portions of his honor's charge, the contention being that his honor, in recapitulating the evidence, used the figure $11,500.00 when in fact the figure $11,000.00 should have been used. The defendant did not suggest any correction to the court. The court specifically instructed the jury to use their own recollection of the evidence. These assignments of error are overruled. *Holloway v. Medlin,* 3 N.C. App. 89, 164 S.E. 2d 69.

No error.

MALLARD, C.J., and MORRIS, J., concur.

BILL HOWELL, T/A BILL HOWELL CONSTRUCTION COMPANY v. C. M. ALLEN & COMPANY

No. 708DC163

(Filed 27 May 1970)

1. Contracts § 27— breach of contract — failure to prove price — nonsuit

Failure of plaintiff contractor to prove an agreement as to price between himself and the defendant construction company warrants entry of judgment of nonsuit in plaintiff's action for breach of contract to provide defendant with 26,000 feet of concrete, there being no meeting of the minds on this essential element of a contract.

2. Contracts § 3— definiteness of agreement — the price

An agreement which does not specify the price or any method for determining it, but which leaves the price for future determination and agreement of the parties, is not binding.

3. Contracts § 1— essentials of a contract — meeting of the minds

In order for a valid contract to exist, the parties must assent to the same thing in the same sense, and their minds must meet as to all the terms.

APPEAL from *Hardy, District Judge,* October 1969 Session, WAYNE County District Court.

This is an action for breach of contract instituted by the plaintiff on 16 March 1966. The plaintiff, in his complaint, alleges that there was an express contract between the parties to this action whereby he was to furnish the defendant 26,000 feet of concrete on a construction job in the City of Goldsboro, North Carolina. The plaintiff alleged:

> "3) That during January of 1966, pursuant to a request from the agents, servants, and employees of the defendant, the plaintiff submitted to the defendant a written bid for the furnishing by the plaintiff to the defendant of 26,000 feet of concrete on the 'Southern Bell Job' located in the City of Goldsboro, Wayne County, North Carolina.
>
> "4) That subsequent to submitting said bid to the defendant, the plaintiff was thereupon notified and advised by the defendant's foreman, the same person to whom the plaintiff had submitted said bid, that the plaintiff was the low bidder for the 26,000 feet of concrete, and thereupon advised the plaintiff to enter into and commence construction."

The complaint further alleges that the plaintiff made arrangements to enter into said work and did enter the performance of the alleged contract.

The defendant contended that it did not accept any bid by the plaintiff nor did it enter into any contract with the plaintiff. Issues of breach of contract and damages were submitted to the jury and answered in favor of the plaintiff. From a judgment awarding the plaintiff $1,500.00, the defendant appealed to this Court.

Sasser, Duke and Brown, by J. Thomas Brown, Jr., for plaintiff appellee.

Dees, Dees, Smith and Powell, by William L. Powell, Jr., for defendant appellant.

HEDRICK, J.

[1] The appellant assigns as error the court's overruling his motions for judgment as of nonsuit. All the evidence considered in its light most favorable to the plaintiff tended to show that in the month of January 1966 the defendant was engaged in placing underground conduit lines for Southern Bell in the City of Goldsboro, North Carolina, and that the plaintiff went to the site of the job and dis-

cussed with one E. O. Bradshaw, an employee of the defendant, the possibility that the plaintiff might bid on some concrete work. Bradshaw informed the plaintiff that Barrus Construction Company of Kinston, North Carolina, was also bidding on the job, but that the plaintiff could submit a proposal. The plaintiff testified that in consequence of his conversation with Bradshaw he did, in fact, submit to Bradshaw a written proposal to install the concrete for a sidewalk from Ash Street to William Street five feet in width, four inches thick and six inches thick in the driveways with a test strength of 3,000 pounds. The plaintiff further testified that in the afternoon after he had submitted the written proposal to Bradshaw he was advised that he did have the contract, and that he was the low man, and that he was to begin work immediately cutting out the driveways. The plaintiff testified that after he and his men had worked 3½ days he was told by one Williams, Secretary and General Superintendent for C. M. Allen & Company, to stop work because the defendant had decided to award the contract to Barrus Construction Company.

The written proposal described by the plaintiff was not introduced into evidence nor does the record disclose any evidence as to any agreement between the parties regarding the price to be paid by the defendant for the work to be done by the plaintiff. "The general rule is that price or compensation is an essential ingredient of every contract for the transfer of property or rights therein or for the rendering of services and must be definite and certain or capable of being ascertained from the contract itself. . . .

[2] "An agreement which does not specify the price or any method for determining it, but which leaves the price for future determination and agreement of the parties, is not binding." 17 Am. Jur. 2d, Contracts, § 82.

[1, 3] In order for a valid contract to exist the parties must assent to the same thing in the same sense, and their minds must meet as to all the terms. *Goeckel v. Stokely,* 236 N.C. 604, 73 S.E. 2d 618 (1952). "An offer must be definite and complete, and a mere proposal intended to open negotiations which contain no definite terms but refers to contingencies to be worked out cannot constitute the basis of a contract, even though accepted." 2 Strong, N.C. Index 2d, Contracts, § 2; *Yeager v. Dobbins,* 252 N.C. 824, 114 S.E. 2d 820 (1960). The plaintiff contends in his complaint that he is entitled to recover damages because the defendant breached an express contract. The plaintiff's evidence tends to show only that he negotiated with one of the defendant's employees to do some concrete work.

The evidence is silent as to the terms of the alleged express contract. The evidence does not disclose with any certainty what the plaintiff agreed to do for the defendant, or what the defendant agreed to pay the plaintiff. The plaintiff's evidence fails to show the existence of a binding contract between the parties; hence, the defendant's motion for judgment as of nonsuit ought to have been allowed. *Leffew v. Orrell,* 7 N.C. App. 333, 172 S.E. 2d 243 (1970).

Reversed.

BROCK and BRITT, JJ., concur.

EUNICE BROWN v. JIMMY RAY WEAVER AND LONNIE WEAVER, GUARDIAN AD LITEM

No. 707SC96

(Filed 27 May 1970)

1. Trial § 22— nonsuit — sufficiency of evidence

A nonsuit should not be allowed if the evidence presents material conflicts or if there are reasonable inferences to be drawn from the evidence other than that defendant was not negligent or that his negligence was not the proximate cause of the injuries complained of.

2. Negligence § 35; Automobiles § 73— nonsuit for contributory negligence

Nonsuit on the ground of contributory negligence is proper only when plaintiff's evidence, considered in the light most favorable to him, so clearly establishes his own negligence as one of the proximate causes of his injuries that no other reasonable inference may be drawn.

3. Automobiles § 62— pedestrian struck by automobile at intersection — sufficiency of evidence for jury

In this action for personal injuries allegedly sustained by plaintiff pedestrian when she was struck by defendant's automobile while crossing the street within a pedestrian crosswalk at an uncontrolled T-intersection, plaintiff's evidence presented a question for the jury and the trial court erred in granting defendant's motion for nonsuit.

APPEAL by plaintiff from *Bundy, J.,* 8 September 1969 Civil Session of NASH County Superior Court.

This is an action to recover for injuries sustained by plaintiff while she was crossing a street in Rocky Mount when she was allegedly struck by an automobile being driven by defendant. Plain-

tiff alleged that she was struck while walking in a pedestrian crosswalk and that defendant failed to keep a proper lookout, failed to yield the right-of-way, failed to keep his vehicle under proper control and failed to give proper warning by sounding the horn of his car. The accident occurred immediately after defendant had turned right off Howard Street onto Western Avenue, a one-way street, at approximately noon on Christmas eve, 1966, at the "T" intersection of Western Avenue and Howard Street, which dead ends into Western Avenue. At the time of the accident it had been intermittently raining and sleeting.

The evidence in the case consists of testimony of witnesses for plaintiff and the adverse deposition of defendant. That portion about which there is no dispute tends to show that after the accident at least one-half of plaintiff's body was lying within the area designated as a pedestrian crosswalk somewhere near the middle of Western Avenue. Defendant was driving about five miles per hour and was aware of the existence and location of the crosswalk. There was no traffic light at the intersection. Some conflicts do arise between the testimony of plaintiff's witnesses and the defendant's version of the accident as stated in his deposition. Two of plaintiff's witnesses testified that the traffic was heavy on Western Avenue at the time of the accident. Defendant stated that there was no traffic on Western Avenue at the time of the accident. Defendant stated that a truck was parked in a no parking zone on Howard Street at the corner of the intersection and that his vision to the right was blocked by the truck. He states that he told the police officer about this truck. The officer, who testified for plaintiff, did not remember seeing a truck parked in the no parking zone but admitted that he arrived at the scene about two minutes after the accident and that it could have been moved. He testified that defendant did not tell him anything about a truck being parked in the no parking zone. The officer further testified that defendant made a statement shortly after the accident that "he had glanced to his left to see if any traffic was coming in his direction and that when he looked back the pedestrian was in front of him." Defendant states that he never saw plaintiff and learned of the accident when a passenger in his car told him that he had hit someone. Another witness for plaintiff testified that he was near the scene when the collision occurred, that he heard a "lick" and turned around and saw the plaintiff lying in the middle of the street. He further testified that he did not remember a truck being parked at the intersection of Howard Street and Western Avenue.

At the close of plaintiff's evidence, defendant made a motion for a judgment of nonsuit which was granted. Plaintiff appealed.

Thorp and Etheridge by William D. Etheridge and Stephen E. Culbreth for plaintiff appellant.

Boyce, Mitchell, Burns and Smith by F. Kent Burns for defendant appellee.

MORRIS, J.

Plaintiff's only assignment of error is bottomed on whether the granting of defendant's motion for nonsuit and the subsequent dismissal of plaintiff's suit was error. In *Bowen v. Gardner,* 275 N.C. 363, 168 S.E. 2d 47 (1969), the Court presents five rules to be followed when a motion for nonsuit is being considered. They are:

> "1. All the evidence which tends to support plaintiff's claim must be taken as true and considered in its light most favorable to plaintiff, giving her the benefit of every reasonable inference which legitimately may be drawn therefrom. (Citation omitted.)
>
> 2. Contradictions, conflicts and inconsistencies are resolved in plaintiff's favor. (Citations omitted.)
>
> 3. Defendants' evidence which contradicts that of the plaintiff, or tends to show a different state of facts is disregarded. (Citations omitted.) Only that part of it which is favorable to plaintiff can be considered. (Citations omitted.)
>
> 4. Acts of contributory negligence not alleged in the answer should be ignored. (Citations omitted.)
>
> 5. When opposing inferences are permissible from plaintiff's evidence, nonsuit on the basis of contributory negligence as a matter of law should be denied. (Citations omitted.)"

[1, 2] A nonsuit should not be allowed if the evidence presents material conflicts or if there are reasonable inferences to be drawn from the evidence other than that defendant was not negligent or that his negligence was not the proximate cause of the injuries complained of. *Price v. Miller,* 271 N.C. 690, 157 S.E. 2d 347 (1967). Nonsuit on the ground of plaintiff's contributory negligence is proper only when plaintiff's evidence, considered in the light most favorable to her, so clearly establishes her own negligence as one of the proximate causes of her injuries that no other reasonable inference may be drawn. *Carter v. Murray,* 7 N.C. App. 171, 171 S.E. 2d 810 (1970).

[3] Applying these principles to the evidence in the instant case,

we hold that it was error to grant defendant's motion for nonsuit and dismiss the action.

Reversed.

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

MAGGIE H. EASON v. STATE CAPITAL LIFE INSURANCE COMPANY

No. 703DC127

(Filed 27 May 1970)

1. Insurance § 67— action on accident policy — death of on-duty policeman — accidental means — nonsuit

Evidence *held* insufficient to support a jury finding that the insured under an accident policy, a policeman, died solely from accidental means so as to bring his death within the coverage of the policy, where the evidence was to the effect that the policeman was observed searching a suspect who had his hands over his head, that a shot was fired and the policeman fell to the ground, and that the policeman was found dead on the pavement where he fell, and there was no evidence whether the death was caused accidentally or intentionally.

2. Insurance § 67— action on accident policy — burden of proof

In an action on an accident policy, the plaintiff must show that the loss sued upon falls within the terms of the coverage of the policy; the insurer has the burden of showing, once coverage has been established, that the circumstances of the loss bring it within any exclusionary clauses.

3. Insurance § 45— accident policy — interpretation of language

Language in an accident policy affording coverage on "injuries sustained solely through external, violent and accidental means" is interpreted to mean that the cause of the allegedly compensable event must be accidental in nature.

APPEAL by plaintiff from *Roberts, J., Chief District Judge,* October 1969 Session of the General Court of Justice, District Court Division, PITT County.

This suit was commenced by the widow of the decedent herein, Lyman Eason (Eason), to recover for Eason's death under the terms of an accidental death or injury policy issued by the defendant 16 April 1956 and in effect at the time of his death on 10 November 1965. It was stipulated by the parties that all premiums due as of 10 November 1965 had been paid, that all notice provisions had been

complied with, and that if plaintiff were entitled to recover anything it would be the face amount of the policy, $2,500.

The policy provides that the defendant insures the named insured (Eason) ". . . against loss resulting directly and independently of all other causes from bodily injuries sustained by the Insured solely through external, violent and accidental means, while this Policy is in force . . . all subject to the provisions and limitations herein contained."

Under "Exclusions", the policy provides:

> "The insurance under this Policy shall not cover death, loss of limb or sight, or other loss caused directly or indirectly, wholly or partly, (1) by the intentional act of the Insured or any other person, whether sane or insane . . . ."

The plaintiff's evidence taken in the light most favorable to her tended to show that her husband had been engaged in his duties as a policeman in Farmville, North Carolina, on the morning of 10 November 1965 and that he was in uniform. A postal employee, Richard Barfield, in the post office across the street saw him searching Robert Rogers, who had his hands over his head, in front of the bus station. Barfield testified that the next thing he saw was Eason falling towards the ground after a shot or shots were fired. Rogers was at arm's length from Eason until he started running away.

Robert Rogers was called to testify, but offered little of substance, stating merely that he was arrested, tried, convicted and sent to prison for the killing of Eason. He had pleaded not guilty.

James Jones testified that he carried Rogers to Farmville about 6:20 on 10 November 1965 and left him at the bus station. J. C. Brock stated that when he reached Eason he was lying on his back beside a telephone booth. Earl Keel, also a police officer, added that Eason had on his person a .38 caliber pistol which had not been fired recently. He stated that he found a part of a bullet on the sidewalk near the body.

Dr. Gradis testified that he performed an autopsy on the decedent and, in his opinion, the bullet which had traveled into the chest on the left in the area of the armpit, down through the sixth rib and the vertebral column and into the muscles on the right of the spine, could have caused death. There were three other wounds on the body: inside the hand, on the back of the hand and on the abdomen. These three wounds, he hypothesized, were caused by one bullet, which he could not locate. Dr. Fitzgerald testified that he found Eason dead on the pavement just outside the bus station.

At the conclusion of the plaintiff's evidence, the defendant made a motion for nonsuit, which was allowed by the court. The plaintiff assigns as error the granting of this motion.

Lewis and Rouse by John B. Lewis, Jr., for plaintiff appellant.

Allen, Steed & Pullen by Thomas W. Steed, Jr., and Arch T. Allen, III; and James, Speight, Watson & Brewer by W. H. Watson for defendant appellee.

CAMPBELL, J.

[1, 2] The evidence taken in the light most favorable to the plaintiff, *Price v. Tomrich Corp.*, 275 N.C. 385, 167 S.E. 2d 766 (1969), tends to show that the decedent, Eason, died of a gunshot wound suffered while he was on duty in his policeman's uniform and shortly after he had been seen searching Robert Rogers. The plaintiff must show that the loss sued upon falls within the terms of the coverage of the insurance policy in question. The insurer has the burden of showing, once coverage has been established, that the circumstances of the loss bring it within any exclusionary clauses. *Slaughter v. Insurance Co.*, 250 N.C. 265, 108 S.E. 2d 438 (1959). To withstand nonsuit, thus, the plaintiff must at least bring the loss within the coverage of the policy. *Henderson v. Indemnity Co.*, 268 N.C. 129, 150 S.E. 2d 17 (1966). See 46 N.C.L. Rev. 178.

[1, 3] The language used in the instant policy, "injuries sustained . . . solely through external, violent and accidental means," has been interpreted to mean that the cause of the allegedly compensable event must be accidental in nature. *Henderson v. Indemnity Co., supra; Skillman v. Insurance Co.*, 258 N.C. 1, 127 S.E. 2d 789 (1962); *Slaughter v. Insurance Co., supra.* Although the lack of direct evidence that Rogers did indeed shoot Eason weakens the defendant's contention that Eason's death was the result of an intentional act and thus excluded from coverage, this same paucity of evidence will not allow us to say that it has been shown that Eason's death was caused by an accident. We hold that the evidence of the plaintiff herein does not establish that the shooting of Eason was solely a result of "accidental means." It follows that the nonsuit was properly allowed.

Affirmed.

PARKER and VAUGHN, JJ., concur.

STATE OF NORTH CAROLINA v. ROY LEE EDWARDS

No. 707SC230

(Filed 27 May 1970)

1. Homicide § 21— second-degree murder — use of shovel — nonsuit

Evidence of defendant's guilt of second-degree murder by use of a shovel was sufficient to go to the jury.

2. Homicide § 9— self-defense

Self-defense is based on necessity, real or apparent.

3. Homicide § 28— instruction on self-defense — omission of apparent necessity

An instruction on self-defense that the defendant could use no more force than was reasonably necessary under the circumstances for his protection is erroneous in omitting the element of apparent necessity, and the error is not cured by correct instructions on this point in another part of the charge.

APPEAL by defendant from *May, S.J.*, October 1969 Criminal Session of WILSON County Superior Court.

Defendant was tried for murder in the second degree under a bill of indictment charging him with the capital offense of murder. The jury returned a verdict of guilty of manslaughter and from judgment imposing a prison sentence of not less than twelve nor more than fifteen years defendant appealed.

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

Farris and Thomas by Robert A. Farris for defendant appellant.

GRAHAM, J.

[1] Defendant contends that the court erred in overruling his motion for judgment of nonsuit made at the close of the State's evidence and renewed at the close of all the evidence.

The State's evidence tended to show that deceased died from a blow to the back of the head suffered when he was struck with a shovel by defendant on 24 September 1969. The incident occurred in the yard of the house where defendant and deceased lived and shared a room. Several witnesses testified for the State that defendant came from inside the house carrying the shovel and attacked the deceased who was armed with an open "hawk-bill knife" and a stick. One witness described what transpired as follows: "When Edwards

[defendant] came out the door with the shovel, he went straight down the steps and Buddy [deceased] was getting up off the porch. Willie Ruffin [deceased] was backing back and after he picked up the stick and Roy [defendant] was coming up on him with the shovel and beating him with the shovel, he said, 'Please don't beat me with the shovel.' Roy said, 'I am going to kill your damned -- anyhow.' And so he kept on hitting him 'til the last lick — he knocked him out flat. All this time, Buddy Ruffin was standing up there with his hand up. . . ."

The theory of defendant's defense was that he administered the fatal blow while exercising his right of self-defense. He testified as follows:

> "I got home that day after 7:00 in the evening. Willie Gray was sitting on the edge of the porch when I walked up. I spoke to him and he told me 'You are a m----- f---- --. I am going to cut your throat.' I said what did I do to him. He said, 'You heard what I said.' He had his hawkbill knife. I saw it and told him to go ahead on and leave me alone. That is when he stood up and I went around and got the shovel. It was sitting around beside the house. That is when he swung at me and I swung at him. We wound up out there in the street. He swung at me two or three times but didn't ever cut me. I swung at him with the shovel and missed him the first time. The next time, I hit him on the leg. He swung again and I hit him on the shoulder the next time. * * * The last time he swung, when I swung at the shovel (sic), I hit him beside the head, the last time."

We find the evidence sufficient to raise the issue of defendant's guilt of second degree murder and to support the jury verdict finding defendant guilty of manslaughter. This assignment of error is overruled.

Defendant also assigns as error various portions of the court's charge to the jury including the following:

> "If one who is fighting in self-defense uses more force than is reasonably necessary under the circumstances for his protection and he takes the life of another while so doing, he is guilty of manslaughter."

[2, 3] This assignment of error must be sustained. Self-defense is based on necessity, real or apparent. *State v. Jennings*, 276 N.C. 157, 171 S.E. 2d 447, and cases therein cited. The instructions excepted to are erroneous in that they fail to charge that defendant

could use such force as was reasonably necessary or *apparently* necessary. "[O]ne may fight in self-defense and may *use more force than is actually necessary* to prevent death or great bodily harm, if he believes it to be necessary and has a reasonable ground for the belief." *State v. Francis,* 252 N.C. 57, 59, 112 S.E. 2d 756. (Emphasis added). In the case of *State v. Johnson,* 184 N.C. 637, 113 S.E. 617, the Supreme Court said:

> "Whether there was any actual necessity for killing the deceased in order to save his own life, or to prevent great bodily harm to him, makes no difference, provided, at the time, the prisoner believed, and had reason to believe, that from the facts and circumstances as they then appeared to him he was about to be killed, or to suffer some enormous bodily harm."

It is true that the judge in this case did, in another part of his charge, give the correct instruction. However, "[a]n erroneous instruction upon a material aspect of the case is not cured by the fact that in other portions of the charge the law is correctly stated." *State v. Ellerbe,* 223 N.C. 770, 28 S.E. 2d 519. See also: *State v. Jennings, supra; State v. Fowler,* 250 N.C. 595, 108 S.E. 2d 892; *State v. Isley,* 221 N.C. 213, 19 S.E. 2d 875; *State v. Floyd,* 220 N.C. 530, 17 S.E. 2d 658.

We do not rule on the other assignments of error since these questions may not recur in a new trial.

New trial.

MALLARD, C.J., and MORRIS, J., concur.

STATE OF NORTH CAROLINA v. THEODORE RICHARDSON AND JOHNNIE MACK BROWN

No. 702SC296

(Filed 27 May 1970)

1. Burglary and Unlawful Breakings § 4; Larceny § 6— evidence found along route defendants pursued from crime scene

In this prosecution for breaking and entering an appliance store and larceny of five television sets therefrom wherein the State's evidence tended to show that officers pursued from the crime scene a station wagon in which defendants were riding and that when the vehicle was stopped it contained three of the stolen television sets, the trial court

did not err in the admission of evidence pertaining to the two remaining stolen television sets which were found along the route of the officers' pursuit of defendants' vehicle, since it is competent in a prosecution for breaking and entering and larceny to show all of the goods lost from the store and to trace some or all of the articles to defendant.

2. Burglary and Unlawful Breakings §§ 2, 4; Larceny §§ 2, 6— exclusion of evidence that stolen property was on consignment

In this prosecution for breaking and entering an appliance store and the larceny of television sets therefrom, the trial court did not err in the exclusion of evidence sought to be elicited by defense counsel on cross-examination of a State's witness as to whether the television sets were on consignment and were not owned by the appliance company, since it is no defense to either crime that title to the property taken is in one other than the person from whom it was taken.

3. Burglary and Unlawful Breakings §§ 2, 6; Larceny §§ 3, 8— felonious breaking and entering — felonious larceny — value of property involved

Defendants were properly convicted of felonious breaking and entering of an appliance store and felonious larceny of property therefrom without evidence of the value of the property taken and without requiring the jury to fix the value of the property taken, since breaking and entering with intent to commit larceny and larceny committed pursuant to a breaking and entering are felonies without regard to the value of the property involved. G.S. 14-54, G.S. 14-72.

APPEAL by both defendants from *Mintz, J.*, January 1970 Criminal Session, BEAUFORT Superior Court.

Each defendant was charged in a three-count bill of indictment with (1) felonious breaking and entering on 9 January 1970 of premises occupied by Jefferson Gas and Appliance Company, Inc., (2) with felonious larceny of 5 television sets, and (3) receiving stolen goods.

The two cases were consolidated for trial. The defendants entered a plea of not guilty. The jury returned a verdict of guilty as to each defendant on the count of breaking and entering, and likewise on the count of larceny. From the imposition of a prison sentence as to each defendant, there was an appeal to this Court.

The evidence tends to show that about 3:10 a.m. on the morning of 9 January 1970, two deputy sheriffs of Beaufort County, accompanied by J. B. Freeman, were traveling in an automobile southwardly from Washington, North Carolina, on Highway No. 17 approaching the place of business of the appliance company. They saw a station wagon leaving the premises. The officers then drove into the driveway and observed a plate glass window broken out leaving an opening some 5 or 6 feet by 8 feet in size. The officers immedi-

ately pursued the station wagon for a distance of some 5 miles before overtaking it. During this pursuit, speeds in excess of 100 m.p.h. were attained. On at least two occasions the lights of the station wagon were turned off for short distances. When the station wagon finally stopped, three persons, the two defendants and a woman, got out and ran. All three were apprehended by the officers. In the rear of the station wagon three television sets were found, and the tailgate of the station wagon was down. On the way back into Washington a fourth television was found lying in the road, and the next morning a fifth television was found in the road ditch along the route the pursuit had taken. The five television sets were identified by serial numbers as being five sets which had been located in the appliance company when it had closed for business and secured about 5:30 p.m. on 8 January 1970.

After the arrest of the defendant Richardson, he was taken to the Beaufort County Hospital at about 4:00 o'clock a.m. on 9 January 1970, and a doctor removed a piece of glass from his foot.

Attorney General Robert Morgan by Deputy Attorney General Ralph Moody and Staff Attorney Donald M. Jacobs for the State.

LeRoy Scott for defendant appellants.

CAMPBELL, J.

[1] The defendants assign as error the admission of evidence pertaining to the two television sets which were found in the road and not in the station wagon. There is no merit in this exception. "[E]very circumstance that is calculated to throw any light upon the supposed crime is admissible. The weight of such evidence is for the jury." *State v. Hamilton,* 264 N.C. 277, 286, 141 S.E. 2d 506 (1965). See also *State v. Taylor,* 250 N.C. 363, 108 S.E. 2d 629 (1959). It is always competent in a prosecution for breaking and entering and larceny to show all of the goods lost from a store and to trace some or all of the articles to a defendant. *State v. Willoughby,* 180 N.C. 676, 103 S.E. 903 (1920). Likewise, see *State v. Weinstein,* 224 N.C. 645, 31 S.E. 2d 920 (1944).

[2] The defendants also assign as error the exclusion of evidence elicited on cross examination of a State's witness with regard to the ownership of the television sets. The defendants were attempting to establish that the television sets in question were not owned by the appliance company, but were possibly on consignment. There is no merit in this exception. It is no defense to a larceny charge that title

to the property taken is in one other than the person from whom it was taken. *State v. Smith,* 266 N.C. 747, 147 S.E. 2d 165 (1966); *State v. Cotten,* 2 N.C. App. 305, 163 S.E. 2d 100 (1968). The same rule applies to breaking and entering with larcenous intent. *State v. Crawford,* 3 N.C. App. 337, 164 S.E. 2d 625 (1968) (Certiorari denied, 275 N.C. 138).

[3] The defendants also assign as error the conviction of the defendants for felonious breaking and entering and felonious larceny of property when there was no evidence of the value of the property and without requiring the jury to fix the value of the property in question. There is no merit in this exception. G.S. 14-54 was rewritten in 1969, and now provides:

> *"Breaking or entering buildings generally.* — (a) Any person who breaks or enters any building with intent to commit any felony or larceny therein is guilty of a felony and is punishable under G.S. 14-2."

Therefore, for felonious breaking and entering there need be only an intent to commit larceny, and the value of the property involved is immaterial. Likewise, G.S. 14-72 was rewritten in 1969 and provides, in part:

> "(b) The crime of larceny is a felony, without regard to the value of the property in question, if the larceny is:
>
> * * *
>
> (2) Committed pursuant to a violation of G.S. 14-51, 14-53, 14-54 or 14-57 . . . ."

It is thus provided that where larceny is committed pursuant to breaking and entering, it constitutes a felony without regard to the value of the property in question. See *State v. Jones,* 275 N.C. 432, 168 S.E. 2d 380 (1969).

We have reviewed all of the assignments of error brought forward by the defendants, and we find

No error.

PARKER and VAUGHN, JJ., concur.

HUBERT EARL JONES, SON; PEGGY WHITAKER, DAUGHTER; BARBARA JONES TURNER, DAUGHTER; BETTY MALDONADO, DAUGHTER; MARGARET HARRELL RITTER, DAUGHTER; LUCILLE PATE, DAUGHTER; AND NANCY CAROL JONES, DAUGHTER; HUBERT LEE JONES, DECEASED v. JAMES D. SUTTON AND IOWA MUTUAL INSURANCE COMPANY

No. 708IC181

(Filed 27 May 1970)

Master and Servant § 79— persons entitled to workmen's compensation — 18-year-old daughter — partial dependent

A daughter who was 18 years old when her father died from an injury arising out of his employment was not entitled to "next of kin" compensation under the Workmen's Compensation Act; but the daughter was entitled to compensation as a partial dependent under G.S. 97-38(2). G.S. 97-2(12), G.S. 97-38(2), G.S. 97-40.

APPEAL by defendants from opinion and award of the North Carolina Industrial Commission filed 14 November 1969.

This is an appeal by James D. Sutton, employer, and Iowa Mutual Insurance Company, carrier, from an opinion and award of the North Carolina Industrial Commission awarding compensation under the Workmen's Compensation Act to Nancy Carol Jones (Nancy Carol), daughter of a deceased employee, Hubert Lee Jones (decedent). It was stipulated by the parties that the employer-employee relationship existed between defendant Sutton and decedent, that the defendant Iowa Mutual was the compensation carrier, that on 31 October 1967 decedent sustained an injury by accident arising out of and in the course of his employment with defendant Sutton, and that the injury resulted in decedent's death on said date.

The evidence disclosed that decedent's wife predeceased him; that he was survived by seven children who were married, more than 21 years of age, and not dependent on him for support; and that he was also survived by his daughter Nancy Carol who was partially dependent on him for support.

The hearing commissioner found, among other things, that "Nancy Carol Jones was partially dependent for support upon deceased, and there was no one else, either partially or wholly, dependent for support upon the deceased." The commissioner found that Nancy Carol was born on 12 December 1948 and was 18 years of age at the time of the deceased's death. He made the conclusion of law that Nancy Carol "is entitled to all compensation due by reason of the death of the deceased to the exclusion of all other persons. Nancy Carol Jones is entitled to compensation as the next of kin of the deceased * * *."

On 14 November 1969 the full Commission, with Commissioner Shuford dissenting, adopted the findings, conclusions of law and award of the deputy commissioner and defendants appealed to this Court.

No counsel for plaintiff appellees.

Teague, Johnson, Patterson, Dilthey & Clay by Grady S. Patterson, Jr., for defendant appellants.

BRITT, J.

Defendants contend that the award of the Industrial Commission is in error on the ground that Nancy Carol is entitled to compensation only as a "partial dependent" under G.S. 97-38(2) and not as "next of kin" under G.S. 97-38(3). G.S. 97-38(3) provides in part:

> "If there is no person wholly dependent, and the person or all persons partially dependent is or are within the class of persons defined as 'next of kin' in G.S. 97-40, * * * he or they may take, share and share alike, the commuted value of the amount provided for whole dependents in (1) above instead of the proportional amount provided for partial dependents in (2) above."

The pertinent clause of G.S. 97-40 provides: "For the purpose of this section and G.S. 97-38, 'next of kin' shall include only child, father, mother, brother or sister of the deceased employee."

Nancy Carol would thus be entitled to compensation under G.S. 97-38(3) as a partial dependent who is also "next of kin" by virtue of being a "child," but for yet another definition found in G.S. 97-2(12):

> " 'Child,' 'grandchild,' 'brother,' and 'sister' include only persons who at the time of the death of the deceased employee are under eighteen years of age."

G.S. 97-2 generally sets out definitions of various terms used in the Workmen's Compensation Act, indicating that the definitions are applicable when the terms are "used in this article, unless the context otherwise requires." We fail to see that the context requires any construction contrary to defining "child" as used in G.S. 97-40 in accordance with G.S. 97-2(12).

In *Hewett v. Garrett*, 274 N.C. 356, 163 S.E. 2d 372 (1968), at page 360, the court said: "G.S. 97-2(12) clearly sets out how a child, legitimate or acknowledged illegitimate, may lose its right as

a child to share in compensation benefits: 1. By reaching the age of 18 years, whether married or single. 2. By marriage before 18 unless after marriage the child continues wholly dependent upon the parent."

We hold that Nancy Carol, as a person over 18 at the time of her father's death, is not a "child" as defined in G.S. 97-2(12), is therefore not "next of kin" as defined in G.S. 97-40, and for that reason is not entitled to "next of kin" compensation conferred by G.S. 97-38(3). Nancy Carol is entitled to compensation as a partial dependent, determined under G.S. 97-38(2).

The order and award appealed from is vacated and this proceeding is remanded to the Industrial Commission for proper order and award consistent with this opinion.

Remanded.

BROCK and HEDRICK, JJ., concur.

STATE OF NORTH CAROLINA v. SAMUEL JESSIE GURKIN, EARL W. NEWMAN AND LEONARD STINSON

No. 7017SC157

(Filed 27 May 1970)

1. Criminal Law §§ 146, 162— objection to evidence — failure to object on trial — appeal

Defendants who failed to object to in-court identification on the trial cannot raise objections thereto for the first time on appeal.

2. Criminal Law § 112— instructions — burden of proof on alibi

The jury could not have been misled as to the burden of proof on the defense of alibi, where the court emphatically instructed the jury that the defendants were presumed to be innocent until the State satisfied the jury of their guilt beyond a reasonable doubt.

3. Robbery § 5— armed robbery — instructions on lesser degrees of the offense

Where there was no evidence in an armed robbery prosecution that any offense other than armed robbery or common law robbery had been committed, the trial court did not err in failing to submit the issues of assault with a deadly weapon and simple assault.

4. Criminal Law § 115— instruction on lesser degrees of offense

Where there is no conflict in the evidence, the mere contention that the

jury might accept the evidence in part and reject it in part is insufficient to require an instruction on a lesser included offense.

APPEAL by defendants from *Gwyn, J.*, 27 October 1969 Session, CASWELL Superior Court.

Defendants were charged jointly in a bill of indictment with the felony of robbery with firearms or other dangerous weapons (G.S. 14-87). Upon their pleas of not guilty they were tried by jury which returned for its verdict that each of the defendants was guilty as charged.

The State's evidence tended to show that on 17 March 1969 the three defendants went to Caswell County ABC Store No. 5; defendant Gurkin was driving and remained in the car while defendants Newman and Stinson went into the store; in the store, defendants Newman and Stinson went behind the counter, defendant Newman exhibited a knife, and the store attendant fled out the back door; defendants Newman and Stinson ran out the front door, Newman carrying a bottle of whiskey; and the three defendants drove away with defendant Gurkin at the wheel.

Each of the defendants offered evidence which tended to show that they were at some other place at the time of the alleged offense.

From the verdicts of guilty as charged and judgments pronounced thereon, each defendant appealed.

Attorney General Morgan, by Trial Attorney Harris, for the State.

Price, Osborne & Johnson and Gwyn, Gwyn & Morgan by Melzer A. Morgan, Jr., for defendants Gurkin and Newman.

D. Emerson Scarborough, for the defendant Stinson.

BROCK, J.

[1] Defendants undertake to assign as error the in-court identification of the three defendants; they argue that the in-court identification was tainted by an illegal in-custody pre-trial confrontation. Not one of the three defendants objected to or moved to strike the in-court identification; on appeal they have raised the question for the first time. At trial defendants did not indicate in any way that they desired an examination of the witness and findings by the trial judge upon the question; they were content to allow the witness to identify defendants, and they cannot successfully raise objections for the first time on appeal. *State v. Jones*, 6 N.C. App. 712, 171

S.E. 2d 17; *State v. Martin,* 2 N.C. App. 148, 162 S.E. 2d 667. In any event, we note from the testimony of the victim that his in-court identification was clearly based upon his observation of the defendants at the time of the commission of the offense.

[2] Defendants assign as error a portion of the judge's instructions to the jury relating to the defense of alibi. They argue that the trial judge did not make it clear who had the burden of proof where the defense is alibi. Although the charge in this respect is not a model to be followed, the trial judge did emphatically instruct the jury that the defendants were presumed to be innocent and that this presumption remained until the State satisfied the jury of defendants' guilt beyond a reasonable doubt. Also, the trial judge clearly instructed the jury as to each defendant that if the State failed to satisfy the jury beyond a reasonable doubt of the guilt of defendant, it would be the duty of the jury to return a verdict of not guilty. We fail to perceive how the jury could have been misled upon the question of the burden of proof.

[3, 4] Defendants next complain that the trial judge did not submit the issues of assault with a deadly weapon and simple assault to the jury. There was evidence from which the jury could have found that the offense committed was robbery with firearms or other dangerous weapon, or common law robbery; and these two issues were properly submitted to the jury. However there was no evidence which indicated that any offense other than a robbery was committed. Upon the evidence of the State, which was uncontradicted as to the event, and questioned only as to the identity of the perpetrators, all of the elements of the offense of either armed robbery or common law robbery were present; there was no evidence that any person committed a lesser offense. *State v. Lentz,* 270 N.C. 122, 153 S.E. 2d 864. Where there is no conflict in the evidence the mere contention that the jury might accept the evidence in part and reject it in part is not sufficient to require an instruction on a lesser included offense. *State v. Hicks,* 241 N.C. 156, 84 S.E. 2d 545.

Defendants assign as error certain portions of the trial judge's recapitulation of the evidence and the contentions of the parties. A careful reading of the evidence and the charge fails to disclose that the trial judge expressed any opinion upon the evidence or assumed any material fact to be true.

Counsel for defendants frankly and properly state that they find no error in the Court's action in overruling their motions for nonsuit.

No error.

BRITT and HEDRICK, JJ., concur.

WILLIAM THOMAS ROUSE, JR., BY HIS NEXT FRIEND, HELEN J. ROUSE v. PAUL RICHARD HUFFMAN

No. 704SC183

(Filed 27 May 1970)

Automobiles § 45; Evidence § 19; Negligence § 27— evidence that driver has had no previous accident

In this action for personal injuries sustained in an automobile accident, the trial court erred in allowing defendant driver to testify that he had not been involved in any previous accidents, such evidence not being competent on the issue of the driver's negligence in the accident in question.

APPEAL from *Cowper, J.*, 12 November 1969 Session, ONSLOW Superior Court.

This is an action instituted by the plaintiff, William Thomas Rouse, Jr., through his next friend, Helen J. Rouse, to recover damages for injuries sustained as the result of an automobile accident that occurred on 19 January 1969 at approximately 6:30 P.M. The plaintiff's evidence tended to show the following facts: The plaintiff was riding as a passenger in a 1965 Chevrolet automobile being operated by his father in a northerly direction on U.S. Highway 17 toward Jacksonville, North Carolina. His father testified that as he approached the intersection where he wanted to turn to the left he gave a left turn signal and waited for several cars with their lights on to pass in the left lane. He had his automobile in low gear and as he began to make his turn he saw an automobile with no headlights on approaching. When he saw this vehicle he speeded up and attempted to cross the highway in front of this automobile. The collision occurred when the Rouse vehicle was approximately one-third in the left lane of the highway. The plaintiff and his father both testified that the accident occurred in a forty-five mile per hour speed zone in the early evening and that the defendant was traveling at a speed of fifty-five to sixty miles per hour and without his headlights on. The plaintiff testified that he was unconscious after the accident and that he has suffered a loss of health as a result of the accident.

After presentation of the evidence the court submitted two issues to the jury and the first issue as to negligence of the defendant was answered "No". From a judgment in favor of the defendant, the plaintiff appealed to the Court of Appeals assigning error.

Joseph C. Olschner for plaintiff appellant.

E. W. Summersill for defendant appellee.

HEDRICK, J.

The appellant in this case brings forward several assignments of error. His first contention is that the court below committed prejudicial error in allowing the defendant to testify that he had not been involved in any previous accidents. The record shows that the defendant, while on the stand and being examined by his own attorney, was asked if he had ever had an accident before the one which led to the present case. The attorney for the plaintiff objected and the court overruled the objection and allowed the defendant to answer the question. The defendant replied that he had never been involved in an accident prior to this.

It is the general rule that evidence that either party to an automobile accident, in which the injury sued for was sustained, had been a party to a similar accident prior to the one upon which the suit was based is inadmissible on the issue of negligence. 11 Blashfield, Automobile Law and Practice, Relevancy and Materiality — Operation of Vehicles, § 425.1; Annotation: "Admissibility, in civil motor vehicle accident case, of evidence that driver was or was not involved in previous accidents." 20 A.L.R. 2d 1210 et seq., and supplemental decisions. North Carolina is in accord with this general rule. In *Karpf v. Adams and Runyon v. Adams,* 237 N.C. 106, 74 S.E. 2d 325 (1953), the North Carolina Supreme Court stated: "As a general rule, evidence of other accidents or occurrences is not competent and should not be admitted." "Conversely, it is also generally held that evidence that a driver has not been involved in any prior accidents is not competent as to the issue of the driver's negligence in the accident in question." 8 Am. Jur. 2d, Automobiles and Highway Traffic, § 943; cf. *Mason v. Gillikin,* 256 N.C. 527, 124 S.E. 2d 537 (1962).

The admission of the evidence in the present case that the defendant had not been involved in any prior accidents of a similar nature was prejudicial error entitling the plaintiff to a new trial.

Since the plaintiff is awarded a new trial it is unnecessary to discuss questions raised by the plaintiff's other assignments of error.

New trial.

BROCK and BRITT, JJ., concur.

ALBERT RAY COUSINS, EMPLOYEE v. ALVIN S. HOOD, EMPLOYER

No. 703IC100

(Filed 27 May 1970)

Master and Servant § 48— employers subject to Compensation Act — regular employee — part-time employee

In this workmen's compensation proceeding, claimant's brother was a "regular employee" of defendant service station operator where he was employed eight days prior to the accident in question to keep one of defendant's stations open at night beyond regular hours to see if this would increase business at the station and had worked for two hours every evening during the eight days, notwithstanding he was a full-time state employee; consequently, defendant employer who also employed four full-time employees at his two service stations "regularly employed" five persons and was subject to the Workmen's Compensation Act.

APPEAL by Hood, Employer, from an Award of the North Carolina Industrial Commission.

Albert Ray Cousins (Albert), the employee, received injuries in the course of his employment on 15 April 1968 when an automobile on which he was working began to roll and crushed him against a workbench. He sustained a multiple fracture of the left femur from which he has not recovered and for which corrective surgery is required. A hearing was held in New Bern on 22 January 1969 by Deputy Commissioner Thomas. Deputy Commissioner Thomas denied compensation for lack of jurisdiction as he found that the defendant-employer did not have five regular employees on and prior to 15 April 1968. On appeal to the Full Commission it was held, "[t]he defendant employer did have five or more employees in his operation of his service stations on and prior to April 15, 1968, and the parties hereto are subject to and bound by the provisions of the North Carolina Workmen's Compensation Act. G.S. 97-2(1)."

The Full Commission thereupon entered an Award, from which Award Hood appealed to this Court.

Robert G. Bowers for employee-appellee.

Dunn & Dunn by Raymond E. Dunn for employer-appellant.

CAMPBELL, J.

The sole question before us on appeal is whether, at the time of Albert's injury, Hood regularly employed five or more persons and was subject to and bound by the Workmen's Compensation Act.

If Hood did not "regularly employ" five or more employees, he is not subject to and bound by the Act. The statute G.S. 97-2(1) does not define "regularly employed."

The undisputed evidence discloses that on 15 April 1968 and for sometime prior thereto Hood operated two automobile service stations. One was a Texaco station located on East Front Street in New Bern. The other was a Sinclair service station located in James City which was about one-fourth mile from the Texaco station. There were three full-time employees at the Texaco station, namely, Raymond Cumbo, Charles Whitehead and Jessie Whitehead. Albert operated the Sinclair station, but when additional help was needed there, one or more of the three regular employees at the Texaco station would come over and assist Albert at the Sinclair station.

Some eight days prior to Albert's injury on 15 April 1968, Hood employed Albert's brother, Earl Cousins, to keep the Sinclair station open at night beyond regular hours in an effort to see if this would increase business at that station. Earl had other employment as a full-time employee with the State of North Carolina. Pursuant to this arrangement, Earl worked two hours or so every evening during the eight days immediately prior to the date of the injury received by Albert.

Hood testified:

> "During the week or two before Albert got hurt Earl worked part of the day in the evening. I believe he worked every day during that time. He worked fairly regularly during that week or two weeks, whichever it was. He worked regularly during the day with the State."

Under the evidence of this case the decisive question is: On 15 April 1968, when Albert was injured, was Earl "regularly employed" by Hood?

As stated in *Patterson v. Parker & Co.*, 2 N.C. App. 43, 48, 162 S.E. 2d 571 (1968) (Certiorari denied, 274 N.C. 379).

> "We believe that the term 'regularly employed' connotes employment of the same number of persons throughout the period with some constancy. . . ."

In the instant case Earl had been working regularly eight days. There was no indication at the time of Albert's accident that the employment of Earl was to be terminated. His job was to keep the station open at night beyond the regular hours to see if this practice would result in more business at that station. The fact that Earl was also employed full time for the State of North Carolina is inconsequential. It did not prevent him from being one of the 5 regular employees of Hood.

We find no error in law in the opinion, findings and award of the Industrial Commission herein.

Affirmed.

PARKER and VAUGHN, JJ., concur.

STATE OF NORTH CAROLINA v. HARRY LEE BARKER

No. 7017SC168

(Filed 27 May 1970)

1. Criminal Law § 76— in-custody statement — testimony volunteered by officer stricken by court — necessity for voir dire

In this prosecution for larceny of a radio, the trial court did not err in failing to conduct a *voir dire* hearing to determine the voluntariness of defendant's in-custody statements when the arresting officer, while testifying for the State, volunteered the statement that defendant told him he had pawned the radio, where the court sustained defendant's objection to the testimony and instructed the jury not to consider it.

2. Criminal Law § 76— evidence of in-custody statements — failure to object

Objection to testimony of defendant's in-custody statements cannot be raised for the first time on appeal.

APPEAL by defendant from *Godwin, J.*, 3 November 1969 Special Session, ROCKINGHAM Superior Court.

Defendant was charged in a warrant with nonfelonious breaking and entering and the nonfelonious larceny of a radio of a value of less than $20.00. He was tried in the Leaksville Township Recorder's Court (the District Court will be established in Rockingham County on the first Monday in December 1970. G.S. 7A-131.) and upon conviction of larceny he appealed to the Superior Court where he was tried *de novo* upon the charge of larceny.

The State's evidence tended to show the following: About 23 September 1969 defendant visited in the home of one Jim Cobb, and, while there, defendant asked Cobb to give him the table model radio. Cobb told defendant he could not do that. About a week later Cobb was away from home for a few days, and, when he returned, the radio was missing. On or about 1 October 1969 defendant sold Cobb's radio to one W. L. Thomasson.

Defendant's evidence tended to show the following: About 23 September 1969 while defendant was visiting in Cobb's home, Cobb asked defendant to take the table model radio and repair it. Defendant carried the radio away with him for the purpose of repairing it but did not have the money to buy the parts. On or about 1 October 1969 defendant pawned the radio to W. L. Thomasson for $2.00, and was going to get it back later to repair it and return it to Cobb.

From a verdict of guilty and judgment of confinement entered thereon defendant appealed.

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

Price, Osborne & Johnson, and Gwyn, Gwyn & Morgan, by Melzer A. Morgan, Jr., for defendant.

BROCK, J.

[1, 2] Defendant assigns as error that the trial judge did not conduct a *voir dire* to determine the voluntariness of defendant's in-custody statement to the arresting officer. While testifying for the State the arresting officer, in answer to a question as to when he arrested defendant, volunteered the statement that defendant told him he had pawned the radio to Mr. Thomasson. Upon objection by defendant, the trial judge sustained the objection and emphatically instructed the jury to disregard the latter part of the officer's testimony. Defendant's argument that the judge should have additionally conducted a *voir dire* in the absence of the jury is without merit; the objection had already been sustained and the testimony stricken.

It is true that later the officer was asked to relate, and did relate, what in-custody statements the defendant made; but no objection of any kind was made at trial, and the objection cannot be raised for the first time on appeal. Defendant is not entitled to sit silently at trial in hopes that the State's evidence will work to his advantage, and, upon finding that it did not, have the benefit of objecting to the evidence for the first time on appeal. The rule that objection to evidence must be timely interposed at trial is necessary for the proper administration of justice.

Defendant's remaining assignments of error relate to the charge and the failure of the trial court to grant judgment of nonsuit. We have carefully reviewed the charge in the light of the evidence and in our opinion it fairly and adequately complies with G.S. 1-180. A review of the evidence reveals that it is sufficient to require submission to the jury. In our view defendant had a fair trial, free from prejudicial error.

No error.

BRITT and HEDRICK, JJ., concur.

STATE OF NORTH CAROLINA v. RONALD MOSS THOMPSON

No. 7019SC265

(Filed 27 May 1970)

1. Burglary and Unlawful Breakings § 5; Larceny § 7— felonious intent — sufficiency of evidence

In a prosecution charging defendant with felonious breaking and entering and with larceny, State's evidence that around midnight the defendant and a companion broke the glass door of a hardware store and took away guns and ammunition *held* sufficient to show a present intent on the part of defendant to take property belonging to another and convert it to his own use.

2. Witnesses § 7— corroborative testimony

Evidence which tends to corroborate a party's witness is competent and is properly admitted upon the trial for that purpose.

3. Criminal Law § 89— corroborative testimony — admissibility

Testimony of a police officer was admissible to corroborate the testimony of the State's witnesses relating to a robbery, and there is no merit to defendant's contention that the evidence should have been excluded on

the ground that the State's witnesses were indefinite as to the date and time of the robbery while the officer's testimony was of "convincing assurance."

APPEAL by defendant from *Martin, Robert M., S.J.,* October 1969 Session, CABARRUS Superior Court.

Defendant was tried upon a bill of indictment, proper in form, charging him with felonious breaking and entering and larceny. There was an accompanying charge of receiving which was not pursued by the State. The defendant, through his court-appointed attorney, entered a plea of not guilty to each count.

Evidence presented by the State tended to show that the defendant and three others were riding in an automobile driven by Steven Finger in Kannapolis, N. C., on 13 January 1969 and that at about midnight they parked near the Centerview Hardware Store. The defendant and Sam Cruse broke the glass in the front door of the store and took guns and ammunition. The property was put in the trunk of Finger's automobile. Finger took his three passengers to the Bethel section of Kannapolis whereupon the defendant, David Lee Higgins, and Cruse removed the stolen property from the trunk. This evidence was related in testimony by Steven Finger and David Lee Higgins and was corroborated by the testimony of Lieutenant H. E. Tucker of the Kannapolis Police Department. The State offered the testimony of W. B. Moore, the owner-operator of Centerview Hardware, who testified that he was informed of the robbery by the Kannapolis Police Department and thereafter went to his store and observed the condition of the front door and made a list of missing property of the value of $550.40.

The defendant offered the testimony of Odessa Moss, the defendant's grandmother with whom he lived, who stated that each night she rises to let her grandson in and that on the night of this occurrence he came home at ten minutes past midnight.

The jury returned a verdict of guilty on both counts as charged in the bill of indictment. From the judgment entered and sentence imposed of seven (7) to ten (10) years for breaking and entering and seven (7) to ten (10) years for larceny, the defendant appeals.

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

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

VAUGHN, J.

[1] The defendant contends that the trial court committed error by overruling the defendant's motion for nonsuit entered at the close of all the evidence. The defendant contends that "the State did not introduce evidence tending to negative knowledge or intent on the part of the owner" and therefore, the State failed to prove felonious intent to steal. There is no merit to this contention. Suffice to say that the record is replete with evidence tending to show a present intent on the part of the defendant to take property belonging to another and convert it to his own use. The defendant relies on *State v. Goffney,* 157 N.C. 624, 73 S.E. 162, which we find to be inapplicable to the case at bar. There the entry was found to be a lawful one as the owner of the premises gave the defendant permission to enter. The entry was with the consent and at the instance of the owner. Such permission or consent does not appear from the evidence of this case. The motion for nonsuit was properly overruled.

[2, 3] The defendant further contends that error was committed by the admission of the testimony of Lieutenant H. E. Tucker, over the defendant's objection, for the purpose of corroborating the testimony of the State's witnesses. The defendant vigorously asserts that the testimony of the State's witnesses was not definite or exact as to the date nor time of the alleged robbery and the testimony of the police officer, which was of "convincing assurance," should not be allowed to bolster this evidence. Evidence which tends to corroborate a party's witnesses is competent, and is properly admitted upon the trial for that purpose. 7 Strong, N.C. Index 2d, Witnesses, § 5, p. 696. The court instructed the jury that Tucker's testimony was being allowed into evidence solely for the purpose of corroborating the State's witnesses and that it was for the jury to decide whether the evidence was in fact corroborative. The testimony was properly admitted and the objection is without merit.

In the trial below we find

No error.

CAMPBELL and PARKER, JJ., concur.

STATE OF NORTH CAROLINA v. KENNETH BRIGMAN

No. 7020SC196

(Filed 27 May 1970)

1. Criminal Law § 155.5— dismissal of appeal — failure to docket on time

Appeal is dismissed by the Court of Appeals *ex mero motu* for defendant's failure to docket the record on appeal within the time allowed by Rule 5. Rule of Practice No. 48.

2. Criminal Law § 155.5— extension of time of docketing record

An order extending the time for defendant to serve his case on appeal does not extend the time for docketing the record on appeal.

APPEAL by defendant from *Crissman, J.*, 9 October 1969 Session of RICHMOND Superior Court.

By indictment proper in form, defendant was charged with unlawfully, wilfully and feloniously abusing and carnally knowing one Kathryn Ann Tilly, a female child over twelve and under sixteen years of age who had never before had sexual intercourse with any person, defendant being a male person over eighteen years of age at the time of the alleged offense.

At trial defendant pleaded not guilty, the jury found him guilty as charged, and from judgment imposing an active prison sentence of from three to four years defendant appealed, assigning error.

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

Joseph G. Davis, Jr. for defendant appellant.

BRITT, J.

[1] The judgment appealed from was entered on 9 October 1969. The record on appeal was docketed in this Court on 3 February 1970 which was after the expiration of the time within which the appeal could be docketed in compliance with Rule 5, Rules of Practice in the Court of Appeals of North Carolina. Under Rule 5 the record on appeal must be filed within 90 days after the date of the judgment, order, decree or determination appealed from unless the trial tribunal, for good cause, extends the time not exceeding 60 days. Rule 48, Rules of Practice, *supra,* provides that if the rules are not complied with, the appeal may be dismissed. The practice of this Court has been to dismiss appeals for failure to docket the record on appeal within the time prescribed by Rule 5. *Umphlett v. Bush,*

7 N.C. App. 72, 171 S.E. 2d 80; *Young v. Insurance Co.*, 6 N.C. App. 443, 170 S.E. 2d 90; *State v. Cline*, 4 N.C. App. 112, 165 S.E. 2d 691; *Coffey v. Vanderbloemen*, 4 N.C. App. 504, 167 S.E. 2d 36; *Laws v. Palmer*, 4 N.C. App. 510, 167 S.E. 2d 49; *State v. Ellisor*, 4 N.C. App. 514, 167 S.E. 2d 35; *Simmons v. Edwards*, 3 N.C. App. 591, 165 S.E. 2d 345; *In re Custody of Burchette*, 3 N.C. App. 575, 165 S.E. 2d 564; *Evangelistic Assoc. v. Bd. of Tax Supervision*, 3 N.C. App. 479, 165 S.E. 2d 67; *Kelly v. Washington*, 3 N.C. App. 362, 164 S.E. 2d 634; *Smith v. Starnes*, 1 N.C. App. 192, 160 S.E. 2d 547.

[2] The record discloses an order extending the time for defendant to serve his case on appeal. We repeat once again what we said in *Smith v. Starnes, supra,* and quoted in *Reece v. Reece,* 6 N.C. App. 606, 170 S.E. 2d 546:

> "The time for docketing the record on appeal in the Court of Appeals is determined by Rule 5, *supra,* and should not be confused with the time allowed for serving case on appeal and the time allowed for serving countercase or exceptions. The case on appeal, and the countercase or exceptions, and the settlement of case on appeal by the trial tribunal must all be accomplished within a time which will allow docketing of the record on appeal within the time allowed under Rule 5. The trial tribunal, upon motion by appellant, and upon a finding of *good cause* therefor, may enter an order extending the time *for docketing the record on appeal* in the Court of Appeals not exceeding a period of 60 days beyond the 90 days provided by Rule 5. However, this cannot be accomplished by an order allowing additional time to serve case on appeal."

[1] For failure to timely docket the record on appeal, this appeal is dismissed *ex mero motu.* Nevertheless, we have carefully reviewed the record on appeal, with particular reference to the questions raised and discussed in defendant's brief, and find that the trial was free from prejudicial error and the judgment imposed was well within the limits provided by statute.

Appeal dismissed.

BROCK and HEDRICK, JJ., concur.

STATE OF NORTH CAROLINA v. L. E. DAUGHTRY, JESSIE MATTHEWS, AND JAMES E. SCOTT

No. 702SC161

(Filed 27 May 1970)

1. Attorney and Client § 2— purported appearance by out-of-state attorneys — failure to comply with G.S. 84-4.1

Where two attorneys purportedly appearing for defendants in appeal from criminal conviction are not members of the North Carolina Bar and were not authorized to appear in this case in compliance with G.S. 84-4.1, they will not be considered as participating attorneys.

2. Criminal Law § 155.5— failure to docket record on appeal in apt time

Appeal is dismissed for failure to docket the record on appeal within 90 days after the date of the judgment appealed from as required by Rule 5, the time for docketing the record on appeal not having been extended by the trial tribunal.

APPEAL by defendants from *Parker, J.*, October 1969 Session, HYDE Superior Court.

The defendants were charged in separate bills of indictment with unlawfully engaging in an assemblage of more than three persons in the Community of Middletown, the members of said assemblage being armed with firearms and thereafter engaging in a riot and provoking a breach of the peace causing serious bodily injuries of certain named persons and causing damage to property.

Each defendant entered a plea of not guilty, and the cases were consolidated for the purpose of trial.

The evidence disclosed that during the afternoon and evening of 4 July 1969, the defendants, along with many others, participated in a gathering or rally in the vicinity of the United Klans of America meeting hall, which was located in Middletown. During the course of the afternoon and evening, a sound truck was located in front of the hall. Records were played on the sound truck, and speeches were made through the same facility. By means of the amplifying devices on the sound truck, the music and speeches could be heard for more than a mile. The records and the speeches were of such nature as to be offensive to members of the Negro race who lived within the sound of the amplifying system. A group of Negroes were attracted to the location, and law enforcement officers were called to the scene.

Under such circumstances firearms were discharged by those attending the Klan rally and likewise by the Negroes. The evidence

was conflicting as to which side first started shooting. The evidence, however, is replete that considerable shooting occurred. One Negro girl was shot in the leg; the High Sheriff of the county and two members of the North Carolina Highway Patrol received minor wounds from shotgun blasts. The three defendants were present dressed in security guard uniforms of the Klan. There was no evidence that either of the defendants discharged a firearm. Nevertheless, the defendant Scott had a pistol in his possession, and the defendant Matthews had ammunition in his possession.

Each defendant was found guilty by the jury, and from the imposition of a suspended sentence with conditions attached thereto, the defendants appealed to this Court.

Attorney General Robert Morgan by Trial Attorney Charles M. Hensey for the State.

LeRoy Scott for defendant appellants.

CAMPBELL, J.

[1] In addition to Mr. Scott, Arthur J. Hanes, Sr., and Fred Blanton, Jr., members of the Alabama Bar, purportedly appeared for the defendants. Since neither Hanes nor Blanton is a member of the North Carolina Bar and not authorized to appear in this case in compliance with the North Carolina law, G.S. 84-4.1, they will not be considered as participating attorneys.

[2] The judgment was entered in the trial court on 9 October 1969. According to Rule 5 of the Rules of Practice in the Court of Appeals of North Carolina, it was necessary that the record on appeal be docketed within 90 days thereafter unless the trial tribunal for good cause extended the time, not exceeding an additional 60 days, for docketing the record on appeal. Consequently, without an extension by the trial tribunal, the record on appeal should have been docketed in this Court on 7 January 1970. It was actually docketed on 19 January 1970 which was 12 days late. There was no order from the trial tribunal entered under the provisions of Rule 5, *supra,* extending the time within which the record on appeal might be docketed.

For failure to comply with the rules of this Court, this appeal, pursuant to Rule 17, is

Dismissed.

PARKER and VAUGHN, JJ., concur.

STATE OF NORTH CAROLINA v. HURLEY CANADY

No. 7019SC159

(Filed 27 May 1970)

Robbery § 4— armed robbery — sufficiency of evidence

Testimony by armed robbery victim, including identification of defendant, was sufficient for submission of case to the jury.

APPEAL by defendant from *Martin, S.J.*, October 1969 Session, CABARRUS Superior Court.

By bill of indictment sufficient in form, defendant was charged with armed robbery on 30 July 1969. He pleaded not guilty, a jury found him guilty as charged, and from judgment imposing active prison sentence of not less than 17 nor more than 20 years defendant appealed.

Attorney General Robert Morgan and Deputy Attorney General Harrison Lewis for the State.

Webster S. Medlin for defendant appellant.

BRITT, J.

The only question presented in defendant's brief is stated as follows: "Was the State's evidence sufficient to warrant its submission to the jury and upon which to base a verdict of guilty?"

Although the record reveals that defendant did not challenge the sufficiency of the State's evidence at trial, he contends that such evidence is reviewable on appeal under G.S. 15-173.1 which provides as follows: "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." Pursuant to this statute, enacted in 1967, we have reviewed the evidence to test its sufficiency to support the verdict of guilty. *State v. Davis*, 273 N.C. 349, 160 S.E. 2d 75 (1968).

The testimony of William Junior Hodges (Hodges), the victim of the armed robbery and the State's key witness, is summarized as follows: Around 5:00 a.m. on 30 July 1969, Hodges was sole attendant at the U-Save Service Station in Cabarrus County. He had just finished waiting on a customer, put the money from the sale in a box, and walked out to the side of the service station lot near his car when defendant and another man ran up behind him. The other man was wearing a stocking over his face and Hodges could not

identify him. Defendant had a sawed-off shotgun and held it on Hodges. Defendant's accomplice ordered Hodges to "hand over the money" after which Hodges told him the money was in a box in the station building. While defendant with his shotgun stayed with Hodges, the other man went into the building, got the money (approximately $350) and returned to where Hodges and defendant were. Defendant and the other person then forced Hodges to go with them back of a building some 200 yards from the station where they took a wallet, some cigarettes, a cigarette lighter, a wristwatch, a pocket knife, a 32-caliber pistol and $200.00 from Hodges' person. They then told Hodges to run up the road. Defendant was in Hodges' presence some ten or fifteen minutes and the service station lot was very well lighted. As soon as defendant and his accomplice left Hodges, he returned to the station and called the police. About a week later he saw defendant in jail and identified him as one of the persons who robbed him.

We conclude that the evidence was more than sufficient to warrant its submission to the jury and to support the jury's verdict of guilty of armed robbery.

Although the other points discussed in defendant's brief are not supported by exceptions in the record, we have carefully considered them and conclude they are without merit. The defendant had a fair trial, free from prejudicial error, and the sentence imposed was well within statutory limits. G.S. 14-87.

No error.

BROCK and HEDRICK, JJ., concur.

STATE OF NORTH CAROLINA v. LORETTA EATON

No. 7021SC303

(Filed 27 May 1970)

Criminal Law § 166— failure to bring forward questions preserved by assignments of error

Appeal is subject to dismissal for failure to comply with Court of Appeals Rule 28 where defendant failed to bring forward in her brief any of the questions preserved in the assignments of error.

STATE *v.* EATON

APPEAL by defendant from *Johnson, J.*, 5 January 1970 Session of FORSYTH County Superior Court.

Defendant was charged in a three-count bill of indictment with (1) housebreaking, (2) felonious larceny, and (3) receiving stolen property. She entered a plea of not guilty to each count.

The evidence presented at the trial tended to show:

The Orrs (Betty and James) lived in a basement apartment at 619 Mt. Vernon Avenue in Winston-Salem. The defendant lived at the same address in an apartment above the Orrs. They were friends and did favors for each other. In June 1969 the Orrs left on a trip and requested the defendant to watch their apartment while they were gone. The defendant was not given access to the apartment. The Orrs returned about 2:30 a.m. on 28 June 1969. They found a 1959 Chevrolet automobile in their driveway and lights on in their apartment. The door of their apartment had been forced open, and a screen over the rear window had been cut. Various items of their household possessions were missing. The defendant stated that she had heard a noise in the apartment and had come down to investigate and had found someone inside. Linda Hawks, (Linda) the owner of the 1959 Chevrolet automobile in the driveway, was also present. Police officers were called to the scene and conducted an investigation but no arrest was made.

Several months later on 19 November 1969, Betty Orr testified that the defendant came to her apartment and told her that she knew about the break-in and that she had acted as the lookout; that a man by the name of Bradley did the breaking in; that the stolen articles were put in the trunk of Linda's Chevrolet automobile and had been taken to Bradley's home or thrown in a nearby lake. Betty Orr called Detective Sergeant Burk to come to her apartment, and in his presence the defendant repeated the story. Betty Orr swore out a warrant for the defendant and instigated the charges on which the defendant was tried.

At the trial, Betty Orr testified to the above facts and was corroborated by Detective Sergeant Burk. The defendant denied that she had made any such statements and denied any participation in the breaking into the apartment and the subsequent larceny.

The jury returned a verdict of guilty of felonious larceny and not guilty as to housebreaking. From the imposition of a prison sentence of eighteen months, the defendant appealed to this Court.

The defendant assigns as error (1) the failure of the trial court to conduct a *voir dire* examination and make findings regarding the

voluntariness of the alleged confession, (2) the admission of evidence after the jury had retired initially for deliberation, (3) the failure of the trial court to declare a mistrial when one juror dissented from the verdict during a poll, (4) failure of the trial court to set aside the verdict, and (5) the entry of judgment upon the verdict.

Attorney General Robert Morgan by Deputy Attorney General James F. Bullock for the State.

Robert M. Bryant for defendant appellant.

CAMPBELL, J.

The defendant has failed to bring forward in her brief any of the questions preserved in the assignments of error. The appeal is therefore subject to dismissal for failure to comply with Rule 28, Rules of Practice in the Court of Appeals of North Carolina.

We have nonetheless searched the record and find no error which, if properly presented to us, would be prejudicial to the defendant.

No error.

PARKER and VAUGHN, JJ., concur.

STATE OF NORTH CAROLINA v. BRUCE C. FLYNT

No. 7021SC231

(Filed 27 May 1970)

Criminal Law § 148— judgments appealable — order of superior court refusing to review proceedings of district court

A "judgment" of the superior court denying defendant's application to that court for a writ of certiorari to review the proceedings of the district court in a criminal case was not a final judgment within the meaning of G.S. 7A-27(b), and defendant was not authorized to appeal therefrom to the Court of Appeals as a matter of right; defendant's only remedy was by petition for certiorari to the Court of Appeals.

APPEAL by defendant from *Exum, J.*, 22 December 1969 Session, FORSYTH Superior Court.

On 24 December 1968 a warrant was issued from the District Court of Forsyth County charging defendant with violations of a

zoning ordinance of the City of Winston-Salem. Defendant pleaded not guilty and the record indicates that on 2 June 1969 Clifford, District Judge, found "defendant GUILTY IN PART AND NOT GUILTY IN PART" and entered a lengthy judgment in which he reviewed the charges, found certain facts, declared defendant not guilty of certain violations alleged and guilty of others, and imposed a substantial fine suspended on certain conditions consistent with the zoning ordinance.

Thereafter, defendant filed a petition for certiorari in the superior court alleging irregularities in the district court proceedings and asking the superior court for an order "directing the District Court to forward all records in this matter to the Superior Court for review and directing the District Court to take no further action in this case pending review in the Superior Court."

Following a hearing the superior court entered a "judgment" in which it was ordered, adjudged and decreed "that the Application for Writ of Certiorari be, and the same is hereby, denied, not in the Court's discretion but because of the Court's opinion that it does not have the power as a matter of law to issue such a writ." Defendant attempts to appeal from said "judgment."

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

White, Crumpler & Pfefferkorn by William G. Pfefferkorn and Joe P. McCollum, Jr., for defendant appellant.

BRITT, J.

The attorney general has moved in this Court that the appeal be dismissed for the reason that the case is not properly before us. The motion is well taken and is allowed.

G.S. 7A-27 provides in pertinent part as follows:

"§ 7A-27. *Appeals of right from the courts of the trial divisions.* — (a) From any judgment of a superior court which includes a sentence of death or imprisonment for life, appeal lies of right directly to the Supreme Court.

(b) From any *final judgment* of a superior court, other than one described in subsection (a) of this section or one entered in a post-conviction hearing under article 22 of chapter 15, including any *final judgment* entered upon review of a de-

cision of an administrative agency, appeal lies of right to the Court of Appeals.

* * *" (Emphasis ours.)

Defendant attempts to appeal from a "judgment" of the superior court denying his application to that court for a writ of certiorari asking that it review the proceedings of the district court in a criminal case over which the district court had exclusive, original jurisdiction. G.S. 7A-272(a). By statute, G.S. 7A-32(b) and (c), certiorari is declared a *prerogative writ* and this Court is authorized to issue the writ "in aid of its own jurisdiction, or to supervise and control the proceedings of any of the trial courts of the General Court of Justice."

We hold that the "judgment" of the superior court from which defendant attempts to appeal is not a *final judgment* within the meaning of G.S. 7A-27(b), therefore, defendant is not authorized to appeal therefrom as a matter of right. His only remedy to have the "judgment" reviewed here is by certiorari and his petition for that remedy was denied by this Court in conference on 24 March 1970.

Appeal dismissed.

BROCK and HEDRICK, JJ., concur.

CLARENCE ROUGHTON AND WIFE, JANE CARROLL ROUGHTON v. JIM WALTER CORPORATION, MID-STATE HOMES, INC., AND ROY M. BOOTH, TRUSTEE

No. 702SC92

(Filed 27 May 1970)

1. Appeal and Error § 26— assignment to the entry of judgment — questions presented

An assignment of error to the entry of judgment presents the questions whether the facts found or admitted support the judgment and whether the judgment is regular in form; it does not present for review the findings of fact or the sufficiency of the evidence to support them.

2. Appeal and Error § 44— submission of "brief" after argument — leave of the court

A brief entitled "Reply to Argument of Appellees" that was filed with the Clerk of the Court of Appeals after argument in that Court was not

considered where appellant failed to obtain leave of the Court as required by Rule of Practice No. 11.

APPEAL by plaintiffs from *Parker, J.*, September 1969 Session of Superior Court held in TYRRELL County.

Upon a pretrial hearing, the following judgment was entered:

"THIS MATTER being heard before the Honorable Joseph W. Parker, Judge Presiding at the September 1969 Civil Session of Superior Court of Tyrrell County, and it appearing to the court and the court finding as a fact that in accordance with a stipulation entered into between the parties and an order signed by the Honorable Elbert S. Peel, Jr., the plaintiffs have filed an amended Complaint and the defendants have filed an Answer thereto; and it further appearing to the court and the court finding as a fact that the defendants in their answer set up as a defense the fact that more than three years had elapsed from the time that the alleged contract between the plaintiffs and the defendants was entered into and the time that the action was brought based upon the said alleged breach of contract; and at the call of the case for trial, the defendants moved the court for dismissal of the action for the reason that plaintiffs' alleged cause of action on breach of contract was barred by the three year statute of limitations as provided for in G.S. 1-52; after hearing the said motion, the court is of the opinion and finds as a fact that the plaintiffs' alleged cause of action based upon breach of contract is barred by the three year statute of limitations and that this action should be dismissed.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED, AND DECREED that the plaintiffs' action be and the same is hereby dissolved and the restraining order heretofore entered by this Court is hereby resolved (sic) and the plaintiffs are taxed with the costs of this action."

The plaintiffs "object and except to the entry of the foregoing Judgment and give notice of appeal."

H. L. Swain for plaintiff appellants.

Booth, Fish & Adams by H. Marshall Simpson for defendant appellees.

MALLARD, C.J.

[1] Plaintiffs' only assignment of error is stated as follows: "Plaintiffs object and except to the entry of the Judgment."

This assignment of error presents the question of whether the facts found or admitted support the judgment and whether the judgment is regular in form. This assignment of error does not present for review the findings of fact or the sufficiency of the evidence to support them. *Fishing Pier v. Town of Carolina Beach*, 274 N.C. 362, 163 S.E. 2d 363 (1968); *Sternberger v. Tannenbaum*, 273 N.C. 658, 161 S.E. 2d 116 (1968); *King v. Snyder*, 269 N.C. 148, 152 S.E. 2d 92 (1967); 1 Strong, N.C. Index 2d, Appeal and Error, § 26.

The facts found in this case support the judgment, and the judgment is regular in form.

[2] Rule 11 of the Rules of Practice in the Court of Appeals reads, in part: "No brief or written argument will be received after a case has been argued or submitted, except upon leave granted in open court, after notice to opposing counsel." This case was argued in the Court of Appeals on 29 April 1970. On 1 May 1970 appellants filed with the Clerk of the Court of Appeals what they call "Reply to Argument of Appellees." Since leave to file this was not obtained as required by Rule 11, we do not consider it.

The judgment of the Superior Court entered herein is affirmed.

Affirmed.

MORRIS and GRAHAM, JJ., concur.

CAROLYN D. BRAKE v. LEVY HARPER

No. 707SC123

(Filed 27 May 1970)

Automobiles § 91; Damages § 11— negligent operation of automobile while under influence of intoxicants — punitive damages

In this action for injuries sustained by plaintiff in an automobile accident, the trial court did not err in refusing to submit to the jury the issue of punitive damages where plaintiff's evidence tends to show only that defendant was operating a vehicle immediately behind plaintiff while under the influence of intoxicants, that defendant started to pass plaintiff and observed a vehicle coming toward him, and that defendant cut back into the right lane and struck plaintiff's vehicle in the rear.

APPEAL by plaintiff from *Bundy, J.*, 15 September 1969 Civil Session, NASH Superior Court.

This is a civil action to recover $15,000.00 compensatory damages and $5,000.00 punitive damages for injuries sustained by plaintiff in an automobile accident. Plaintiff's evidence pertinent to this appeal may be stated as follows. About 1:00 a.m. on 8 September 1968 plaintiff left the Progressive Club in Rocky Mount. She was operating her friend's Pontiac automobile. A number of other vehicles departed the Progressive Club at the same time and thereafter proceeded along Atlantic Avenue. Defendant was operating the vehicle immediately behind plaintiff. A white automobile passed both plaintiff and defendant. Defendant then started to pass plaintiff and observed a vehicle coming towards him. He cut back into the right lane and struck plaintiff's vehicle in the rear. In an effort to stop her car, which was about out of control, plaintiff "threw the car in 'PARK' " and the vehicle then turned around in the road. The highway patrolman who investigated the accident testified that, in his opinion, the defendant was under the influence of alcohol when he talked to him at the scene of the accident. The record is silent as to the basis upon which he formed this opinion. He could not remember the results of the breathalyzer test administered to the defendant but did recall that it was less than .10. In apt time plaintiff tendered issues of the defendant's gross and wanton negligence and that of punitive damages. The court only submitted two issues, negligence and compensatory damages. The jury answered both issues in favor of the plaintiff, awarding plaintiff $2,000.00 compensatory damages. Plaintiff appealed.

Don Evans for plaintiff appellant.

Battle, Winslow, Scott and Wiley by Robert Spencer for defendant appellee.

VAUGHN, J.

The sole question presented by this appeal is whether the court erred in refusing to submit to the jury the issue of punitive damages. Plaintiff candidly states that there is no North Carolina case holding that punitive damages should be allowed when the defendant is operating an automobile while under the influence of alcohol and negligently causes injury to another. In an excellent brief he favors us with decisions from a number of other states which reflect a sharp conflict as to what acts by a defendant may be used to enlarge an award of damages beyond that which will compensate the plaintiff for the injuries suffered. "Punitive damages are never awarded as compensation, but are awarded above and beyond ac-

tual damages in proper instances as punishment inflicted for intentionally wrongful conduct." 3 Strong, N.C. Index 2d, Damages, § 11, p. 179, 180. In *Hinson v. Dawson,* 244 N.C. 23, 92 S.E. 2d 393, Justice Bobbitt (now C.J.) discusses the matter of punitive damages as follows:

> "No North Carolina statute defines the bases for the recovery of punitive damages. The soundness of the doctrine has been challenged and defended. McCormick on Damages, sec. 77. It is challenged because it enables the injured party to recover more than full compensatory damages. Hence, such damages are sometimes called vindictive damages. It is defended as a needed deterrent to wrongdoing in addition to that provided by criminal punishment. Hence, such damages are sometimes called exemplary damages or smart money. Stacy, C.J., in *Worthy v. Knight, supra,* characterized the doctrine as an anomaly; but the many decisions cited in his opinion as well as later decisions give it an established place in our law. *Even so, we are not disposed to expand the doctrine beyond the limits established by authoritative decisions of this Court.*" (Emphasis ours)

The expressed reluctance to expand the doctrine does not, upon a proper showing of wanton conduct, preclude the recovery of punitive damages in an automobile collision case. See *Pearce v. Barham,* 271 N.C. 285, 156 S.E. 2d 290; *Plummer v. Henry,* 7 N.C. App. 84, 171 S.E. 2d 330. Wantonness, however, connotes intentional wrongdoing. *Hinson v. Dawson, supra; Hughes v. Lundstrum,* 5 N.C. App. 345, 168 S.E. 2d 686. Rules which attempt to define the variations or degrees of negligence are more easily recited than applied. We hold, however, that under the facts of this case the court properly declined to submit the issues as to punitive damages.

No error.

CAMPBELL and PARKER, JJ., concur.

IN THE MATTER OF THE CUSTODY OF JOHN GRAHAM WRIGHT

No. 7011SC240

(Filed 27 May 1970)

Habeas Corpus § 4; Insane Persons § 11— legality of restraint at Dix Hospital — appellate review

No appeal lies from an order entered in a habeas corpus hearing that inquired into the legality of petitioner's restraint at the Dorothea Dix Hospital; petitioner's remedy, if any, is by petition for writ of certiorari addressed to the sound discretion of the appellate court.

ATTEMPTED appeal by petitioner John Graham Wright from *Carr, J.*, 9 January 1970 Session of HARNETT County Superior Court.

The judgment from which this appeal is attempted was entered upon the return of a writ of habeas corpus inquiring into the legality of petitioner's restraint at the Dorothea Dix Hospital where he was duly committed pursuant to G.S. 122-84 by an order of the Superior Court of Harnett County on 13 March 1967. Petitioner did not appeal from the entry of the original order of committal. Although petitioner was present at the hearing upon the return of the writ and was represented by counsel, he offered no evidence. After hearing evidence tending to show the legality of petitioner's restraint, Judge Carr found petitioner to be held in legal custody and ordered that he so remain.

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

Seawell, Van Camp and Morgan by H. F. Seawell, Jr., for petitioner appellant.

VAUGHN, J.

" 'Except in cases involving the custody of minor children, G.S. 17-40 [repealed in 1967 but reprovided by G.S. 50-13.5(b)(2)], no appeal lies from a judgment rendered on return to a writ of habeas corpus. *In re Steele*, 220 N.C. 685, 687, 18 S.E. 2d 132, 134, and cases cited; *in re Renfrow, supra* [247 N.C. 55, 59, 100 S.E. 2d 315, 317]. The remedy, if any, is by petition for writ of certiorari, addressed to the sound discretion of the appellate court. *In re Lee Croom*, 175 N.C. 455, 95 S.E. 903.' *State v. Lewis*, 274 N.C. 438, 441, 164 S.E. 2d 177. See also *In re Palmer*, 265 N.C. 485, 144 S.E. 2d 413; *State v. Burnette*, 173 N.C. 734, 739, 91 S.E. 364; *In re Wilson*, 3 N.C. App. 136, 164 S.E. 2d 56; *State v. Green*, 2 N.C. App. 391, 163 S.E. 2d 14; 2 McIntosh, N.C. Practice 2d, § 2464(9). The same

rule applies to hearings on return to writs of habeas corpus in extradition proceedings. *In re Malicord,* 211 N.C. 684, 191 S.E. 730; *In re Guerin,* 206 N.C. 824, 175 S.E. 181; *In re Bailey,* 203 N.C. 362, 166 S.E. 165; *In re Hubbard,* 201 N.C. 472, 160 S.E. 569." *Texas v. Rhoades,* 7 N.C. App. 388, 172 S.E. 2d 235.

Although this attempted appeal from a judgment rendered on a return to a writ of habeas corpus must be dismissed, we have considered the record and brief as a petition for writ of certiorari. The only error assigned was to the entry of the judgment. The record supports the judgment. Answer to the inquiries made by counsel in his brief and oral argument may, we believe, be found in numerous decisions of the Supreme Court. See *State v. Propst,* 274 N.C. 62, 161 S.E. 2d 560; *Bell v. Smith,* 263 N.C. 814, 140 S.E. 2d 542; *State v. Sullivan,* 229 N.C. 251, 49 S.E. 2d 458.

Appeal dismissed.

Petition denied.

CAMPBELL and PARKER, JJ., concur.

STATE OF NORTH CAROLINA v. RONALD W. FRIETCH AND MELVIN A. EMBLEY

No. 703SC200

(Filed 27 May 1970)

1. Robbery § 2— indictment — felonious intent

Bill of indictment for armed robbery sufficiently charged felonious intent where it alleged that defendants, by the use and threatened use of firearms whereby the life of a motel night clerk was endangered, unlawfully, wilfully and feloniously took money from the motel.

2. Robbery § 2— indictment — intent to convert property to own use

Bill of indictment for armed robbery need not allege that defendants intended to convert the personal property stolen to their own use.

3. Constitutional Law § 36— cruel and unusual punishment

Punishment which does not exceed the limit fixed by statute cannot be considered cruel and unusual in a constitutional sense.

APPEAL by defendants from *Fountain, J.,* November 1969 Criminal Session of CARTERET Superior Court.

Defendants were sentenced on their pleas of guilty to a single bill of indictment charging them with armed robbery. Separate judgments were rendered against each defendant imposing prison sentences of not less than twenty (20) nor more than twenty-five (25) years. Both defendants appeal.

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

Wheatly and Mason by L. Patten Mason for defendant appellant Frietch.

Nelson W. Taylor for defendant appellant Embley.

VAUGHN, J.

Defendants were represented at their trial and on the appeal by the same court-appointed attorneys. They bring forward two assignments of error.

[1] For their first assignment of error defendants assert that the bill of indictment was defective in that it did not charge felonious intent. The indictment was as follows:

> "THE JURORS FOR THE STATE UPON THEIR OATH PRESENT, That Ronald W. Frietch, Melvin A. Embley and David E. Stevens late of the County of Carteret on the 8th day of October, 1969 with force and arms, at and in the County aforesaid, unlawfully, wilfully and feloniously, having in their possession and with the use and threatened use of firearms, to wit: pistols, whereby the life of one Edward Sides was endangered and threatened, did then and there unlawfully, wilfully and feloniously, forcibly and violently take, steal and carry away $150.00 in money of the value of $150.00 from the Buccaneer Motor Lodge, 2608 Arendell Street, Morehead City, a place of business, the aforesaid Edward Sides being the night clerk at said place of business and a person in attendance there against the form of the statute in such case made and provided and against the peace and dignity of the State."

[2] The indictment is sufficient to meet the requirements of G.S. 14-87. The requisite intent was properly alleged. An allegation that the defendants intended to convert the personal property stolen to defendants' own use is not required to be alleged in the indictment. *State v. Williams,* 265 N.C. 446, 144 S.E. 2d 267.

[3] Defendants also assign as error that the sentences imposed by the court were excessive. This assignment of error is overruled. The

punishment imposed does not exceed the limit fixed by statute. It has been held in case after case that when the punishment does not exceed the limit fixed by statute, it cannot be considered cruel and unusual in a constitutional sense. *State v. Caldwell,* 269 N.C. 521, 153 S.E. 2d 34.

Affirmed.

CAMPBELL and PARKER, JJ., concur.

THE NORTHWESTERN BANK, EXECUTOR OF THE ESTATE OF NANCY SMITH DAVIS, DECEASED v. NORTH CAROLINA NATIONAL BANK

No. 7028SC259

(Filed 27 May 1970)

Appeal and Error § 9— moot question — appeal of bank acting in capacity of executor

The question presented by the appeal of plaintiff bank acting as executor of an estate *is held* rendered moot where Court of Appeals in another case had affirmed an order setting aside plaintiff's letters testamentary.

APPEAL by plaintiff from *Grist, J.,* 8 December 1969 Session of BUNCOMBE County Superior Court.

Both parties claim to represent the estate of the late Nancy Smith Davis. Plaintiff purports to act pursuant to letters testamentary issued by the Clerk of Buncombe County Superior Court. Defendant purports to act pursuant to letters of administration issued by the Clerk of the Iredell County Superior Court.

Plaintiff instituted this action in Buncombe County Superior Court on 13 November 1969 seeking injunctive relief from an order of the Iredell Clerk which ordered plaintiff to deliver to defendant all assets of the late Nancy Smith Davis in its possession. In its complaint, plaintiff alleged that the Buncombe County Clerk had entered an order denying a motion by defendant and others to vacate plaintiff's letters testamentary. It was also alleged that this order was based upon the Clerk's supported findings that he had conclusive jurisdiction over the estate as *ex officio* judge of probate for Buncombe County. Plaintiff prayed that defendant be enjoined from executing the order of the Iredell County Clerk "until such time as the Order of the Clerk of Superior Court of Buncombe

County becomes final for lack of appeal, or until the same is modified, affirmed or reversed upon appeal; . . ."

Defendant's demurrer to plaintiff's complaint was sustained on 18 December 1969 and plaintiff appealed.

Van Winkle, Buck, Wall, Starnes & Hyde by Herbert L. Hyde for plaintiff appellant.

Jordan, Wright, Nichols, Caffrey & Hill by Welch Jordan and Edward L. Murrelle for defendant appellee.

GRAHAM, J.

On 18 December 1969, the same date on which the judgment here appealed from was entered, Judge Grist entered an order reversing the order of the Buncombe County Clerk and vacating, annulling, and setting aside the letters testamentary that had been issued to plaintiff. Upon appeal from the judge's order, this court, in an opinion by Brock, J., (see *In re Estate of Nancy S. Davis,* 7 N.C. App. 697, 173 S.E. 2d 620, filed 6 May 1970) affirmed the order of the Superior Court. The question raised by this appeal is therefore moot since any right plaintiff might have had for injunctive relief terminated with the vacating of its letters testamentary.

Appeal dismissed.

BROCK and BRITT, JJ., concur.

STATE OF NORTH CAROLINA v. CHARLES LOYAL HUGHES

No. 7023SC301

(Filed 27 May 1970)

1. Criminal Law § 161— exception to signing of judgment

An exception to the judgment must fail if the judgment is within the statutory limits and is supported by the evidence, and there is no fatal defect appearing on the face of the record proper.

2. Robbery § 6— armed robbery — exception to judgment

Exception to signing of judgment entered upon defendant's conviction of armed robbery is without merit where the indictment properly charged defendant with armed robbery, the evidence supports the judgment and the sentence is within the statutory limits.

STATE *v.* HUGHES

APPEAL by defendant from *Tillery, J.*, February 1970 Criminal Session, WILKES Superior Court.

Defendant was charged in a bill of indictment with the armed robbery of "Lowe's Food Stores, Incorporated, Lowe's Supermarket No. 3, located on Highway #421 East in Wilkes County," and that he did "feloniously take, steal and carry away" therefrom the sum of Fifteen Hundred Dollars ($1500.00). To this charge the defendant pled not guilty.

The case was tried to its conclusion and the jury returned a verdict of guilty as charged. Judgment was entered imposing a sentence of fifteen (15) to twenty (20) years. Counsel was appointed to perfect the defendant's appeal to this Court.

Attorney General Robert Morgan by Assistant Attorney General Parks H. Icenhour for the State.

Max F. Ferree for defendant appellant.

VAUGHN, J.

The only exception and assignment of error brought forward upon this appeal is to the signing of the judgment. Counsel for defendant candidly admits that he has carefully examined the record and is unable to find prejudicial error therein, but asks this Court to review the record and to give to the defendant the benefit of any prejudicial error.

[1] The appeal presents the case for review for error appearing on the face of the record. An exception to the judgment must fail if the judgment is within the statutory limits and is supported by the evidence, and there is no fatal defect appearing on the face of the record proper. 3 Strong, N. C. Index 2d, Criminal Law, § 161, p. 112.

[2] The record herein contains a bill of indictment, proper in form, charging the defendant with armed robbery in violation of G.S. 14-87. There is ample evidence to support the judgment and the sentence is well within the statutory limits. We have examined the record and find no error.

No error.

CAMPBELL and PARKER, JJ., concur.

STATE OF NORTH CAROLINA v. JAMES WILSON CARROLL

No. 7010SC249

(Filed 27 May 1970)

Criminal Law §§ 151, 155.5— failure to comply with statutes and court rules — dismissal of appeal

Appeal is dismissed for failure to comply with the North Carolina Statutes and the Rules of Practice in the Court of Appeals where the record does not show any notice of appeal given in open court or within 10 days from the rendition of the judgment, and the record on appeal was filed after the time for perfecting the appeal had expired and after the Court of Appeals had denied defendant's petition for a writ of certiorari.

PURPORTED appeal from *Godwin, S.J.*, 13 October 1969 Criminal Session, WAKE Superior Court.

The record in this case discloses that the defendant was charged in a warrant with driving a motor vehicle on the public highways while under the influence of an intoxicating liquor and with a second charge of illegal transportation of tax-paid whiskey. The defendant, through his personally-employed attorney, tendered a plea of guilty to each offense.

> "The Superior Court Judge adjudged that the two charges be consolidated for judgment and that the defendant be imprisoned for a term of 90 days in the Wake County jail. The execution of the sentence was suspended upon compliance of the following condition, to wit, that the defendant pay a fine of $200 and the costs.
>
> The defendant complied with the judgment of the Superior Court by paying the fine and costs on October 14, 1969. The defendant also surrendered his driver's license to the Clerk of the Superior Court on October 14, 1969."

The record does not show any notice of appeal given either in open court or within 10 days from the rendition of the judgment.

On 14 January 1970, the time for perfecting an appeal having expired, the defendant filed a petition for a writ of certiorari to review the judgment of Superior Court. This petition was denied by this Court in conference on 4 February 1970. The defendant, nevertheless, caused statement of case on appeal to be served upon the Solicitor of Wake County on 27 February 1970, and filed the case on appeal in this court on 5 March 1970.

Attorney General Robert Morgan, Assistant Attorney General William W. Melvin, Staff Attorney T. Buie Costen for the State.

William T. McCuiston for defendant appellant.

CAMPBELL, J.

Appeal dismissed for failure to comply with the North Carolina Statutes and the Rules of Practice in the Court of Appeals of North Carolina.

PARKER and VAUGHN, JJ., concur.

MARGARET FONVIELLE v. W. ALEX FONVIELLE, JR.

No. 705DC165

(Filed 27 May 1970)

Divorce and Alimony §§ 16, 23— alimony without divorce — child support — husband's anticipation of decrease in earnings

In the wife's action for alimony without divorce and for child support, the Court of Appeals will not disturb an order of the trial court requiring the husband to make substantial payments to the wife for alimony and for support of the minor children, notwithstanding the husband's contention that he anticipates a substantial decrease in earnings, since the order is temporary in nature and is subject to modification upon change of circumstances.

APPEAL by defendant from *Burnett, District Judge,* November 1969 Session, NEW HANOVER District Court.

This is an action instituted by plaintiff wife for alimony without divorce (G.S. 50-16.2(7)); for custody of, and support for, the minor children born of the marriage (G.S. 50-13.5(b)(3)); for alimony *pendente lite* (G.S. 50-16.3); and for counsel fees (G.S. 50-13.6 and 50-16.4).

Upon the *pendente lite* hearing the evidence tended to show that plaintiff was a dependent spouse; that she was entitled to the relief demanded in her action for alimony without divorce; and that the interest and welfare of the minor children would best be promoted if their custody be granted to plaintiff. The evidence further tended to show that defendant was capable of, and actually did, earn a substantial income; and that defendant owned real estate and personal property of substantial value.

Defendant's evidence tended to show that he anticipated a substantial decrease in earnings, and a decrease in the value of his real estate and personal property.

The District Judge entered an order requiring substantial payments to be made by defendant to plaintiff for alimony and for support of the minor children. Defendant appealed.

Murchison, Fox & Newton, by Algernon L. Butler, Jr., for plaintiff.

John F. Crossley, for defendant.

BROCK, J.

The crux of defendant's appeal is his argument that the payments required of him under the order are excessive in the light of his present circumstances. It is defendant's contention that he will be earning less money because of the high interest rates and consequent slow down in the building trade, and that the values of his property will be depressed. On the other hand plaintiff contends that the building trade will become more profitable and the values of defendant's properties will be inflated. The entire appeal deals in speculations as to what defendant's financial situation may or may not become.

From the record before us we cannot say that the trial judge exceeded his discretionary authority. Unless an abuse of discretion is shown the order must stand.

The order is temporary in nature, and if future circumstances justify a change, defendant is at liberty to seek relief in the trial court by motion in the cause.

Affirmed.

BRITT and HEDRICK, JJ., concur.

STATE *v.* GIBBS AND STATE *v.* SPENCER

No. 702SC118 STATE OF NORTH CAROLINA v. VAN GRAY GIBBS (68-CR-96); JIMMY BLOUNT (68-CR-95); JANICE MARIE WHITNEY (68-CR-91); HATTIE DELORIS GREEN (McCABE) (68-CR-93)

— AND —

No. 702SC119 STATE OF NORTH CAROLINA v. BARBARA JOYCE GIBBS (68-CR-47); AUDREY SIMPSON (69-CR-48); BELVIN MARIE MACKEY (68-CR-34); PERLINE GIBBS (68-CR-55); LONNIE LEE GIBBS (68-CR-78); RICHARD LEE SPENCER (68-CR-79); THOMAS WHITAKER (68-CR-75)

— AND —

No. 702SC120 STATE OF NORTH CAROLINA v. WALTER LEWIS SPENCER (68-CR-150); CHARLES WADE GREEN (68-CR-143)

Nos. 702SC118, 702SC119, 702SC120

(Filed 27 May 1970)

1. Criminal Law § 155.5— extension of time for docketing record on appeal — service of case on appeal

Extension of time for docketing the record on appeal cannot be accomplished by an order allowing additional time to prepare and serve case on appeal.

2. Criminal Law § 155.5— failure to docket record on appeal in apt time

Appeal is subject to dismissal where the record on appeal was docketed more than 90 days after the date of the judgment appealed from and no order extending the time for docketing the record on appeal appears in the record. Court of Appeals Rule No. 5.

APPEAL by defendants from *Copeland, J.*, 10 September 1969 Session of HYDE Superior Court.

Defendants were each tried and convicted on charges of impeding the regular flow of traffic by willfully standing upon a public highway in violation of G.S. 20-174.1. From judgments imposing active jail sentences, defendants appealed.

Attorney General Robert Morgan, Assistant Attorney General William W. Melvin, and Staff Attorney T. Buie Costen, for the State.

Jerry Paul for defendant appellants.

PARKER, J.

[1, 2] The judgments appealed from were entered on 10 September 1969. The record on appeal was docketed in the Court of Appeals on 23 December 1969, which was more than ninety days after the date of the judgments appealed from. No order extending

the time for docketing the record on appeal appears in the record. This cannot be accomplished by an order allowing additional time to prepare and serve case on appeal. *Smith v. Starnes,* 1 N.C. App. 192, 160 S.E. 2d 547. The Attorney General's motion to dismiss these appeals for failure of appellants to comply with Rule 5 of the Rules of the Court of Appeals should be allowed.

Nevertheless, to assure that no injustice has been done, we have carefully examined the entire record and considered all matters raised in the brief and argument presented by appellants' counsel. The principal questions sought to be raised have all been answered adversely to appellants by the decision of the Supreme Court of North Carolina in the case of *State v. Spencer,* 276 N.C. 535, 173 S.E. 2d 765. In the record before us we find no error.

Appeals dismissed.

CAMPBELL and VAUGHN, JJ., concur.

STATE OF NORTH CAROLINA v. JAMES COLIN HOLWAY

No. 7020SC193

(Filed 27 May 1970)

1. Criminal Law § 118— charge on contentions of the parties

Although the trial judge is not required to state or recapitulate the contentions of the parties, it is permissible for him to do so.

2. Automobiles § 129; Criminal Law § 168— charge on contentions of the parties

Although trial judge in drunken driving prosecution may have detailed the contentions of the parties more than good practice should dictate, no prejudicial misstatement appears in the court's statement of the contentions.

APPEAL by defendant from *Crissman, J.,* 27 October 1969 Session, UNION Superior Court.

Defendant was charged with operating a motor vehicle on the public highway while under the influence of intoxicating beverage on 17 December 1968, at about 2:30 a.m. on Highway 74 in the vicinity of Marshville, Union County, North Carolina. On 31 December 1968, defendant was found guilty in the District Court and gave notice of appeal.

On 4 November 1969 he was tried *de novo* in the Superior Court upon the original warrant, and found guilty by a jury.

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

Childs & Patrick, and James E. Griffin, by Stuart R. Childs, for defendant.

BROCK, J.

Defendant assigns as error four brief portions of the judge's charge to the jury. In one of these the judge was explaining to the jury the nature of the charges against defendant. In the other three the judge was recapitulating the contentions of the parties.

At the beginning of the charge, and again at the end of the charge, the judge clearly and accurately defined the elements of the offense with which defendant was charged. It seems the jury was accurately and adequately apprised of the applicable legal principles.

[1, 2] Although the judge is not required to state or recapitulate the contentions of the parties, it is permissible for him to do so. *State v. Douglas*, 268 N.C. 267, 150 S.E. 2d 412; *State v. Watson*, 1 N.C. App. 250, 161 S.E. 2d 159. And although the trial judge in this case may have detailed the contentions more than good practice should dictate, nevertheless we find no prejudicial misstatement.

No error.

BRITT and HEDRICK, JJ., concur.

J. V. HARRELL AND WIFE, LUCILLE A. HARRELL v. E. L. BRINSON, SR.

No. 703DC293

(Filed 27 May 1970)

Appeal and Error § 39— failure to docket record on appeal in apt time

Appeal is dismissed by the Court of Appeals *ex mero motu* where the record on appeal was not docketed within 90 days after the date of the judgment appealed from, and no order extending the time for docketing was entered by the trial court. Court of Appeals Rule No. 5.

APPEAL by plaintiffs and defendant from *Whedbee, District Judge,* 11 December 1969 Session, CRAVEN District Court.

Plaintiffs instituted this action to recover from defendant, a real estate agent, damages allegedly sustained by plaintiffs by reason of defendant's negligence in giving them advice with respect to the adequacy of a promissory note given to plaintiffs by one Earl A. Northern; and by reason of defendant's negligence in the preparation of said note. In effect plaintiffs seek to recover damages for defendant's negligence in the practice of law.

The case was tried before the district judge sitting without a jury. The judge found that defendant practiced law as alleged; that defendant was guilty of the malpractice of law; awarded compensatory damages to plaintiffs; and did not assess punitive damages.

Plaintiffs and defendant appealed.

Robert G. Bowers for plaintiffs.

David S. Henderson for defendant.

BROCK, J.

Plaintiffs appealed for failure of the trial judge to award punitive damages. Defendant appealed for failure of the trial judge to grant his motion for nonsuit, and for other alleged errors. We do not pass upon the merits of either appeal.

The judgment appealed from was entered 11 December 1969. The Rules of Practice in the Court of Appeals require that the record on appeal be docketed within ninety days after the date of the judgment appealed from, unless for good cause shown the trial tribunal extends the time for docketing for a period not exceeding sixty days. No order extending the time for docketing was entered for either plaintiffs or defendant. The record on appeal should have been docketed in this Court on or before 11 March 1970; it was docketed here on 31 March 1970.

For failure to comply with the Rules we *ex mero motu* dismiss both appeals.

Appeals dismissed.

BRITT and HEDRICK, JJ., concur.

STATE OF NORTH CAROLINA v. LEROY BOLDER ALIAS LEROY TORRENCE

No. 7019SC160

(Filed 27 May 1970)

Forgery § 2— sentence of imprisonment

Sentence of five years' imprisonment imposed upon defendant's plea of guilty to the charge of forging a check in the amount of $45.00 *is held* within the maximum authorized by G.S. 14-119.

APPEAL from *Martin, S.J.*, October 1969 Session, CABARRUS County Superior Court.

The defendant was charged in a valid bill of indictment with the felony of forgery of a check in the amount of forty-five dollars drawn on The Concord National Bank and made payable to the order of Leroy Torrence.

The defendant in open court, through his court-appointed attorney, entered a plea of guilty to forgery. On 9 October 1969 the court adjudicated that the defendant had been examined in open court and that his plea of guilty was freely, understandingly and voluntarily made without undue influence, compulsion or duress and without promise of leniency. From imposition of a sentence of five years, the defendant entered an appeal to this Court.

E. Johnston Irvin for the defendant appellant.

Robert Morgan, Attorney General, and Jean A. Benoy, Deputy Attorney General, for the State.

HEDRICK, J.

The defendant's attorney states quite frankly in his brief that he was "unable to find any error in the trial of the matter or in the record; . . . ."

We have reviewed the record and have found that it supports the adjudication entered by the trial judge that the defendant freely, voluntarily and understandingly entered his plea of guilty. The sentence imposed by the court is within the limits imposed by the Statute, G.S. 14-119, which prescribes a sentence of not less than four months nor more than ten years.

No error.

BROCK and BRITT, JJ., concur.

STATE OF NORTH CAROLINA v. BRYANT CLIFTON FAULKNER

No. 709SC278

(Filed 27 May 1970)

Criminal Law § 146— appeal from guilty plea

Where a defendant enters a plea of guilty, his appeal presents for review only whether error appears on the face of the record proper.

APPEAL by defendant from *May, S.J.*, November 1969 Special Criminal Session of FRANKLIN Superior Court.

Defendant was charged in a bill of indictment with felonious breaking and entering, larceny and receiving. The defendant was found to be indigent and counsel was appointed. Upon the case being called for trial, the defendant entered a plea of guilty to breaking and entering and larceny. The plea was accepted by the court and judgment was pronounced imposing an active sentence of five (5) to seven (7) years. The defendant gave notice of appeal to this Court and his present counsel was appointed to represent him.

Attorney General Robert Morgan by Assistant Attorney General R. S. Weathers for the State.

Conrad B. Sturges, Jr., for defendant appellant.

VAUGHN, J.

Where the defendant enters a plea of guilty, his appeal presents for review only whether error appears on the face of the record proper. *State v. Dawson,* 268 N.C. 603, 151 S.E. 2d 203. The attorney for the defendant has brought forward three assignments of error but candidly admits that the North Carolina law relevant to each assignment shows them contrary to law.

The record upon appeal shows the defendant was charged in a bill of indictment, proper in form. Prior to the acceptance of defendant's plea of guilty, the trial court questioned the defendant as to his understanding of the nature of the offense, his opportunity to confer with his counsel, his knowledge of the offense charged and the punishment therefore under the statute. Upon inquiries made of the defendant in open court, the trial judge found as a fact that the defendant's plea was made without undue influence, compulsion or duress and without promise of leniency. The sentence is well within

that authorized by the statute. We have examined the record and find no error therein.

Affirmed.

CAMPBELL and PARKER, JJ., concur.

STATE OF NORTH CAROLINA v. ERNIE MARSHALL TOMLINSON

No. 702SC274

(Filed 27 May 1970)

Larceny § 10— larceny of cigarette machine — punishment

Sentence of 18 months' imprisonment imposed upon defendant's plea of guilty to the larceny of a cigarette machine together with its contents of money and cigarettes, *is held* within the statutory limits.

APPEAL by defendant from *Mintz, J.*, 22 January 1970 Session of BEAUFORT County Superior Court.

Defendant was charged in an indictment, proper in form, with larceny and receiving of a cigarette machine together with its contents of money and cigarettes. He pleaded guilty to larceny, and the State took a *nolle pros* on the charge of receiving. Defendant was sentenced to serve 18 months and has appealed.

Attorney General Robert Morgan by Assistant Attorney General Sidney S. Eagles, Jr., and Staff Attorney Russell G. Walker, Jr., for the State.

Knott and Carter by W. B. Carter, Jr., for defendant appellant.

MORRIS, J.

Counsel for defendant, with commendable candor, states that he is unable to find prejudicial error in the record. We have, nevertheless, carefully examined the record. Defendant was charged with the crime of larceny and freely, understandingly and voluntarily entered a plea of guilty. The transcript of his plea and the court's adjudication thereon are in the record. He testified under oath that he took the machine and its contents. His sentence is well within the statutory limit. We find

No error.

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

STATE OF NORTH CAROLINA v. JAMES THOMAS JACKSON

No. 7028SC271

(Filed 27 May 1970)

Robbery § 6— common-law robbery — punishment

Sentence of five years' imprisonment imposed upon a verdict of guilty of common-law robbery *is held* within the statutory maximum.

APPEAL by defendant from *Snepp, J.*, 17 December 1969 Session of BUNCOMBE Superior Court.

Defendant was indicted for armed robbery. He pleaded not guilty. The jury found him guilty of common-law robbery. From judgment entered on the verdict sentencing defendant to prison for a term of five years, defendant appealed.

Attorney General Robert Morgan and Deputy Attorney General Harrison Lewis for the State.

Robert L. Harrell for defendant appellant.

PARKER, J.

No exceptions or assignments of error are noted in the record. Appellant's counsel states in his brief that he has studied the record carefully and has not been able to find prejudicial error. We have also reviewed the record carefully and find no error. The indictment is sufficient to charge a violation of G.S. 14-87 and will support a conviction for common-law robbery. The verdict supports the judgment and the sentence imposed is within the maximum authorized by statute. On the record before us we find

No error.

CAMPBELL and VAUGHN, JJ., concur.

STATE OF NORTH CAROLINA v. RONALD MOSS THOMPSON

No. 7019SC266

(Filed 27 May 1970)

APPEAL by defendant from *Martin, (Robert M.), S.J.*, October 1969 Session, CABARRUS Superior Court.

The defendant was tried on a bill of indictment containing three counts: (1) felonious breaking and entering of Ritchie Hardware Co., Inc., on 13 January 1969, (2) felonious larceny of merchandise from said hardware company, and (3) receiving stolen merchandise. The State dropped the charge contained in the third count. The defendant entered a plea of not guilty as to the first two counts in the bill of indictment. The jury returned a verdict of guilty as to both counts; and from a judgment of imprisonment, the defendant appealed.

Attorney General Robert Morgan by Staff Attorney (Mrs.) Christine Y. Denson for the State.

Johnson, Davis and Horton by Clarence E. Horton, Jr., for defendant appellant.

CAMPBELL, J.

The record on appeal contains no evidence or assignments of error. Mr. Horton, by affidavit appearing in the record, states that he was not an attorney at the trial of the case and was assigned only to assist on the appeal. He further advises that the court reporter had lost her notes and for that reason no testimony was available to him. The record discloses that in addition to Mr. Horton, the attorney who represented the defendant at the trial was likewise assigned to perfect the appeal. No valid justification has been made as to why the record does not contain assignments of error in compliance with the rules of this Court.

We have viewed the record as it presently appears, and it is free of error.

No error.

PARKER and VAUGHN, JJ., concur.

STATE OF NORTH CAROLINA v. THOMAS D. DIXON

No. 7024SC282

(Filed 27 May 1970)

APPEAL by defendant from *McLean, J.*, 23 January 1970 Session of WATAUGA County Superior Court.

Defendant entered a plea of guilty to felonious escape. From judgment imposing a prison sentence of two years and recommending Work Release, defendant appealed.

Robert Morgan, Attorney General, by Christine Y. Denson, Staff Attorney, for the State.

GRAHAM, J.

No brief has been filed by defendant; however, in the statement of the case on appeal contained in the record, defendant's court appointed counsel candidly states that he has found no error. We have reviewed the record proper and conclude that no error appears on the face thereof. The judgment appealed from is therefore affirmed.

Affirmed.

MALLARD, C.J., and MORRIS, J., concur.

STATE OF NORTH CAROLINA v. CHARLES R. SMITH

No. 6920SC451

(Filed 24 June 1970)

1. Criminal Law § 23— encouragement of guilty plea by State

Although agents of the State cannot produce a plea of guilty by actual or threatened physical harm or by mental coercion which overbears the will of the defendant, it is proper for the State to encourage pleas of guilty at every important step in the criminal process.

2. Criminal Law §§ 23, 135; Constitutional Law § 29; Homicide §§ 13, 31— first degree murder — guilty plea — coercive effect of death penalty

Defendant's otherwise valid plea of guilty of first degree murder was not rendered involuntary by the fact that, at the time it was entered, [former] G.S. 15-162.1 permitted a defendant to escape the possibility of the death penalty for first degree murder by pleading guilty to that charge.

ON certiorari, upon petition by the State, in lieu of appeal, from *Exum, J.*, January 1969 Session of Superior Court of RICHMOND County.

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

Norman T. Gibson, for the defendant appellee.

HEDRICK, J.

On 22 May 1967, the body of James Melton was discovered on an isolated road several miles north of Rockingham, North Carolina. Mr. Melton, a Rockingham taxi driver, had been shot four times with a .32 caliber automatic pistol. Mr. Melton's 1961 model taxicab and some money were missing. The investigation of the murder revealed that Charles R. Smith, a resident of Richmond County, had been seen with the victim earlier in the day and that he was the last person known to have seen the victim alive. During the afternoon of 22 May 1967, Alfred Rush, step-brother of the defendant, reported the disappearance of a pistol from his home and told the officers that the defendant had made statements to him earlier that he needed some money. A bulletin was released for the location of the taxicab and a "wanted for questioning" bulletin was issued for defendant. On the night of 22 May 1967, defendant was captured after he wrecked the taxi attempting to evade a roadblock near Lumberton, North Carolina. He was returned to Rockingham where he was questioned and where he confessed to the murder of James Melton. On 23 May 1967, a warrant for his arrest was issued by W. H. Jackson, Justice of the Peace, charging him with murder. Defendant was indicted at the July 1967 Session of Superior Court of Richmond County for the murder of James Melton.

The defendant informed the court that he was indigent and unable to employ counsel to represent him, whereupon the court, on 25 May 1967, appointed John T. Page, Jr., Attorney at Law, to represent the defendant. On 31 May 1967, the defendant's attorney made a motion praying that the defendant be committed to a State hospital for observation to determine his capacity to stand trial. The motion was granted, and on 1 June 1967, the defendant was transferred to Dorothea Dix Hospital in Raleigh, North Carolina, where he remained until 13 February 1968 when he was pronounced able to plead to the bill of indictment.

Following his return to Richmond County, he entered the following plea of guilty to first degree murder through his attorney:

> "The undersigned, Charles R. Smith, the defendant herein, having been arraigned upon a bill of indictment pending in this court charging him with the Felony of Murder in the First

Degree on the 22nd day of May, 1967, and being fully advised by his undersigned counsel John T. Page, Jr., hereby tenders in writing to the State of North Carolina his plea of guilty of Felony of murder in the first degree as charged in the said bill of indictment with full knowledge that in the event of the acceptance of his said plea by the State, with the approval of the court, the legal effect will be the same as a jury verdict of guilty of murder in the first degree with recommendation by the jury in open court that the punishment be imprisonment for life in the State Prison, and that the judgment to be pronounced in the event of such acceptance of his said plea now tendered will be a judgment that he be confined in the State Prison for the full term of his natural life.

"This plea is voluntarily, intelligently and understandingly entered by the undersigned, Charles R. Smith and the said Charles R. Smith is not at the time of entering this plea under the influence of any intoxicating beverages, drugs or medicine and is entirely in possession of all his mental facilities and is entirely normal; no threats, inducements of reward or hope of reward have been made to the undersigned Charles R. Smith and this plea is entirely free and the desire of the defendant, he having reached his own decision without fear and after sufficient consultation with his attorney, to enter said plea.

"This 2nd day of April, 1968.

"Charles R. Smith

"JOHN T. PAGE, JR.
Attorney for Defendant"

The plea was accepted by the Solicitor for the State with the approval of the Judge. The court questioned the defendant in order to determine the voluntariness of the plea. Everette Norton, a Special Agent of the State Bureau of Investigation, testified regarding the voluntariness of the confession given by the defendant on the night of 22 May 1967. He testified that he was present at the sheriff's office when Smith was returned to Rockingham from Lumberton. Mr. Norton stated that the defendant was warned of his constitutional rights and that he then confessed to the murder of James Melton and the theft of twenty dollars from the victim. Defendant told the officers that he took the taxi and drove for several hours and that he pawned the gun for gas at a service station in Fuquay-Varina, North Carolina. The gun was later found in the possession of the operator of the station named by the defendant.

The court then entered its adjudication that the plea of guilty to murder in the first degree was entered intelligently and that "no threats, inducements or hope of reward have been made to the said Charles R. Smith, and that said plea is entirely free and the desire of the defendant and having been reached of his own decision without fear and after sufficient consultation with his attorney." The defendant was sentenced to life imprisonment, began serving his sentence, and on 11 September 1968, filed a petition for mandamus. On 7 October 1968, the Honorable Thomas Seay, Judge of the Superior Court, treating the petition for mandamus as a petition for a post conviction hearing, ordered that the defendant be given a post conviction hearing under G.S. 15-217, and appointed Norman T. Gibson as counsel.

The post conviction hearing was held before the Honorable James G. Exum, Jr., on 10 April 1969. The defendant was present and was represented by counsel. Defendant testified that he had several conversations with Mr. Page, his trial attorney, regarding the case and that after he told Mr. Page what had occurred on 22 May 1967, he decided to enter a plea of guilty to murder in the first degree in order to avoid taking a chance on receiving the death penalty. He stated that he was scared at the time he signed the plea but that he signed it voluntarily and freely.

John T. Page, Jr., defendant's trial attorney, also testified at the hearing. Prior to the original trial Mr. Page talked with the defendant on several occasions and took a detailed statement from him describing the events of 22 May 1967. In his statement to his attorney, he related his activities which led eventually to the murder of James Melton and the theft of the taxicab. He also told him, in detail, his activities following the murder. Mr. Page testified at length as to the circumstances which surrounded the defendant's decision to enter a plea of guilty to murder in the first degree. Mr. Page stated that he was very careful to explain the alternatives involved to his client. During their discussions, the defendant indicated many times that he wanted to get a sentence of twenty-five to thirty years. Mr. Page discussed this with the solicitor but before he could tell his client that the solicitor would only accept a plea of guilty to murder in the first degree, he was called back to the jail by his client who then told him he had decided to enter a plea of guilty to murder in the first degree. Mr. Page testified that the defendant signed the plea voluntarily and that he, Page, believed the defendant was aware of what was happening and understood that the tender of plea meant he would receive a sentence of life imprisonment.

The court, after hearing the evidence, made finding of fact and entered a judgment granting the defendant a new trial, as follows:

"This cause coming on to be heard and being heard on this the 10th day of January, 1969, in the Richmond County Courthouse at a Criminal Session of the Superior Court of Richmond County by the undersigned Presiding Judge of the Superior Court.

"The Petitioner and his Court appointed attorney, Norman Gibson, Esq., were present and each announced that they were ready for this trial. The Solicitor, M. G. Boyette, was present and announced his readiness for this trial.

"The Court finds and determines that this is a proceeding instituted by the petitioner herein under Article 22 of Chapter 15 of the General Statutes known as the Post Conviction Hearing Act by filing a petition herein on the 11th day of September, 1968, and an Amended Petition filed January 14, 1969, and that all contentions listed in the Amended Petition were considered by the court at the hearing, the court having been notified that the Petitioner's counsel would file the Amended Petition at the time of the plenary hearing; that petitioner's Court appointed attorney was appointed on the 7th day of October, 1968.

"The Court finds and determines that the petitioner in his petition, or at this trial after being sworn, testified, or stated and contended in open court that his legal or constitutional rights were denied or violated before, during and after his trial at the April, 1968 Criminal Session of the Superior Court of Richmond County, on a Bill of Indictment bearing Docket No. 8161, in one, or more, or all of the following respects:

"1. That he entered his plea of guilty in order to avoid the death penalty, and that his plea was involuntarily entered and was entered through the coercive effect of the possibility of his receiving the death penalty should he risk a jury trial;

"2. That his plea of guilty is involuntary and coerced;

"3. That his answers to the questions of the court with reference to the voluntariness of his plea were coerced and were not voluntarily made;

"4. That he has a defense to the crime in that he was insane at the time the crime was allegedly committed and remembers no facts with reference to the alleged crime;

"5. That the Court asked the petitioner and his attorney if there were any other contentions of denials or violations of his constitutional or other legal rights, and none other contentions were stated to the court.

"The Court heard the petitioner and his attorney, and heard and considered all the competent evidence offered by the petitioner and the state, and at the conclusion of the evidence, the petitioner, his attorney, and the Solicitor for the State each stated that they had no further or other evidence they desired the Court to consider.

"From a consideration of all of the competent evidence offered, and after hearing and considering the argument of counsel, the Court finds the facts in this case to be as follows:

"1. That the petitioner was tried and pleaded guilty to Murder in the First Degree at the April, 1968 Criminal Session of the Superior Court of Richmond County, on a valid Bill of Indictment bearing Docket No. 8161, charging the petitioner with the felony of Murder in the First Degree, and that said Bill of Indictment had been theretofore at the July, 1967 Criminal Session of the Superior Court of Richmond County returned in open court a true bill by the Grand Jury.

"2. That after said plea of guilty said petitioner was sentenced by the Honorable John D. McConnell, Judge of the Superior Court, who was present and presiding at such session of court to a term of life imprisonment in the State Prison System; that commitment dated the 2nd day of April, 1968, was duly and properly issued and that the petitioner began to serve said sentence, and is now imprisoned thereunder and is serving said sentence in the State Prison System.

"3. That the sentence of life imprisonment is not in excess of that permitted by law.

"4. That before said trial, and on the 25th day of May, 1967, competent counsel, to-wit, John T. Page, Jr., was appointed to represent said petitioner, and did represent said petitioner in an able and diligent manner at said trial, after having had time to prepare, and adequately and properly preparing said case for trial.

"5. That the petitioner expressed to his court appointed counsel his fear of the death penalty and stated that he did not want to take a chance on losing his life, and would enter his plea to avoid that chance.

"6. That the petitioner was committed by order of the court to Dorothea Dix Hospital, Raleigh, N. C., for observation and evaluation and was admitted to the Hospital on June 1, 1967. That the diagnosis made by the Medical Staff of Dorothea Dix Hospital on July 18, 1967 was 'psychotic depressive reaction.' And the Staff of the Hospital found further that the petitioner was at that time unable to plead against the Bill of Indictment, unable to understand the charges against him, and did not know the difference between right and wrong.

"7. That the petitioner remained at Dorothea Dix Hospital where on February 13, 1968 the Medical Staff found that the Petitioner had recovered from his psychotic depressive reaction and was able to plead to the indictment and did know the difference between right and wrong. And the petitioner was thereafter released to the custody of the Sheriff of Richmond County to stand trial.

"8. That the petitioner executed on April 2, 1968 a 'Tender of Plea' in which he recited that his plea was 'voluntarily, intelligently and understandingly entered', that the petitioner was entirely in possession of his mental faculties, and that no threats, inducements or reward of hope have been made, and that the plea was entirely free and the desire of the defendant, he having reached his decision to plead without fear and after sufficient consultation with his attorney, and the petitioner did execute the written tender of plea.

"9. That the petitioner was examined in open court by the Honorable John D. McConnell, Judge Presiding, on April 1, 1968, with regard to the voluntariness of his plea, and Judge McConnell found that the petitioner's plea was entered voluntarily, intelligently and no threats or inducement or hope of reward were made to the petitioner, and that the court thereafter conducted an inquiry to determine the accuracy of the plea and adduced evidence which tended to show that the plea was accurately entered.

"Based upon the foregoing findings of fact the Court is of the opinion and finds and concludes as a matter of law:

"1. That the fear and threat of the imposition of the death penalty should the petitioner stand trial, constituted a coercive effect upon the petitioner sufficient to render his plea involuntary pursuant to the constitution of the United States and the constitution and laws of the State of North Carolina.

"2. That otherwise the court concludes that the petitioner's plea was intelligently and voluntarily entered, and that no coercive influences, inducements, or rewards were made to the petitioner.

"3. That the threat of the imposition of the death penalty standing alone under the facts as found by the court, was sufficient, in this case, to constitute coercion so as to render the petitioner's plea involuntary.

"4. That the petitioner's plea of guilty to Murder in the First Degree to be stricken and the petitioner returned to the custody of the Sheriff of Richmond County there to await a new trial upon the Bill of Indictment, bearing Docket #8161.

"IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED and the Court rules and adjudges as follows:

"1. That the petitioner's plea of guilty to Murder in the First Degree entered on the 1st day of April, 1968, in the Superior Court of Richmond County, be and the same is hereby stricken.

"2. That the petitioner be and he is hereby awarded a new trial upon the Bill of Indictment, bearing Docket #8161.

"3. That the petitioner be returned by the State Department of Corrections to the custody of the Sheriff of Richmond County, there to await a new trial and such disposition as may be made at the time of his new trial.

"4. It is further ordered that one copy of this Judgment be forwarded by the Clerk of the Superior Court of Richmond County to the Director of the North Carolina Department of Corrections; the Solicitor of this District; the Attorney General of North Carolina; the petitioner herein; and to Norman Gibson, Esq., petitioner's attorney.

"This 21st day of April, 1969.

"JAMES G. EXUM, JR
Judge Presiding"

Judge Exum's findings of fact do not include a finding that the defendant entered his plea of guilty as a result of his fear of the death penalty. On the contrary, in finding of fact #8 he expressly found that the plea was made while the petitioner was in possession of his mental faculties, that no threats, inducements or reward of hope had been made and that the plea was the desire of the defendant having been made without fear and after sufficient consultation

with his attorney. This finding is in complete accord with the finding made by Judge McConnell at the time the defendant entered his plea.

[2] The defendant contends that *United States v. Jackson,* 390 U.S. 570 (1968), applies to North Carolina procedure and that the death penalty, in conjunction with G.S. 15-162.1, creates a fear and threat of the imposition of the death penalty in a defendant and constitutes a coercive effect upon a defendant sufficient to render any plea he tenders involuntary. The defendant cites the case of *Alford v. North Carolina,* 405 F. 2d 340 (4th Cir. 1968), in support of this proposition.

The United States Supreme Court, in the recent case of *Brady v. United States,* 397 U.S. 742, 25 L. Ed. 2d 747, 90 S. Ct. 1463 (1970), held that *Jackson, supra,* did not render all pleas of guilty entered to avoid the death sentence involuntary *per se.* White, J., speaking for the majority, said:

> "Plainly, it seems to us, *Jackson* ruled neither that all pleas of guilty encouraged by the fear of a possible death sentence are involuntary pleas nor that such encouraged pleas are invalid whether involuntary or not. *Jackson* prohibits the imposition of the death penalty under § 1201(a), but that decision neither fashioned a new standard for judging the validity of guilty pleas nor mandated a new application of the test theretofore fashioned by courts and since reiterated that guilty pleas are valid if both 'voluntary' and 'intelligent.' See *Boykin v. Alabama,* 395 U.S. 238, 242, 23 L Ed 2d 274, 279, 89 S Ct 1709 (1969)."

[1] The Supreme Court went on to state that the plea of guilty is more than merely an admission of past conduct; it is the defendant's consent that a judgment of conviction may be entered against him without a trial. "Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." Although agents of the State cannot produce a plea by actual or threatened physical harm or by mental coercion which overbears the will of the defendant, it is proper for the State to encourage pleas of guilty at every important step in the criminal process. "For some people, their breach of a State's law is alone sufficient reason for surrendering themselves and accepting punishment. For others, apprehension and charge, both threatening acts by the Government, jar them into admitting their guilt. In still other cases, the post-indictment accumulation of evidence may con-

vince the defendant and his counsel that a trial is not worth the agony and expense to the defendant and his family." All of these circumstances which produce guilty pleas are valid even though the State has produced the primary factors which encouraged the defendant to enter the plea.

Justice White went on to set out the standard to be used to determine the voluntariness of a defendant's plea. It is:

> "The standard as to the voluntariness of guilty pleas must be essentially that defined by Judge Tuttle of the Fifth Circuit Court of Appeals:
>
> " '[A] plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel, must stand unless induced by threats (or promises to discontinue improper harassment), misrepresentation (including unfulfilled or unfulfillable promises), or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business (e.g. bribes).'
>
> "Under this standard, a plea of guilty is not invalid merely because entered to avoid the possibility of a death penalty."

In *Parker v. North Carolina,* 397 U.S. 790, 25 L. Ed. 2d 785, 90 S. Ct. 1458 (1970), a companion case to *Brady, supra,* the defendant asked the Supreme Court to hold his guilty plea involuntary and invalid because it was induced by a North Carolina statute providing a maximum penalty in the event of a plea of guilty lower than the penalty authorized after a guilty verdict and because the plea was the product of a coerced confession. In holding the defendant's plea valid, the Court said:

> "It may be that under *United States v. Jackson,* 390 US 570, 20 L Ed 2d 138, 88 S Ct 1209 (1968), it was unconstitutional to impose the death penalty under the statutory framework which existed in North Carolina at the time of Parker's plea. Even so, we determined in *Brady v. United States,* 397 U.S. 742, 25 L Ed 2d 749, 90 S Ct 1463, that an otherwise valid plea is not involuntary because induced by the defendant's desire to limit the possible maximum penalty to less than that authorized if there is a jury trial. In this respect we see nothing to distinguish Parker's case from Brady's."

See also *Garner v. State,* (N.C. App.), filed 27 May 1970.

[2] Clearly, from the holdings handed down in the three cases

cited above, there was nothing in the present case which would render the guilty plea invalid. Both the trial judge and the judge who heard the defendant's post conviction hearing found as a fact that the plea was entered by the defendant freely and voluntarily and was not the product of either physical or mental coercion.

The order of Judge Exum striking the plea of guilty and requiring a new trial is reversed. The Superior Court is directed to enter an order remanding petitioner to the custody of the Warden of the State's Prison for the completion of the sentence imposed by Judge McConnell.

Reversed.

MALLARD, C.J., and MORRIS, J., concur.

STATE OF NORTH CAROLINA, EX REL, UTILITIES COMMISSION AND WACHOVIA COURIER CORPORATION v. AMERICAN COURIER CORPORATION

No. 7010UC97

(Filed 24 June 1970)

1. Carriers § 2— contract carrier of bank documents — application for permit — sufficiency of findings

The Utilities Commission properly granted an application for a contract carrier permit which would authorize the applicant to transfer bank documents and other commodities between banks in the state, notwithstanding the protest by an existing contract carrier of bank documents that the granting of the application would adversely affect its business, where there were findings, supported by competent and substantial evidence, that banks needed the services offered by the applicant and that their need could not be met by any existing means of transportation. G.S. 62-262(i).

2. Utilities Commission § 9— review of Commission's findings of fact

On appeal to a reviewing court, findings of fact made by the Utilities Commission are conclusive and binding if they are supported by competent, material, and substantial evidence in view of the record as a whole.

APPEAL by protestant, American Courier Corporation, from final order of the North Carolina Utilities Commission dated 5 September 1969.

This was a proceeding initiated by the applicant, Wachovia Courier Corporation, by filing with the North Carolina Utilities Commission, on 28 April 1969, an application for contract carrier authority to transport cash letters, commercial papers, documents and records, bank stationery, sales, payroll and other accounting, audit and data processing media, and business, institutional and governmental records between all points and places in North Carolina. Wachovia Courier Corporation (applicant) is a North Carolina corporation organized as a subsidiary of the Wachovia Corporation. The applicant will acquire the assets of the transportation departments of Wachovia Bank and Trust Company, N. A., and of Wachovia Services, Inc., and will own and operate 37 vehicles with initial investment in vehicular equipment of over $80,000. The applicant will serve routes covering almost all of the State of North Carolina and will lease facilities in four locations throughout the State to be used in addition to storage and service facilities at its home office in Winston-Salem, North Carolina. Contracts have been entered with several other banks to provide service through the applicant.

On 13 June 1969 the protestant, American Courier Corporation, filed a Protest and Motion for Intervention. The protestant alleged that it is a contract carrier operating in North Carolina under a permit issued in 1958 which gives it authority to transport the exact commodities that the applicant now seeks authority to transport. The protest alleged that the proposed operations of the applicant do not comply with the requirements of G.S. 62-262(i) and that the proposed operations are not consistent with the public interest and transportation policy of the State.

The matter came on for hearing before the North Carolina Utilities Commission on 12 August 1969, and on 5 September 1969 the Commission entered its order granting the applicant a permit to operate as a contract carrier in the State of North Carolina.

Edward B. Hipp and Larry G. Ford for the Utilities Commission.

James M. Kimzey for the applicant appellee.

Allen, Steed and Pullen, by Thomas W. Steed, Jr., for the protestant appellant.

HEDRICK, J.

[1] The order of the Commission contained the following findings of fact and conclusions:

"FINDINGS OF FACT

"1. The Applicant, Wachovia Courier Corporation, is a duly organized North Carolina corporation and subsidiary of the Wachovia Corporation, authorized by its charter to engage in the business of general transportation.

"2. The proposed operations of Wachovia Courier Corporation conform with the definition of a contract carrier by motor vehicle; will not unreasonably impair the efficient service of carriers operating under certificates or rail carriers; will not unreasonably impair the use of the highways by the general public; and the applicant is fit, willing and able to perform the proposed service as a contract carrier.

"3. The proposed operation will be consistent with the public interest and the policy declared in Chapter 62 of the General Statutes of North Carolina.

"4. Applicant, Wachovia Courier Corporation, has entered into bilateral contracts for the proposed services with Bank of Reidsville, Commercial and Farmers Bank, The Planters National Bank and Trust Company, Southern National Bank of North Carolina, First National Bank of Eastern North Carolina, Waccamaw Bank and Trust Company, Wachovia Bank and Trust Company, N.A., and Wachovia Services, Inc.

"5. The Protestant, American Courier, is a contract carrier by motor vehicle operating under a permit issued by the Utilities Commission under the provisions of G.S. 62-262(h)(i) and performs services in North Carolina as a contract carrier as defined in GS 62-3(8) and GS 62-3(9), and as a contract carrier, does not hold itself out to serve the public generally as a common carrier and is not a carrier operating under a certificate of the Commission within the provisions of GS 62-262(i)(2).

"Based upon the foregoing Findings of Fact, the Commission makes the following:

"CONCLUSIONS

"We deem it sufficient to recite in this Docket the following language contained in the conclusion of the Order dated August 1, 1969 in Docket No. T-1445, a case almost identical to the present case:

> " 'Applicant, First Courier Corporation, has borne the burden of proof that there is a public need by several shippers for the proposed service which conforms to the definition

of a Contract Carrier by Motor Vehicle contained in GS 62-3(8). Bilateral contracts between the applicant and shippers have been filed in accordance with Commission Rule R2-15. The Commission is of the opinion and concludes that the applicant has fulfilled the requirements of the Public Utilities Act and the rules and regulations of the Commission and is entitled to a contract carrier permit authorizing it to perform the proposed transportation service.

The Commission has given consideration to the protest of American Courier and to the testimony offered by American Courier with respect to its operations in North Carolina and cannot find that the proposed operations of the applicant will improperly or unlawfully interfere with or impair any rights granted to existing contract carriers under the Public Utilities Act. Contract carriers holding permits under GS 62-262 are not afforded the same protection in their permit authority from subsequent applications as the Public Utilities Act affords to common carriers operating under certificates issued under the Public Utilities Act. A common carrier is given certain protection in its franchise area consistent with the duty and obligation of the common carrier to provide service to the public under rates and charges on file with the Utilities Commission and regulated by the Utilities Commission. The common carrier must provide service on call and demand to all of the public at published regulated rates and in return for the obligation and duty to provide such service the common carrier is granted certain franchise protection of the Public Utilities Act so long as it is able to adequately serve the public. The contract carrier, on the other hand, is not required to serve anyone and does not serve anyone except those that it voluntarily enters into contracts with for motor carrier service. The contract carrier's minimum rates are on file with the Commission, but it is not required to provide service at such minimum rates and may decline to enter into a contract except at such rates as it desires to negotiate in any particular contract.

The Public Utilities Act does not place the same burden and obligation upon contract carriers as it places upon common carriers to provide service in their service area and, by the same token, it does not provide the same franchise protection afforded to common carriers. A protesting

contract carrier is permitted to intervene and its protest is heard primarily under the provisions of GS 62-262(i)(5) on the requirement that the Commission give consideration in permit applications to "whether the proposed operations will be consistent with the public interest and the policy declared in this chapter."

The Commission has given due consideration to the proposed operations and finds that they are consistent with the public interest and with the policy declared in the Public Utilities Act, i.e., Chapter 62 of the General Statutes. The Commission concludes that it would not be in the public interest to deny the application based upon the desire of the protestant, American Courier, for protection from another contract carrier of bank documents in securing authority to engage in similar transportation of bank documents as a contract carrier. The protection of one contract carrier of bank documents from any competition when the contract carrier has no duty and obligation to serve the public would be contrary to the public interest. The protestant, American Courier, is free to pick and choose the banks and other customers shipping bank documents which it desires to serve, and it is free under its permit to offer its services to selective banks or bank chains to the exclusion of other banks or bank chains. To deny the applicant's permit for contract authority to contract with such other banks and similar shippers who do not enter into contracts with American Courier would be to authorize arbitrary power of American Courier to confer its services upon such bank or bank chains as it chooses at unregulated contract rates and would leave other banks and banking customers without recourse to for hire motor carrier service as contemplated under the contract carrier permit authority provided in the Public Utilities Act.'

"The foregoing language clearly states the Commission's interpretation of the law as applied to the facts of the present case.

"The contention of the protestant that the proposed operations of the applicant may be in violation of State or Federal banking laws or policies is not properly raised before this forum. It is not the function of this commission to determine nor interpret banking law or policy.

"IT IS, THEREFORE,

ORDERED

"That the application of Wachovia Courier Corporation in this docket be and it is hereby approved and that a contract carrier permit be issued to Wachovia Courier Corporation in accordance with Exhibit A attached hereto and made a part hereof.

"IT IS FURTHER

ORDERED

"That service under the contract carrier permit begin when Wachovia Courier Corporation has filed with the Commission evidence of liability insurance coverage, copies of contracts, not heretofore filed, containing rates and charges which shall be not less than the rates and charges approved or prescribed by the Commission for common carriers performing similar service, and has otherwise complied with the rules and regulations of the North Carolina Utilities Commission all of which shall be done within 60 days from the date of this order."

The evidence at the hearing tended to show that Wachovia Courier Corporation is a North Carolina corporation organized in May, 1969, as a wholly-owned subsidiary of the Wachovia Corporation. Until the formation of Wachovia Courier Corporation, Wachovia Bank and Trust Company, N. A., operated a private courier system by which it transported various commodities between the parent bank and its branches and between Wachovia Bank and Trust Company and its correspondent banks throughout the State.

W. Brooks Mewborn, President of Wachovia Courier Corporation, testified as to the operation of the bank's carrier operation and as to the operation of the applicant. He testified that the applicant has an initial capitalization of $200,000 with which to begin business and that the initial investment in vehicles and equipment would exceed $80,000. Wachovia Courier Corporation was formed, according to his testimony, because the operation of the private courier service was becoming too large and complex to be efficiently maintained and it was felt that it could best be operated as an independent subsidiary of the parent corporation. Mr. Mewborn testified that a great deal of difficulty had been experienced in obtaining suitable transportation for this type of material, and that no common carrier transportation was available in North Carolina to provide this type of service. He testified that the only contract carrier operating in North Carolina in any way able to provide the specific service which the applicant sought authority to provide was American Courier Corporation, but that the bank had encountered many problems in dealing with American Courier, and that the ser-

vice offered by the protestant was not adequate to meet the needs of the banks to be served by Wachovia Courier Corporation. He stated that the service provided by American Courier is mostly "an 'in-conjunction' type service" which means that any service provided one customer must be in conjunction with service provided to another and that this prevents American Courier from having much flexibility and "results in an inability to consistently reach all the computer centers of the customers on time as required to process work." Further, according to the testimony of Mr. Mewborn, the situation becomes worse when Wachovia has a breakdown in its computer centers. He testified that on several occasions this had happened and as the work was not ready for delivery until after American Courier's scheduled time of departure, the delivery was passed up and was left to Wachovia to deliver to the proper destination. According to his testimony, these breakdowns caused them to have to use 508 extra carrier hours in the preceding three months. Mr. Mewborn testified that he had on several occasions contacted American Courier in an effort to obtain this service, but that the protestant was unable to provide the service requested either because American Courier's schedule would not meet the bank's needs, or American Courier did not operate or provide the service in that part of the State.

Burnice W. Nash, Vice President and Branch Coordinator of the First National Bank of Eastern North Carolina, testified that his bank had a need for the specific service to be offered by the applicant, and that so far as he knew no common carrier service is available to fulfill their needs, and that his bank entered into a contract with the applicant because American Courier's schedule of service was not suitable to meet their specific needs.

Hector MacLean, President of Southern National Bank of North Carolina, a witness for the applicant, testified that his bank had a need for the specific transportation service to be provided by the applicant and that this service was not otherwise available by either common carrier or contract carrier at the present time. Mr. MacLean testified that the transportation service offered by American Courier was not satisfactory "due to routes and also price".

American Courier offered testimony in the person of John Sinnott, Regional Vice-President, that his corporation operates in North Carolina under a permit granted in 1958 by the Utilities Commission which authorizes the transportation of the same type of commodities sought to be transported by the applicant. Mr. Sinnott went into considerable detail as to the operations of the protestant

in this State. He testified that American Courier is an independent, regulated carrier engaged solely in the transportation business and that they cannot offer banking services or computer processing services to tie in with the transportation. He testified that this was "trapping of traffic" and denied his corporation an opportunity to be competitive in the field. He testified that the position of his company is not that no other contract carrier should be authorized to conduct business but that he felt they were entitled to be protected from what they consider unfair competition.

G.S. 62-262(i) sets forth six factors to be considered by the Utilities Commission when it passes on an application for a permit as a contract carrier. They are:

"(1) Whether the proposed operations conform with the definition in this chapter of a contract carrier,

"(2) Whether the proposed operations will unreasonably impair the efficient public service of carriers operating under certificates, or rail carriers,

"(3) Whether the proposed service will unreasonably impair the use of the highways by the general public,

"(4) Whether the applicant is fit, willing and able to properly perform the services proposed as a contract carrier,

"(5) Whether the proposed operations will be consistent with the public interest and the policy declared in this chapter; and

"(6) Other matters tending to qualify or disqualify the applicant for a permit."

G.S. 62-3(8) defines a contract carrier as:

". . . any person which, under an individual contract or agreement with another person and with such additional persons as may be approved by the Utilities Commission, engages in the transportation other than the transportation referred to in subdivision (7) of this section, by motor vehicle of persons or property in intrastate commerce for compensation, except as exempted in G.S. 62-260."

In addition to the statutory requirements set forth above, an applicant for a permit to operate as a contract carrier in North Carolina must conform to the standards set forth by the Utilities Commission in Rule R2-15(b). *Utilities Comm. v. Petroleum Transportation, Inc.*, 2 N.C. App. 566, 163 S.E. 2d 526 (1968). Rule R2-15(b) provides:

"If the application is for a permit to operate as a contract carrier, proof of a public demand and need for the service is not required; however, proof is required that one or more shippers or passengers have a need for a specific type of service not otherwise available by existing means of transportation, and have entered into and filed with the Commission, prior to the hearing or at the time of the hearing, a written contract with the applicant for said service which contract shall provide for rates not less than those charged by common carrier for similar service."

The protestant contends that the Commission did not set forth findings and conclusions and reasons or bases therefor upon all the material issues of fact, law, or discretion presented in the record and that the order entered by the Commission was erroneous as a matter of law and unsupported by competent, material and substantial evidence in view of the entire record.

[2] It is basic law that on appeal to a reviewing court, findings of fact made by the Commission are conclusive and binding if they are supported by competent, material, and substantial evidence in view of the record as a whole. *Utilities Comm. v. Petroleum Transportation, Inc., supra; Utilities Commission v. Radio Service, Inc.*, 272 N.C. 591, 158 S.E. 2d 855 (1968); *Utilities Commission v. Champion Papers, Inc.*, 259 N.C. 449, 130 S.E. 2d 890 (1963); *Utilities Commission v. Towing Corp.*, 251 N.C. 105, 110 S.E. 2d 886 (1959); *Utilities Commission v. R. R.*, 238 N.C. 701, 78 S.E. 2d 780 (1953). It is our opinion that the Commission did make sufficient findings and conclusions as to all the material issues of fact and of law, and that the facts found are supported by competent, material and substantial evidence. The Commission, in its order, set forth the evidence presented at the hearing, which evidence showed that the applicant, Wachovia Courier Corporation, was seeking to gain authority to operate as a contract carrier by permit in the State of North Carolina and that a need existed for the specific service offered by the applicant. Several witnesses testified that they had entered contracts with the applicant in behalf of their banks and that they were unable to obtain the specific service from any existing means of transportation.

[1] The protestant, American Courier Corporation, bases much of its opposition to the granting of the permit to the applicant on the ground that if the permit were granted it would then have competition in the area of transportation. Protestant contends that such competition should not be allowed since the granting of the pro-

posed application would adversely affect the business of American Courier. We do not feel that this is a sufficiently compelling reason to prohibit the entrance of other contract carriers into the field of transporting bank documents and other commodities. In *Utilities Commission v. Coach Co.*, 261 N.C. 384, 134 S.E. 2d 689 (1964), our Supreme Court, speaking through Moore, J., said: "There is no public policy condemning competition as such in the field of public utilities; the public policy only condemns unfair or destructive competition." This Court, in the recent case of *Utilities Comm. v. Petroleum Carriers,* 7 N.C. App. 408, 173 S.E. 2d 25 (1970), citing the above passage from the *Coach Co.* case, stated: "The possibility that a transfer of authority to a more competitive carrier will adversely affect existing carriers does not make such a transfer contrary to 'the public interest' as a matter of law." So, too, in the present case, the Utilities Commission's action in authorizing the granting of the permit to the applicant does not denominate the competition generated by that action unfair or against the "public interest". The testimony contained in the voluminous record indicates that the field of commodity transportation is still open and has not been closed out by the granting of this permit.

For the reasons given in the above opinion, the order of the North Carolina Utilities Commission granting Wachovia Courier Corporation's application for a permit authorizing it to transport bank commodities is

Affirmed.

MALLARD, C.J., and PARKER, J., concur.

STATE OF NORTH CAROLINA, EX REL, UTILITIES COMMISSION AND FIRST COURIER CORPORATION v. AMERICAN COURIER CORPORATION

No. 7010UC65

(Filed 24 June 1970)

1. Carriers § 2— contract carrier of commercial records — application for permit — sufficiency of findings

The Utilities Commission properly granted an application for a contract carrier permit which would authorize the applicant to transfer commercial papers and other business records between all points and places in this state, notwithstanding the arguments by an existing con-

tract carrier of commercial papers that it could serve the needs of the applicant's proposed customers and that the granting of the application would adversely affect its business, where there were findings, supported by competent and substantial evidence, that banks and other institutions needed the services offered by the applicant and that their needs could not be met by the services of the existing carrier.

2. Utilities Commission § 9— review of Commission's findings of fact

On appeal to the Court of Appeals, findings of fact of the Utilities Commission are conclusive and binding if they are supported by competent, material and substantial evidence in view of the entire record.

APPEAL by American Courier Corporation from the order of the North Carolina Utilities Commission dated 4 August 1969.

This proceeding was initiated on 20 November 1968 when the applicant, First Courier Corporation, filed an application with the North Carolina Utilities Commission for a permit authorizing it to transport as a contract carrier certain commercial papers, cash letters, audit and accounting media and other business records, documents and supplies used in processing such media and records and documents between all points and places in North Carolina.

On 30 January 1969, American Courier Corporation filed with the Utilities Commission a Protest and Motion for Intervention, alleging that it held authority as a contract carrier to transport the commodities sought by the applicant between all points and places in North Carolina over irregular routes under individual contracts with shippers, that the operations of the applicant under this permit, if granted, would be directly competitive with the operations of the protestant, and that the applicant does not meet the burden imposed by G.S. 62-262 for the granting of a contract carrier permit in that (a) the operations as proposed by the applicant do not conform with the definition of a contract carrier under rules of the Utilities Law; (b) the operations of the applicant will unreasonably impair the efficient public service of the protestant as well as other carriers operating in North Carolina; (c) the applicant is not fit nor able to properly perform the services proposed; and (d) the operations are not consistent with public interest and the transportation policy declared in the Public Utilities Act of North Carolina.

On 20 March 1969, 3 June 1969 and 4 June 1969, hearings were held before the Utilities Commission regarding this application. The petitioner, First Courier Corporation, presented evidence which tended to show the following facts: The petitioner is a wholly-owned subsidiary of First Union Bank Corporation, a holding company

which holds several subsidiary corporations. First Union Bank presently is operating a courier service providing transportation services to 119 locations in 50 cities extending from Sylva in western North Carolina to Greenville in eastern North Carolina for banking documents, supplies and media on special schedules operating 24 hours per day, seven days per week. The demand for such a transportation service has increased to the point where its operations can best be carried on and conducted as an independent corporation. Upon approval of the permit by the North Carolina Utilities Commission, the equipment and personnel of the Courier Department of First Union National Bank will be transferred to the new subsidiary. These items would consist of seventeen vehicles and twenty-four drivers along with supervisory and dispatch personnel. Extensive security measures will be taken to insure the safety of the commodities being transported and the drivers would be properly and adequately trained.

Several witnesses testified in behalf of the applicant that their corporation was in need of transportation services between their several offices and that the needed service is not available at the present time by common carriers. Each of the witnesses had signed contracts with the applicant and had agreed to utilize the services of the applicant.

The protestant, American Courier Corporation, has operated in North Carolina as a contract carrier under a permit issued by the North Carolina Utilities Commission in 1958. Their permit authorizes them to transport commodities of the same general type sought to be transported by the applicant. The protestant operates approximately 32 routes throughout the State and serves approximately 439 banks and approximately 50 commercial concerns other than banks. American Courier contends that granting of the permit to First Courier Corporation would adversely affect their business because American Courier cannot force any business to enter a bilateral contract for its services and because American Courier has been serving some of the parties with whom the applicant has now contracted.

The North Carolina Utilities Commission, after hearing the evidence presented by the applicant and the protestant, entered the following findings and conclusions based thereon:

"FINDINGS OF FACT

"1. The applicant, First Courier, is a duly organized North Carolina corporation and subsidiary of First Union National

Bank Corporation, authorized by its charter to engage in the business of general transportation. According to its pro forma balance sheet, as of the date it will begin operations, it will have assets of $250,000 including equipment valued at $185,000 and $50,000 in cash.

"2. The proposed operations of First Courier conforms with the definition of a contract carrier by motor vehicle; will not unreasonably impair the efficient service of carriers operating under certificates or rail carriers; will not unreasonably impair the use of the highways by the general public; and the Applicant is fit, willing and able to perform the proposed service as a contract carrier.

"3. The proposed operation will be consistent with the public interest and the policy declared in Chapter 62 of the General Statutes of North Carolina.

"4. Applicant, First Courier Corporation, has entered into bilateral contracts for the proposed service with First Union National Bank of North Carolina, First Card Corporation, Peoples Bank, the Northwestern Bank, Southern National Bank, First National Bank of Catawba, and Cameron-Brown Company.

"5. The Protestant, American Courier, is a contract carrier by motor vehicle operating under a permit issued by the Utilities Commission under the provisions of GS 62-262(h)(i) and performs service in North Carolina as a contract carrier as defined in GS 62-3(8) and GS 62-3(9), and as a contract carrier, does not hold itself out to serve the public generally as a common carrier and is not authorized under the Public Utilities Act and said definitions to serve the public generally as a common carrier, and is not a carrier operating under a certificate of the Commission within the provisions of GS 62-262(i)(2) for consideration as to whether the operations proposed in the application will unreasonably impair the efficient public service of the Protestant, and its protest is considered under other provisions of the Public Utilities Act, as discussed under the conclusions hereinafter set forth.

"CONCLUSIONS

"Applicant, First Courier Corporation, has borne the burden of proof that there is a public need by several shippers for the proposed service which conforms to the definition of a Contract Carrier by Motor Vehicle contained in GS 62-3(8). Bilateral

contracts between the applicant and shippers have been filed in accordance with Commission Rule R2-15. The Commission is of the opinion and concludes that the Applicant has fulfilled the requirements of the Public Utilities Act and the rules and regulations of the Commission and is entitled to a contract carrier permit authorizing it to perform the proposed transportation service.

"The Commission has given consideration to the protest of American Courier and to the testimony offered by American Courier with respect to its operations in North Carolina and cannot find that the proposed operations of the Applicant will improperly or unlawfully interfere with or impair any rights granted to existing contract carriers under the Public Utilities Act.

"Contract carriers holding permits under GS 62-262 are not afforded the same protection in their permit authority from subsequent applications as the Public Utilities Act affords to common carriers operating under certificates issued under the Public Utilities Act. A common carrier is given certain protection in its franchise area consistent with the duty and obligation of the common carrier to provide service to the public under rates and charges on file with the Utilities Commission and regulated by the Utilities Commission. The common carrier must provide service on call and demand to all of the public at published regulated rates and in return for the obligation and duty to provide such service the common carrier is granted certain franchise protection of the Public Utilities Act so long as it is able to adequately serve the public. The contract carrier, on the other hand, is not required to serve anyone and does not serve anyone except those that it voluntarily enters into contracts with for motor carrier service. The contract carrier's minimum rates are on file with the Commission, but it is not required to provide service at such minimum rates and may decline to enter into a contract except at such rates as it desires to negotiate in any particular contract.

"The Public Utilities Act does not place the same burden and obligation upon contract carriers as it places upon common carriers to provide service in their service area and, by the same token, it does not provide the same franchise protection afforded to common carriers. A protesting contract carrier is permitted to intervene and its protest is heard primarily under the provisions of GS 62-262(i)(5) on the requirement that the Com-

mission give consideration in permit applications to 'whether the proposed operations will be consistent with the public interest and the policy declared in this chapter;'. The Commission has given due consideration to the proposed operations and finds that they are consistent with the public interest and with the policy declared in the Public Utilities Act, i.e., Chapter 62 of the General Statutes.

"The Commission concludes that it would not be in the public interest to deny the application based upon the desire of the protestant, American Courier, for protection from another contract carrier of bank documents in securing authority to engage in similar transportation of bank documents as a contract carrier. The protection of one contract carrier of bank documents from any competition when the contract carrier has no duty and obligation to serve the public would be contrary to the public interest. The Protestant, American Courier, is free to pick and choose the banks and other customers shipping bank documents which it desires to serve, and it is free under its permit to offer its services to selective banks or bank chains to the exclusion of other banks or bank chains. To deny the Applicant's permit for contract authority to contract with such other banks and similar shippers who do not enter into contracts with American Courier would be to authorize arbitrary power of American Courier to confer its services upon such bank or bank chains as it chooses at unregulated contract rates and would leave other banks and banking customers without recourse to for-hire motor carrier service as contemplated under the contract carrier permit authority provided in the Public Utilities Act."

From the entry of the order granting the permit to the applicant, American Courier Corporation appealed to the North Carolina Court of Appeals.

Edward B. Hipp and Larry G. Ford for the Utilities Commission.

Bailey, Dixon, Wooten and McDonald, by J. Ruffin Bailey and Ralph McDonald, for the applicant appellee.

Allen, Steed and Pullen, by Thomas W. Steed, Jr., for protestant appellant.

HEDRICK, J.

[1] The protestants in this action contend that the Utilities Commission was in error in granting the permit to the applicant, First

Courier Corporation, to operate as a contract carrier in the State of North Carolina in that the order was erroneous as a matter of law and was unsupported by competent, material and substantial evidence.

[2] On appeal to the Court of Appeals of North Carolina, findings of fact of the Utilities Commission are conclusive and binding if they are supported by competent, material and substantial evidence in view of the entire record. *Utilities Comm. v. Petroleum Transportation, Inc.*, 2 N.C. App. 566, 163 S.E. 2d 526 (1968); *Utilities Commission v. Champion Papers, Inc.*, 259 N.C. 449, 130 S.E. 2d 890 (1963); *Utilities Commission v. Towing Corp.*, 251 N.C. 105, 110 S.E. 2d 886 (1959); *Utilities Commission v. R. R.*, 238 N.C. 701, 78 S.E. 2d 780 (1953); *Utilities Commission v. Radio Service, Inc.*, 272 N.C. 591, 158 S.E. 2d 855 (1968).

[1] G.S. 62-262(i) sets forth the criteria to be used by the Utilities Commission in determining whether a permit is to be granted authorizing an applicant to operate as a contract carrier. This section states that the Commission shall give due consideration to:

"(1) Whether the proposed operations conform with the definition in this chapter of a contract carrier,

"(2) Whether the proposed operations will unreasonable impair the efficient public service of carriers operating under certificates, or rail carriers,

"(3) Whether the proposed service will unreasonably impair the use of the highways by the general public,

"(4) Whether the applicant is fit, willing and able to properly perform the service proposed as a contract carrier,

"(5) Whether the proposed operations will be consistent with the public interest and the policy declared in this chapter; and

"(6) Other matters tending to qualify or disqualify the applicant for a permit."

G.S. 62-3(8) defines a contract carrier as follows:

"'Contract carrier by motor vehicle' means any person which, under an individual contract or agreement with another person and with such additional persons as may be approved by the Utilities Commission engages in the transportation other than the transportation referred to in subdivision (7) of this section, by motor vehicle of persons or property in intrastate commerce for compensation, except as exempted in G.S. 62-260."

The Utilities Commission in the present case, in Finding of Fact Number 2, specifically found that the proposed operations of the applicant, First Courier Corporation, met the statutory requirements of G.S. 62-262(i). The findings are supported by competent, material and substantial evidence and we, as the reviewing court, are bound by them.

The protestant contends that the permit should not have been issued to the applicant because the applicant does not meet the requirements of N.C.U.C. Rule R2-15(b).

By the provisions of G.S. 62-49, the Utilities Commission was authorized and directed to publish rules and regulations.

Rule R2-10(b) provides:

> "Contract carrier authority for the transportation of passengers or property will not be granted unless the proposed service conforms to the definition of a contract carrier as defined in G.S. 62-3(8) and applicant meets the burden of proof required under the provisions of G.S. 62-262(i) and Rule R2-15(b)."

Rule R2-15(b) provides:

> "If the application is for a permit to operate as a contract carrier, proof of a public demand and need for the service is not required; however, proof is required that one or more shippers or passengers have a need for a specific type of service not otherwise available by existing means of transportation, and have entered into and filed with the Commission, prior to the hearing or at the time of the hearing, a written contract with the applicant for said service, which contract shall provide for rates not less than those charged by common carriers for similar service."

The protestant, American Courier, contends that the evidence clearly indicates that its services were readily available to serve the precise needs of the witnesses for the applicant and that in some instances they were doing so. The evidence does not so show. The testimony of the witness, Raymond Griffin, Manager of Data Processing of Southern National Bank in Lumberton, North Carolina, was that his company has a need for transportation of interbank correspondence, audit and accounting media, including cash letters to their offices as far north as Henderson, east to Edenton, south to Tabor City and west to Mt. Gilead. He testified that at the present time they are using the U.S. Mail, bus express, their private cars and First Union National Bank's private courier service which has been provided to them free of charge. Mr. Griffin

testified that no other transportation services were available to them in Lumberton and that no common carrier service is available to meet their specific needs. When questioned in regard to service provided or offered by the protestant, Mr. Griffin testified that they had had no contact with American Courier and that they did not receive any proposal or offer of service to their corporation until 12 April 1969 when American Courier submitted a proposal to them to provide service for $44,000.00, a rate twice what they now are paying. The letter and proposal from the protestant was received approximately five months subsequent to the filing of the application by First Courier Corporation for a permit to operate as a contract carrier.

Bob Harrington, of Cameron-Brown Company, a mortgage banking institution and a wholly-owned subsidiary of First Union National Bank Corporation, Inc., testified that he was familiar with the services offered by the protestant but that he did not learn of the service provided by the protestant until after he began negotiations with First Courier Corporation. He testified that there are several ways in which American Courier does not provide service to meet the specific requirements of Cameron-Brown, and that his company has several offices which are not on the protestant's service routes. Mr. Harrington testified that American Courier offered to provide his company with service after he had signed a contract with First Courier and that they offered to put on the necessary men and equipment if Cameron-Brown would pay the additional cost and if they would sign a sufficient contract to guarantee reimbursement of the costs of the additional runs.

From this evidence, it is clear that the applicant has met the requirements of N.C.U.C. Rule R2-15(b).

The protestant, American Courier Corporation, bases much of its opposition to the granting of the permit to the applicant on the ground that if the permit were granted it would then have competition in the area of transportation. Protestant contends that such competition should not be allowed since the granting of the proposed application would adversely affect the business of American Courier. We do not feel that this is a sufficiently compelling reason to prohibit the entrance of other contract carriers into the field of transporting bank documents and other commodities. In *Utilities Commission v. Coach Co.*, 261 N.C. 384, 134 S.E. 2d 689 (1964), our Supreme Court, speaking through Moore, J., said: "There is no public policy condemning competition as such in the field of public utilities; the public policy only condemns unfair or destructive com-

petition." This Court, in the recent case of *Utilities Comm. v. Petroleum Carriers*, 7 N.C. App. 408, 173 S.E. 2d 25 (1970), citing the above passage from the *Coach Co.* case, stated: "The possibility that a transfer of authority to a more competitive carrier will adversely affect existing carriers does not make such a transfer contrary to 'the public interest' as a matter of law." So, too, in the present case, the Utilities Commission's action in authorizing the granting of the permit to the applicant does not denominate the competition generated by that action unfair or against the "public interest". The testimony contained in the voluminous record indicates that the field of commodity transportation is still open and has not been closed out by the granting of this permit.

For the reasons given in the above opinion, the order of the North Carolina Utilities Commission granting First Courier Corporation's application for a permit authorizing it to transport bank commodities is

Affirmed.

MALLARD, C.J., and PARKER, J., concur.

REDEVELOPMENT COMMISSION OF THE CITY OF WASHINGTON, NORTH CAROLINA v. BRYAN GRIMES AND WIFE, BOBBY H. GRIMES; AND JUNIUS D. GRIMES, JR., AND WIFE, LILY G. GRIMES

No. 702SC186

(Filed 24 June 1970)

1. Eminent Domain § 9; Municipal Corporations § 4— condemnation by redevelopment commission — requisites of petition

In order for a redevelopment commission to establish a right to acquire property by condemnation, the petition must affirmatively show that the provisions of G.S. 40-12 and Article 37 of G.S. Chapter 160 have been complied with.

2. Municipal Corporations § 4; Eminent Domain § 9— condemnation by redevelopment commission

When a redevelopment commission possessing the power of eminent domain under G.S. 160-462 is unable to agree with the owner for the purchase of property required for its purposes, the procedure to acquire the property is by a special proceeding as provided in Article 2 of G.S. Chapter 40, except as modified by the provision of G.S. 160-465.

3. Eminent Domain § 1— construction of condemnation statutes

Statutes prescribing the procedure to condemn lands should be strictly construed.

4. Eminent Domain § 10; Municipal Corporations § 4— condemnation for urban renewal — denial of allegations — duties of clerk — appointment of appraisers

When respondents in a special proceeding to condemn land for urban renewal deny the allegations of the petition, the clerk of superior court has the duty, after notice, to hear the parties and pass upon the disputed matters presented on the record; if the allegations of the petition are found to be true, the clerk must then appoint commissioners to appraise the property and assess damages for the taking. G.S. 40-16.

5. Eminent Domain § 10; Municipal Corporations § 4— condemnation proceeding — appointment of appraisers — failure of clerk to find controverted facts

In this special proceeding to condemn land for urban renewal, the clerk of superior court did not have authority to issue an order appointing commissioners of appraisal where respondents denied the allegations of the petition, and the record does not show that after a proper hearing the controverted facts had been determined in favor of petitioner, the clerk's finding that commissioners should be appointed not being a sufficient finding of the controverted facts.

6. Eminent Domain § 11— exception to commissioners' report — determination by clerk — appeal to superior court

In a condemnation proceeding, the clerk must hear and make a determination of the exceptions to the commissioners' report before an appeal lies to the judge of the superior court.

7. Eminent Domain § 11— premature appeal to superior court from commissioners' report

In this condemnation proceeding, purported appeal to the superior court was premature where the clerk of court failed to make findings on the controverted allegations of the petition before appointing commissioners, and the clerk had not acted on the exceptions to the commissioners' report.

8. Eminent Domain § 11; Trial § 7— condemnation proceeding — appeal to superior court — pretrial conference

In this condemnation proceeding, the trial court should have conducted a pretrial conference where the record shows that the parties had different concepts of what phase of the matter they were going to try.

9. Appeal and Error § 2— premature appeal to superior court — questions presented on appeal to the Court of Appeals

Where appeal to the superior court in this condemnation proceeding was premature, questions with respect to the hearing of evidence in the superior court and the court's findings of fact and conclusions of law are not properly presented on appeal to the Court of Appeals.

APPEAL by petitioner from *Parker, J.*, 3 November 1969 Civil Session of Superior Court held in BEAUFORT County.

On 1 November 1968 Redevelopment Commission of the City of Washington, North Carolina (petitioner), filed a petition for condemnation of the lands of Bryan Grimes and wife, Bobby H. Grimes, and Junius D. Grimes, Jr., and wife, Lily G. Grimes (respondents), described in paragraph four of the petition.

It was alleged in the petition that the petitioner was a body corporate having and exercising the rights, powers and authority conferred by the ordinances of the City of Washington, North Carolina; that on 14 August 1961 the petitioner was created by resolution of the Council of the City of Washington pursuant to G.S. 160-457, and that the Secretary of State issued to it a Certificate of Incorporation; that the respondents are the owners of the property described in paragraph four of this petition; that there are no liens thereon; that on 23 June 1966 the Planning Commission of the City of Washington certified an area within the City of Washington to be a blighted and redevelopment area to be known as the Downtown Waterfront Urban Renewal Area, Project No. NCR 38, and attached a copy of the certification, together with resolutions of the Redevelopment Commission of the City of Washington, North Carolina, certifying that said project area was a non-residential area in character and of the character as described in Chapter 160-456, Subdivision 10, as amended; that it is to be redeveloped for predominantly non-residential uses under the urban renewal plan; that the urban renewal plan for this project was prepared and approved after due notice and after public hearings, all as required by the statute, and that a copy of the plan was attached to the petition; that the petitioner is proceeding with the plan for the urban renewal of the project and that moneys have been and will be expended in the accomplishment of the plan; that the urban renewal area is an area within the meaning of Article 37 of General Statute 160-456, Subdivision 10; that the real property depicted and platted on the map attached is an integral part of the entire urban renewal project, and it is necessary that said real property be taken in order to accomplish the objectives announced in the urban renewal plan adopted; that it proposes in good faith to carry out its plan for urban renewal; that the petitioner has adequate funds on hand with which to acquire the respondents' property and that the program of urban renewal has qualified for Federal funds to be spent on this project; that the petitioner has attempted by good faith bargaining with the owners to acquire the property of the owners involved in this proceeding but has been unable to do so; and that the petitioner, by resolution duly adopted, is exercising its statutory powers to condemn the property involved in this proceed-

ing and has met all requirements under the provisions of all applicable statutes.

Two of the respondents file one answer and the other two respondents file another answer. Every allegation in the petition was denied by one or both of the respondents except the allegation relating to the tract of land sought to be condemned; and as to this allegation, the respondents contend that the boundaries set forth in the petition are indefinite and uncertain, and they ask the court to order a survey in the cause to be paid for by the petitioner.

On 1 May 1969 the Clerk of the Superior Court of Beaufort County entered the following order appointing commissioners:

"This proceedings is brought pursuant to North Carolina General Statute 40-11, et seq. by the petitioner to acquire by condemnation for its use in its urban redevelopment plans real property owned by the respondents or in which they have an interest, which real property is located in the City of Washington, Beaufort County, North Carolina, and is described as follows:

On the S. side of E. Second St. in the City of Washington, N. C., beginning on the Southern sideline of Second St. at the Laughinghouse corner, which is the Northwest corner of Lot #33, Bonner's Old Part; running thence with the dividing line between Lots No. 27 and No. 33, Bonner's Old Part, Southerly a distance of 144 feet to the Northern line of the Ward lot, thence with the Northern line of the Ward lot in an Easterly direction and parallel to Second Street a distance of 54 feet to the line of the Jones lot (formerly the Fulford lot); thence with said line N. and parallel with Market Street a distance of 144 feet to the Southern sideline of Second St., thence with the Southern sideline of Second Street in a Westward direction 54 feet to the point of beginning. Subject, however, to the easement of right-of-way of Dora Bonner Ward 10 feet in width extending from the Southern line of said property to the Southern line of Second Street as set forth more particularly in deed recorded in B. 353, P. 635, Beaufort County Registry. Being the same conveyed by Dora Bonner Ward and husband H. S. Ward, to Junius D. Grimes by deed dated Oct. 11, 1944, and recorded in Book 353, P. 635, Beaufort County Registry.

MATTERS OF SURVEY ARE EXCEPTED: The above

described land was devised by Junius D. Grimes to his 4 children, Bryan Grimes, Eliza Grimes Wahmann, Charlotte Grimes Cooper and Junius D. Grimes, Jr. by will recorded in Will B. 8, P. 249 in Office of Clerk of Superior Court of Beaufort County.

Subsequently said land was awarded to Bryan Grimes and Junius D. Grimes, Jr., pursuant to the Report of Commissioners and an Order entered in Special Proceeding No. 6128, recorded in Book 571, Page 8 of the Beaufort County Registry.

It further appearing to the court that under the provisions of General Statute 40-11, et seq., commissioners of appraisal should be appointed for the purpose of ascertaining and determining the full compensation which ought justly to be paid to the respondents by the petitioner in accordance with the prayer of the petitioner in its petition filed herein.

IT IS, THEREFORE, ORDERED that B. M. Richardson, Ray Moore, and Lloyd Sloan, all of whom are disinterested and competent freeholders residing in this county where the premises are to be appraised, be and they are hereby appointed as commissioners of appraisal herein to view the premises described in this order and to hear the proof and contentions of the parties with respect to the compensation to be paid by the petitioner to the respondents for the acquisition of the property described herein; that after the proof and contentions have been heard, the said commissioners of appraisal, without any unnecessary delay, and with the majority or all of them being present and acting, shall ascertain and determine the compensation which ought justly to be paid by the petitioner to the respondents herein owning or interested in the real estate appraised by the commissioners for the acquisition of the property described herein; and that said commissioners shall report their proceedings to this court within ten days for the further appropriate orders of the court.

IT IS FURTHER ORDERED that the commissioners of appraisal meet at the office of the undersigned Clerk of the Superior Court of Beaufort County, North Carolina, at 2:00 o'clock PM, on the 23rd day of May, 1969, to subscribe their oath and proceed with the discharge of their duties."

On 2 May 1969 the respondents "object and except to the signing and entering of the order dated May 1, 1969" appointing commissioners.

On 28 July 1969 the commissioners filed their report appraising the property at the value of $27,500.

On 12 August 1969 the petitioner filed exception to the report of the commissioners asserting that the assessment of the commissioners was unreasonable and excessive.

The respondents, two of them on 13 August 1969, and the other two on 15 August 1969, filed exceptions to the report of the commissioners and gave notice of appeal. In their "Notice of Appeal and Exceptions," the respondents assert (1) that the award of the commissioners was less than the true value of the premises and (2) that their reply denying the right of the petitioner to condemn and their exception to the signing of the order appointing commissioners constituted a plea in bar, which should have been determined before any hearing by any commissioner.

This cause was tried in the Superior Court of Beaufort County at the 3 November 1969 Civil Session, and judgment was rendered denying the right of petitioner to condemn the property described in the petition.

From this judgment, this appeal is taken to this court by the petitioner.

William P. Mayo and LeRoy Scott for petitioner appellant.

Wilkinson & Vosburgh by John A. Wilkinson for respondent appellees Bryan Grimes and Bobby H. Grimes.

Carter & Ross by W. B. Carter for respondent appellees Junius D. Grimes, Jr., and Lily G. Grimes.

MALLARD, C.J.

[1] In order for a redevelopment commission to establish a right to acquire property by condemnation, the petition must affirmatively show that the provisions of G.S. 40-12 and Article 37 of Chapter 160 of the General Statutes have been complied with. *Redevelopment Commission v. Hagins,* 258 N.C. 220, 128 S.E. 2d 391 (1962); *Redevelopment Comm. v. Abeyounis,* 1 N.C. App. 270, 161 S.E. 2d 191 (1968). In the case before us the respondents concede in their brief that the contents of the petition are sufficient to meet the criteria set out in the statutes as interpreted by the courts. Thus, respondents have made no contention that the petitioner has failed to properly allege the prerequisites necessary to exercise the power of eminent domain.

[2] When a redevelopment corporation, possessing the power of eminent domain under G.S. 160-462, is unable to agree with the owner for the purchase of property required for its purposes, the procedure to acquire the property is by a special proceeding as provided in Article 2 of Chapter 40 of the General Statutes, except as modified by the provision of G.S. 160-465. In McIntosh, N.C. Practice 2d, § 2371(3), it is said:

> "Within the time mentioned in the summons and notice the defendants are to answer the petition, and they may show cause against granting the prayer, or disprove any of the facts alleged in the petition. If the facts alleged are denied, *the burden is upon the petitioner to establish the facts;* but this is for the clerk to hear and determine, and the case is not transferred to the civil issue docket for a jury trial at this stage." (Emphasis Added.)

Under the provisions of G.S. 40-16, after a petition seeking condemnation is filed and served with summons, persons whose estates are to be affected by the proceedings "may answer such petition and show cause against granting the prayer of the same, and *may disprove any* of the facts alleged in it. The court shall *hear the proofs and allegations* of the parties, *and if no sufficient cause is shown against granting the prayer of the petition,* it shall make an order for the appointment of three disinterested and competent freeholders who reside in the county where the premises are to be appraised, for the purposes of the company, and shall fix the time and place for the first meeting of the commissioners." (Emphasis Added.)

[3-5] Statutes prescribing the procedure to condemn lands should be strictly construed. *Redevelopment Comm. v. Abeyounis, supra.* When the respondents denied the allegations of the petition, it then became the duty of the clerk of superior court in this special proceeding, after notice, to hear the parties and pass upon the disputed matters presented on the record. G.S. 40-16; *Selma v. Nobles,* 183 N.C. 323, 111 S.E. 543 (1922). If the allegations of the petition are found to be true, it would be the duty of the clerk to appoint commissioners to appraise the property and assess damages for the taking. G.S. 40-16. However, in this case, the record does not show, and the order entered by the clerk appointing commissioners does not reveal, that after a proper hearing the controverted facts had been determined in favor of the petitioner. *Randleman v. Hinshaw,* 267 N.C. 136, 147 S.E. 2d 902 (1966). We do not think that the clerk's determination that commissioners should be appointed was a sufficient finding of the controverted facts in this case. Because of

the failure to specifically determine the controverted facts in favor of the petitioner, the Clerk of the Superior Court of Beaufort County did not have authority to issue an order appointing commissioners. G.S. 40-16; *R. R. v. R. R.*, 148 N.C. 59, 61 S.E. 683 (1908); 3 Strong, N.C. Index 2d, Eminent Domain, § 10.

The commissioners appointed by the clerk, after one had been excused and another person was substituted by consent of the parties, filed their report on 28 July 1969.

G.S. 40-19, in pertinent part, reads as follows:

> "Within twenty days after filing the report the corporation or any person interested in the said land may file exceptions to said report, and upon the determination of the same by the court, either party to the proceedings may appeal to the court at term, and thence, after judgment, to the appellate division. * * *."

[6] This statute, G.S. 40-19, requires that the clerk hear and make a determination of the exceptions to the report before an appeal lies to the judge of the superior court. In McIntosh, N.C. Practice 2d, § 2371(6), the proper procedure is stated:

> "Within twenty days after the report of the commissioners is filed, either party may file exceptions, and when these are heard and determined by the clerk either party may appeal to the judge at term, and the clerk or judge may confirm or modify the report or make such other orders as may be necessary. * * *"

The record in the case before us does not contain anything to show that after the filing of exceptions to the report of the commissioners, the provisions of G.S. 40-19 were complied with.

The respondents, in their commendable zeal to protect their interests, say, among other things, in their "appeal entries":

> "WHEREFORE, these replying respondents do object and except to the Report of the Commissioners herein and appeal from same to the Superior Court of Beaufort County and demand a Jury Trial, and do further reiterate their Pleas-in-Bar heretofore filed by them in said cause and demand a hearing on the same before any further matters are heard and determined on the Report of said Commissioners."

[7] The case was then, insofar as the record before us reveals, transferred to the superior court. The attempted appeal in this case from the "Report of the Commissioners" by the respondents was

premature. The statute, G.S. 40-19, confers the right of appeal, *after a determination by the court* of the exceptions properly filed, but does not give the right of appeal prior to a determination by the clerk.

[8] The record does not reveal how this matter appeared upon the court calendar for trial at the 3 November 1969 Civil Session of Superior Court of Beaufort County, but it did appear thereon. The petitioner made a motion to continue which was denied by the court. We think that under the circumstances of this case, the trial judge should have conducted a pretrial conference, and these deficiencies would probably have become apparent to the court. This is supported by the fact that upon the case being called for trial, the attorneys for respondents "made a motion that there were questions of fact concerning petitioner's right to condemn which had first to be determined by the court." It appears from the record that the parties had different concepts of what phase of the matter they were going to try. This is evidenced by a portion of the judgment of Judge Parker in which he states:

> "The court being of the opinion that the replies of the respondents raised questions of fact concerning the petitioner's right to condemn, and particularly upon the allegations of Sections Six, Ten and Eleven of the petition, advised the parties that in the course of orderly procedure that there should be an adjudication of the questions of fact raised by the denial of these said allegations of the petitioner as a necessary first step in the determination of the cause.
>
> The court in its discretion then advised the respondents that he considered that they had the burden of going forward upon these questions of fact which were to be determined by the court. * * *"

In addition, Judge Parker found, without any support from this record other than an inference that he may have gathered from the fact that commissioners were appointed, that the defenses raised by the respondents were decided adversely to them and in favor of the petitioner by the Clerk of Superior Court of Beaufort County.

[7, 9] Petitioner attempts to raise the question as to whether the court committed error in failing to find that the respondents' property was an integral part of the Downtown Waterfront Urban Renewal Area, Project NCR 38. Petitioner argues that the Planning Commission had made a determination that it was an integral part thereof, and the court could not alter such findings unless it was al-

leged and proven that the findings of the Planning Commission were arbitrary and capricious. As has already been pointed out, because of the failure of the clerk to rule upon matters in controversy raised in the pleadings; the failure of the clerk to act on the report of the commissioners and the exceptions thereto; and another procedural irregularities stemming therefrom, the appeal to the superior court was premature. Therefore, the question which petitioner attempts to raise in this court is not properly presented. There were no findings by the clerk on the controverted allegations of the petition. For the same reason, the questions with respect to the hearing of evidence in the superior court on petitioner's right to condemn and whether the superior court committed error in its conclusions of law based on the findings of fact are not properly presented on this appeal.

The order of the clerk of superior court dated 1 May 1969, appointing commissioners herein, the report of the commissioners dated 28 July 1969, and the judgment of the superior court dated 7 November 1969 are all vacated, and this cause is remanded to the Superior Court of Beaufort County. The presiding judge or the judge holding superior court in Beaufort County is directed to remand this matter to the Clerk of Superior Court of Beaufort County in order that he may proceed herein as provided by law.

Error and remanded.

MORRIS and GRAHAM, JJ., concur.

LUCILLE F. MUSGRAVE AND GALE M. LANNING, ADMINISTRATRIX OF CLYDE WILSON MUSGRAVE v. MUTUAL SAVINGS AND LOAN ASSOCIATION

No. 7022SC272

(Filed 24 June 1970)

1. Rules of Civil Procedure § 50— motion for judgment notwithstanding the verdict

The availability of a motion for judgment notwithstanding the verdict under G.S. 1A-1, Rule 50(b), constitutes an innovation in the civil procedure of this State, since a motion for nonsuit made under the provisions of former G.S. 1-183 could not be allowed after verdict for insufficiency of the evidence.

2. Rules of Civil Procedure § 50— granting of motion for judgment notwithstanding the verdict

The granting of a motion for judgment notwithstanding the verdict constitutes an adjudication on the merits of the case.

3. Rules of Civil Procedure § 50— appeal from judgment notwithstanding verdict — failure of parties to preserve right to new trial

On appeal from entry of judgment for defendant notwithstanding verdict for plaintiff, a new trial cannot be granted where defendant did not move in the alternative for a new trial pursuant to Rule 50(c)(1), and plaintiffs did not move for a new trial under Rule 50(c)(2); if the appellate court finds that the trial court properly directed judgment for defendant notwithstanding the jury verdict, the judgment of the trial court will stand, but if the appellate court finds such judgment was improperly directed, the jury's verdict will be reinstated and judgment entered thereon.

4. Rules of Civil Procedure § 50— motion for judgment notwithstanding verdict — sufficiency and consideration of evidence

In determining the sufficiency of the evidence to withstand a motion by defendant for judgment notwithstanding the verdict, the same principles apply that prevailed under the former procedure with respect to the sufficiency of evidence to withstand a motion for nonsuit under G.S. 1-183, that is, all evidence which supports plaintiffs' claim must be taken as true and considered in the light most favorable to plaintiffs, giving them the benefit of every reasonable inference which may legitimately be drawn therefrom, and with contradictions, conflicts and inconsistencies being resolved in plaintiffs' favor.

5. Insurance § 11— sufficiency of evidence of undertaking to procure life insurance

Plaintiff's evidence was sufficient to support a jury finding that defendant savings and loan association, through its agent, undertook to procure a policy of insurance on the life of its debtor, now deceased, to cover the unpaid balance of a loan, where it tended to show that all of the papers signed in connection with the loan transaction were white except for one which was colored, that all forms used by defendant in connection with its loans were white, that the insurance application forms were blue, that deceased debtor was asked his date of birth while defendant's agent filled in the various forms, that only the insurance application required that the date of birth be given, that after the death of the debtor defendant's agent went immediately to defendant's office to determine whether the insurance papers had been returned, that defendant customarily made insurance available to its customers, and that deceased debtor had obtained insurance through defendant's agent on six previous occasions to cover loans continuously owed over a period of 25 years.

6. Customs and Usages— admissibility in evidence

While usage and custom cannot take the place of a contract, a person's custom or practice of doing a certain thing in a certain way is admissible as evidence that he did the same thing in the same way on a particular occasion in issue.

7. Insurance § 2— broker as agent of insured

An insurance agent acts as agent of the insured in negotiating for a policy and owes a duty to his principal to exercise reasonable skill, care and diligence in effecting the insurance.

8. Insurance §§ 2, 11— liability of agent for failure to procure policy

If an insurance broker or agent is unable to procure insurance which he has undertaken to provide, it is his duty to give timely notice to the proposed insured, who may then take the necessary steps to secure the insurance elsewhere or otherwise protect himself; a broker who fails to give such notice renders himself liable for the resulting damage which his client suffered from lack of insurance.

9. Insurance § 11— failure to give notice that policy had not been obtained — negligence — sufficiency of evidence

Plaintiffs' evidence was sufficient to be submitted to the jury on the issue of the negligence of defendant savings and loan association in failing to give its debtor, now deceased, notice that a policy of life insurance which defendant's agent had undertaken to procure for him had not in fact been obtained.

APPEAL by plaintiffs from *Seay, J.*, January 1970 Civil Session, DAVIDSON County Superior Court.

The plaintiff Lucille F. Musgrave (Mrs. Musgrave) is the widow of Clyde Wilson Musgrave (Mr. Musgrave) who died 7 July 1966. The plaintiff Gale M. Lanning is the Administratrix of the decedent's estate.

On 27 December 1966, plaintiffs instituted this action and in their amended complaint, filed 12 July 1968 with leave of the court, they allege as follows: Plaintiff Mrs. Musgrave and her husband obtained a $5,000 loan from defendant on 5 May 1966 and executed as security therefor a note and deed of trust on certain realty. As part of the transaction, defendant, acting through its agents, agreed to procure a policy of insurance on the life of Mr. Musgrave, which, upon the death of Mr. Musgrave, would pay the unpaid balance of the note securing the loan. Defendant negligently failed to procure the insurance policy, and negligently failed to notify Mr. and Mrs. Musgrave that the insurance had not been obtained. As a result of the failure to secure the policy of insurance defendant is indebted to plaintiffs in the amount of $4,913.79, which is the amount owed on the loan at the time of Mr. Musgrave's death.

As a second cause of action, plaintiffs allege in the amended complaint that by failing to procure the policy of insurance as hereinabove set out, defendant breached his contract with Mr. and Mrs. Musgrave.

The first trial of the case ended in a mistrial. See *Musgrave v. Savings and Loan Assoc.*, 5 N.C. App. 439, 168 S.E. 2d 497.

Upon retrial of the case, plaintiffs offered evidence tending to show as follows: Mr. and Mrs. Musgrave were married in 1934. He died on 7 July 1966 as a result of a fire at his place of employment. During the period of their marriage, Mr. and Mrs. Musgrave obtained a number of loans from defendant. The first loan was on 4 December 1941 when they moved into a new home. Subsequent loans were obtained on 21 January 1946; 18 April 1952; 5 March 1954; 16 April 1955; and 28 September 1955. When each of these loans was obtained, Mr. and Mrs. Musgrave dealt with Agnes C. Everhart, secretary of defendant. Mrs. Everhart was authorized to act for defendant in accepting applications for life insurance policies. Mr. Musgrave obtained a policy of life insurance in an amount sufficient to cover the unpaid balance of each of the loans obtained prior to 5 May 1966. The procedure followed by Mrs. Everhart when obtaining insurance applications was to fill in the application at the time the loan was closed, writing in the answers provided by the borrower. The borrower would then sign the application form. The questions dealt with health and age, and included the birth date of the borrower. No copy of the application was made, and after it was filled out, it was placed in an envelope and then put in the mail basket of defendant. No record was made of the application, and no covering letter was sent with it. No follow-up procedure was used to see what action was taken on the application. If a policy was issued by the life insurance company in response to the application, the policy was sent to defendant, who, through its agents, delivered it to the borrower. If no policy was issued and the borrower didn't contact Mrs. Everhart about the insurance, nothing more was done about it.

When Mr. and Mrs. Musgrave went to defendant's office on 5 May 1966 to obtain a loan they dealt with Mrs. Everhart, as they had on all past occasions. While seated at Mrs. Everhart's desk they signed various papers at her direction. All of the papers which were signed were white except one which Mrs. Musgrave recalled was some color other than white. All of the forms used by defendant in connection with its loans and which were required to be signed by the borrowers were white. The forms provided by Security Life and Trust Company for making applications for life insurance policies were blue. Mrs. Musgrave further recalled that Mrs. Everhart asked Mr. Musgrave his age and his birth date. None of the loan papers required the borrower to give his birth date. Only the life insurance application required this information.

After the loan was closed Mr. and Mrs. Musgrave received no word by mail relating to any insurance policy until 5 July 1966 when Mr. Musgrave was in the hospital in critical condition. On that date Mr. Musgrave received a letter from Security Life and Trust Company cancelling the life insurance policy which he had carried on a loan obtained in 1955, the balance of which had been paid with a portion of the proceeds from the 5 May 1966 loan. When Mr. Musgrave died two days later, Mrs. Musgrave went to defendant's office and showed the letter to Mrs. Everhart, saying, "Miss Agnes, is it true?" Mrs. Everhart replied, "I'm afraid it is, Lucille. Just as quick as I heard about the accident I came up here to see if his insurance papers had come back yet." Mrs. Everhart made further statements that she had looked to see if a policy had come back, or if any papers or application or anything had been returned by the life insurance company. On cross-examination Mrs. Everhart denied that she had taken an application for life insurance on Mr. Musgrave's life in connection with the loan on 5 May 1966. No policy of insurance was in force at the time of Mr. Musgrave's death.

At the close of plaintiffs' evidence, and again at the close of all the evidence, defendant made a motion for a directed verdict pursuant to G.S. 1A-1, Rule 50(a). The court expressly reserved ruling on both motions and submitted to the jury three issues which were answered in plaintiffs' favor as follows:

"1. Did Clyde Wilson Musgrave make application to Agnes C. Everhart, agent for Mutual Savings & Loan Association, for procurement of a policy of life insurance by signing an application form?

ANSWER: Yes

2. Was Agnes C. Everhart negligent as alleged in the complaint?

ANSWER: Yes

3. What amount of damages, if any, are plaintiffs entitled to recover as a result of the negligence of the defendant?

ANSWER: $4,913.79"

Defendant, in apt time, moved to set the verdict aside and to have judgment entered in its favor notwithstanding the verdict pursuant to G.S. 1A-1, Rule 50(b). The court allowed this motion and ordered, adjudged and decreed:

"1. That the plaintiffs' evidence is not legally sufficient to entitle plaintiffs to recover judgment as against the defendant on

plaintiffs' alleged First Cause of Action of the amended complaint.

2. That the plaintiffs' evidence is not legally sufficient to entitle plaintiffs to recover judgment as against the defendant on plaintiffs' alleged Second Cause of Action of the amended complaint.

3. That plaintiff has [sic] not proved any claim upon which any relief can be granted."

Plaintiffs excepted to this judgment and appealed.

Walser, Brinkley, Walser & McGirt by Walter Brinkley for plaintiff appellants.

J. Lee Wilson and Ned A. Beeker for defendant appellee.

GRAHAM, J.

Plaintiffs only assignment of error is to the entry of judgment for defendant notwithstanding the jury verdict for plaintiffs. The judgment was entered 12 January 1970 and undoubtedly represents one of the early instances where the provisions of Rule 50 of the Rules of Civil Procedure (G.S. 1A-1, effective 1 January 1970) were applied. The provisions of Rule 50 pertinent to the appeal are as follows:

"(b) *Motion for judgment notwithstanding the verdict.*—

(1) 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. . . .

* * *

(c) *Motion for judgment notwithstanding the verdict — conditional rulings on grant of motion.* —

(1) If the motion for judgment notwithstanding the verdict, provided for in section (b) of this rule, is granted, the court shall also rule on the motion for new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial. If the motion for new trial is thus conditionally granted, the order thereon does not affect the finality of the judgment. In case the motion for new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate division has otherwise ordered. In case the motion for new trial has been conditionally denied, the appellee on appeal may assert error in that denial; and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate division.

(2) The party whose verdict has been set aside on motion for judgment notwithstanding the verdict may serve a motion for a new trial pursuant to Rule 59 not later than 10 days after entry of the judgment notwithstanding the verdict."

(See also Rule 41 for the procedure to be followed when the trial is by the court without a jury).

[1-3] The availability of a motion for a judgment notwithstanding the verdict constitutes an innovation in the civil procedure of this State. Formerly, a motion for nonsuit made under the provisions of former G.S. 1-183 could not be allowed after verdict for insufficiency of the evidence. *Jones v. Insurance Co.*, 210 N.C. 559, 187 S.E. 769. The granting of a motion for judgment notwithstanding the verdict constitutes an adjudication on the merits of a case. Here, defendant did not move in the alternative for a new trial pursuant to Rule 50(c)(1). Neither have plaintiffs, under the provisions of Rule 50(c)(2), moved for a new trial. Consequently, the issue before this court is: Did the trial court properly direct judg-

ment for defendant notwithstanding the jury verdict on the grounds set out in its judgment; namely, that the evidence was legally insufficient to permit plaintiffs to recover under any claim asserted? If we answer in the affirmative, the judgment of the trial court will stand. If we answer in the negative, the judgment will be reversed and it will be ordered that the verdict be reinstated and that judgment be entered thereon. In either event, there can be no right to a new trial, for, as previously pointed out, neither party has preserved such a right by proper motion.

[4] In determining the sufficiency of the evidence, we are guided by the same principles that prevailed under our former procedure with respect to the sufficiency of evidence to withstand a motion for nonsuit under G.S. 1-183. See *Dumas v. MacLean,* 404 F. 2d 1062 (1st Cir. 1968). All evidence which supports plaintiffs' claim must be taken as true and considered in the light most favorable to plaintiffs, giving them the benefit of every reasonable inference which may legitimately be drawn therefrom, and with contradictions, conflicts and inconsistencies being resolved in plaintiffs' favor. *Bowen v. Gardner,* 275 N.C. 363, 168 S.E. 2d 47, and cases therein cited.

[5, 6] With these principles in mind we first examine the evidence with respect to whether it is sufficient to support a jury finding under the first issue that defendant, through its agent Mrs. Everhart, actually undertook to obtain a policy of insurance on the life of Mr. Musgrave by taking his application for it. While there is no direct evidence on this issue, there is evidence from which reasonable inferences may be drawn that an application for insurance was obtained from Mr. Musgrave as alleged by plaintiffs. Mrs. Musgrave was present when the loan was closed. She testified that all of the papers signed at that time were white except for one which was colored. Mr. Musgrave was asked his date of birth while Mrs. Everhart filled in the various forms. The uncontradicted evidence is that all forms used by defendant in connection with its loans were white. The insurance application forms were blue. Only the insurance application required that a date of birth be given. Mrs. Everhart stated that after the death of Mr. Musgrave she went immediately to defendant's office to determine whether the insurance papers had been returned. Defendant customarily made insurance available to its customers, and Mr. Musgrave had obtained insurance through defendant's agent, Mrs. Everhart, on six previous occasions to cover loans continuously owed over a period of twenty-five years. It is true that usage and custom cannot take the place of a contract.

Edwards v. Power Co., 193 N.C. 780, 138 S.E. 131; 25 C.J.S., Customs & Usages, § 20. However, a person's custom or practice of doing a certain thing in a certain way is admissible as evidence that he did the same thing in the same way on a particular occasion in issue. Stansbury, N.C. Evidence 2d, § 95.

It may well be that none of the above factors, if considered separately, would be sufficient to take the case to the jury on the question of defendant's undertaking to procure insurance for Mr. Musgrave. When considered together, however, it is our opinion that they are sufficient to support the jury's finding on this issue.

[9] The remaining question is whether there was sufficient evidence of negligence on the part of defendant to support the jury's finding as to the second issue. Defendant has presented no argument on this question, having relied completely upon its contention that the evidence was insufficient to permit a finding for plaintiffs on the first issue.

[7, 8] The general rule is that an insurance agent acts as agent of the insured in negotiating for a policy, and that he owes a duty to his principal to exercise reasonable skill, care and diligence in effecting the insurance. *Elam v. Realty Co.*, 182 N.C. 599, 109 S.E. 632; 43 Am. Jur. 2d, Insurance, § 174, p. 230; Annot., 29 A.L.R. 2d 171 (1953). Although there is some authority to the effect that one who gratuitously undertakes to procure insurance for another is not liable for his omission to do so, the general rule is that the undertaking in itself imposes a duty. 43 Am. Jur. 2d, Insurance, § 174, p. 231. "[T]he better considered decisions on the subject are to the effect that while the agent or broker in question was not obligated to assume the duty of procuring the policy, when he did so, the law imposed upon him the duty of performance in the exercise of ordinary care, . . ." *Elam v. Realty Co., supra,* at p. 602. "If a broker or agent is unable to procure the insurance he has undertaken to provide, he impliedly undertakes — and it is his duty — to give timely notice to his customer, the proposed insured, who may then take the necessary steps to secure the insurance elsewhere or otherwise protect himself. [Citations omitted]. When, under these circumstances, the broker fails to give such notice, he renders himself liable for the resulting damage which his client suffered from lack of insurance. 44 C.J.S., Insurance, § 172 (1945)." *Wiles v. Millinax,* 267 N.C. 392, 148 S.E. 2d 229.

[9] No insurance was procured for Mr. Musgrave by defendant and he was not given timely notice of this fact. The question of defendant's negligence was therefore properly for the jury.

The judgment entered for defendant notwithstanding the verdict is therefore reversed and it is ordered that the jury verdict be reinstated and that judgment be entered thereon.

Reversed and remanded.

MALLARD, C.J., and MORRIS, J., concur.

MAGNOLIA APARTMENTS, INC. v. P. HUBER HANES, JR.

No. 7021SC339

(Filed 24 June 1970)

1. **Waters and Watercourses § 1— saturation of soil — diversion of surface waters — sufficiency of evidence**

Plaintiff landowner whose apartment buildings and parking lot had become settled by the saturation of the underlying soil with water failed to offer sufficient evidence to support its allegations that defendant, through the grading of his property, diverted surface waters from their natural flow and caused them to seep through the ground, thereby saturating the soil on plaintiff's land; plaintiff's evidence that the fill work on defendant's property increased the flow of water toward plaintiff's land does not justify recovery, where the water flowed to the same place as before the fill work.

2. **Waters and Watercourses § 1— increase in flow of water**

Although neither a corporation nor an individual can direct water from its natural course so as to damage another, they may increase and accelerate its flow.

3. **Waters and Watercourses § 1— increase in flow of water — duty of lower estates**

It is the duty of the owners of the lower estates to receive and allow passage of the increased flow of water from the higher estates so long as the flow has not been diverted from its natural course.

4. **Waters and Watercourses § 1— saturation of soil — accumulation of water on defendant's land — stopping up of artificial conduits**

Plaintiff landowner whose apartment buildings and parking lot had become settled by the saturation of the underlying soil with water failed to prove that its loss was occasioned by the large accumulation of water on the defendant's property and that this accumulation resulted from the stopping up of artificial conduits, none of which were located on defendant's land, by fill material used by defendant on his land.

APPEAL by plaintiff from Order of *Exum, J.*, at the 5 January 1970 Session of FORSYTH County Superior Court.

Plaintiff instituted this civil action on 30 January 1968, alleging in its complaint that defendant had wrongfully diverted surface water from his land onto plaintiff's land, causing damage to an apartment building and parking lot located thereon. Defendant answered denying that there had been any diversion, and alleging that the damage complained of, if it had occurred at all, resulted from plaintiff's own negligence.

The evidence presented shows that in 1959 plaintiff acquired a tract of land on the north side of Northwest Boulevard near the intersection of Northwest Boulevard and West First Street in Winston-Salem. Three apartment buildings, which had been constructed prior to 1959, were located on the land. The land is bordered on the north by a Southern Railway Systems, Inc. (Railway) right-of-way some 100 feet wide. A railroad track elevated some 30 to 40 feet and running generally east and west is maintained on the right-of-way.

A tract of land of approximately 16½ acres, acquired by defendant in June of 1964, lies immediately north of the railway right-of-way. Defendant's tract, triangular in shape, is bordered along the west margin by Miller Street, and along the east margin by West First Street, with the railway right-of-way as its southern boundary. The property slopes generally from its apex in the north toward plaintiff's property on the south. The higher elevations are on the north central portions of the acreage and the lower elevations are at the southern margin which adjoins the railway right-of-way. Thus, according to the natural lay of defendant's land, the tract slopes generally southwardly from West First Street to the railway right-of-way. A 24-inch cast-iron drain pipe runs underneath the railroad embankment to plaintiff's land for the purpose of "carrying off" the surface water flowing naturally toward the right-of-way from defendant's property. Before the apartments were constructed on the property purchased by plaintiff, a natural drainage ditch or gulley carried the surface water from the drainage pipe across the property.

In order to construct the apartment buildings, extensive filling was necessary. The filling covered the lower, or southerly, draining end of the 24-inch drain pipe. A 15-inch terra cotta pipe was connected to the southern end of the 24-inch pipe and this 15-inch pipe was carried through the filled land on the tract now owned by plaintiff and connected to large storm drains south of the property. Apartment Building No. 1 was then constructed over the 15-inch pipe. All of this work was done by plaintiff's predecessor in title.

In 1963 plaintiff added more fill dirt under Apartment Building No. 1 and tampered it with a hydraulic tamper in an effort to correct certain sagging and settling about the eastern end of Apartment Building No. 1 and to prevent future settling. I-beams were then installed and 25 cubic yards of concrete, reinforced with steel, was poured under the building on top of the tampered soil. At that time, the dirt under the building was dry, and the 15-inch terra cotta pipe was intact.

In late 1964 and early 1965, plaintiff observed water coming through the brick and block retaining wall at the base of the railroad right-of-way. The asphalt parking lot between Apartment Buildings Nos. 1 and 2 began to deteriorate with small water geysers appearing in the cracks that formed on the lot. A concrete walk in the vicinity collapsed. Upon excavation, a large void was found very near the eastern end of Apartment Building No. 1, and the ground in the entire area was saturated with water. Several witnesses reported seeing the 15-inch terra cotta pipe exposed in two places. A 4 to 6 foot section between the two exposed ends was missing. Witnesses also noted that the concrete placed under Apartment Building No. 1 in 1963 had a 2 to 3 foot void under it, and the soil underneath the void was saturated with water. Plaintiff installed jacks under the building and jacked the building to its original position. More concrete was poured to set the jacks. Mr. George Sparks, a grading and draining contractor, was employed by plaintiff in an attempt to remedy the situation. He constructed a new storm drainage system around Apartment Building No. 1, placing a manhole at the southern end of the 24-inch pipe, running a new 36-inch pipe from there to another manhole, and then out to the storm drains south of plaintiff's tract on Northwest Boulevard.

Sparks had also done some fill work on defendant's tract of land in late 1964 and the early spring of 1965. Prior to this time, defendant's tract had trees and a heavy growth of vines, grass, weeds, and other vegetation growing upon it. Most of the timber and much of the other vegetation was completely removed from the tract during the filling process. The surface water runoff was increased by the loss of vegetation, and more surface water started accumulating on the southern border of defendant's property in the area where the 24-inch cast-iron pipe ran under the railroad right-of-way. Before the fill work was begun, the area immediately surrounding the northern intake of the 24-inch pipe had been damp and marshy. After the fill work, water collected there in larger amounts. This accumulation amounted to as much as an acre in size with depths at times of from 5 to 7 feet.

There was testimony that this large accumulation of water resulted because much of the flow of water was not being carried through the artificial conduits to the storm drains south of plaintiff's property. In 1965, when it was discovered that the terra cotta pipe was broken, it was also discovered that it was completely stopped up with dirt, mud and broken pipe.

Several expert witnesses were called to verify the soil conditions found under the plaintiff's apartment building. They gave their opinions as to how the accumulated water on defendant's property had created a "flow" to plaintiff's property and the reasons why this flow saturated the soil and caused the settling of the building and parking lot. The testimony of William I. Bigger, a consulting engineer, is illustrative. He testified that in his opinion the accumulation of water on defendant's land north of the elevated railroad could have caused the saturated condition beneath plaintiff's parking lot and the other conditions about which plaintiff complains. He based his opinion on the following theory: The soil on both sides of the railroad contains high degrees of porous silts and sands. When materials such as these have water impounded upon them on one side of an embankment higher than the ground level or water level on the lower side, the weight of the impounded water pushes lower lying levels of water into the pores of the silts and sands and causes a "flow net" or "flow lines" to develop through the soil on both sides of the embankment and underneath or through the embankment itself. The pressure of the water on the higher side, through pressure of the flow net, creates pressure on the water on the lower side and causes it to rise. When the upward force of the water on the lower side reaches a point where it is greater than the downward force of the soil over it a condition results known as "boiling" and the water actually bubbles out of the ground, occasionally having the appearance of a small geyser.

At a pretrial conference, both parties entered into certain stipulations and issues to be determined were submitted by both parties, both agreeing that the first issue would be the question of wrongful diversion of surface waters upon defendant's land.

At the end of the plaintiff's evidence, defendant's motion for a directed verdict was granted. Plaintiff appealed.

Randolph and Randolph by Clyde C. Randolph, Jr., for plaintiff appellant.

Deal, Hutchins and Minor by John M. Minor and Philip B. Whiting for defendant appellee.

GRAHAM, J.

The only question on this appeal is whether the evidence, taken in the light most favorable to plaintiff and giving to it the benefit of every reasonable inference which can be drawn therefrom was sufficient to withstand defendant's motion for a directed verdict. (See *Musgrave v. Mutual Savings and Loan Association,* filed in this court on this date).

[1] The theory of plaintiff's complaint is that defendant, through the grading of his property, diverted surface waters from their natural flow and caused them to seep through the ground at the railway right-of-way, saturating the soil on plaintiff's land and causing the damages alleged. The parties do not disagree over the general principle that owners of land on the higher level cannot lawfully divert the surface water or interfere with its natural flow by artificial obstruction or device so as to injure the premises of a servient owner. *Bradley v. Texaco, Inc.,* 7 N.C. App. 300, 172 S.E. 2d 87, and cases therein cited. However, we find no evidence here that there was a diversion of surface water. It is true that the fill work on defendant's property increased the flow of water toward plaintiff's land, but the water flowing across defendant's land after the fill work flowed to the same place that the water flowed before the fill work. The testimony of George Sparks clearly established this fact and there was no evidence to the contrary. He stated:

> "There has been no grading on the 16.5 acres. All we have done is fill. Before we did anything, the rain which fell on this property went under the railroad. And that means the area up at the apex, where Miller and First came along together, the rain which fell on it in the First Street area, all along up Miller street, *all the rain that fell on that 16.5 acre property, all the rain that fell on that property was funneled and drained through the 24-inch line.*
>
> Before we did any work out there on the Hanes property on the railroad side, they had a drainage come in from each way, and the drainage from First Street all of it settled right in that area at the 24-inch line and on the Hanes property. And that was a marshy area. You take you have got a drain coming from Miller Street that goes in there, on the same side of the 16 acres we are talking about, and then you also got a drain, a storm drain system, came from First Street back in there.

All draining water right down towards this 24-inch line. And that created a marshy area right at the mouth of the 24-inch line. It was that way when I started working on it. Nor many years back, I can't state that, but it was that way when I started working on it in 1964. It is labeled 'marshy' in the other diagram. The Hanes property formed sort of a dropping funnel from all sides down towards this 24-inch line.

* * *

I have shown there by my arrows on the other diagram that the drainage from the intersection of Miller Street and the railroad, in the southwestern corner of the 16 acre tract, *that drainage, before I did anything to the property, was down toward, and in the direction of, the 24-inch line under the railroad.* And the drainage from the corner, or the intersection of First Street and the railroad, in the southeastern corner, was in a westerly direction toward the 24-inch line. And it is still there yet, and anybody can look at it." (Emphasis added).

[2] It is well established that while neither a corporation nor an individual can divert water from its natural course so as to damage another, they may increase and accelerate its flow. *Rice v. Railroad,* 130 N.C. 375, 41 S.E. 1031; *Davis v. Cahoon,* 5 N.C. App. 46, 168 S.E. 2d 70. In the case of *Davis v. R. R.,* 227 N.C. 561, 42 S.E. 2d 905, we find the following at pages 565, 566:

"'. . . As long as the drainage results in carrying the water along the natural course the servient proprietor may not complain, even though natural barriers on the higher land have been cut down and the flow of water both accelerated and increased. Were the rule otherwise, there would be no method by which any one owner could improve his land by the construction of ditches and drains which would carry the drainage upon another's property, because the purpose of such improvement in every instance is to hasten and increase the flow of water, and this object is only attained by the removal of natural barriers.' *Fenton & Thompson R. Co. v. Adams,* 211 Ill., 201, 77 N.E., 531, 535.

If the owner of adjacent property on a high level were not permitted to prepare his property for any legitimate purpose to which it might be put by leveling it or clearing it or other improvement, on the theory that he had no right to accelerate the flow of water therefrom but must leave it as an absorbent to retard its flow, it would deprive such owner of the use of his property."

[1] It is our opinion, and we so hold, that plaintiff's evidence was insufficient to establish a diversion of surface water by defendant as alleged in the complaint.

However, plaintiff now asserts a right of recovery under a theory different from that arising on the pleadings.

[3, 4] It is now argued that the cause of plaintiff's damage was the accumulation of the large volume of water on defendant's 16.5 acre tract of land, and substantial authority is cited to support the general principle that every person may make reasonable use of his own property but may not use it in a manner which injures others. Conceding *arguendo* that under the Rules of Civil Procedure (G.S. 1A-1 *et seq.*), effective 1 January 1970, defendant was not entitled to a directed verdict on the grounds of fatal variance between plaintiff's allegations and proof (See Rule 15(b)), we are nevertheless of the opinion that the evidence fails to support a right of recovery under any theory. For instance, there was no evidence to show that the large accumulation of water was caused by any action on the part of defendant. It is true that the flow of water accelerated after the fill work was done on defendant's land, and it was after the work had been completed when the large accumulations of water were noticed. But defendant had the right to accelerate the flow, and it was the duty of the owners of the lower estates to receive and allow passage of the increased flow of water so long as it had not been diverted from its natural course. In the case of *Mizzell v. McGowan*, 120 N.C. 134, 26 S.E. 783, plaintiff sought recovery for flood damages to his property. The flooding was allegedly caused when defendants constructed drainage canals over their property, causing the waters to flow from their land with more force and rapidity than the natural flow. The Supreme Court held that it was error for the trial court to refuse to give unqualified jury instructions to the effect that defendants had the right to make canals for the purpose of draining their land of the water naturally falling thereon, although in so doing the flow of water was increased on plaintiff's land. In speaking of the duties of a servient property owner the court stated:

> "The surface of the earth is naturally uneven, with inequality of elevation. The upper and lower holdings are taken with a knowledge of these natural conditions, and the privilege or easement of the upper tenant to carry off the surface water in its natural course, under reasonable limitations, and the subserviency of the lower tenant to this easement are the natural incidents to the ownership of the soil. The lower surface is doomed by nature to bear this servitude to the superior and

must receive the water that falls on and flows from the latter." (Emphasis added).

The accumulation of the large amount of water, according to any interpretation of the evidence, resulted from the inability of the artificial conduits, none of which was located on defendant's land, to receive and allow passage of the water. Plaintiff contends that this inability resulted from the fill material used by defendant washing into and stopping up the 24-inch pipe and the 15-inch terra cotta pipe. The only evidence directly relating to the cause of this stoppage was that of witness Sparks. He stated:

"At the time I cut into this 24-inch pipe underneath the railroad, there was mud in the pipe. It was completely filled up, blocked at this end.

* * *

When this 24-inch line was blocked in here (the witness pointed to the eastern portion of the 24-inch line), it just backed the water and the settlements all the way through the line. It couldn't drain out because the 15-inch line was broke and the dirt fell in all the way through and blocked the line."

If, as plaintiff's witness Sparks testified, the breakage in the terra cotta pipe caused the stoppage and the resulting "ponding" of water on defendant's property, defendant cannot be held responsible, absent a showing that in some manner he caused the terra cotta pipe to break. There is no such showing.

Affirmed.

MALLARD, C.J., and MORRIS, J., concur.

STATE OF NORTH CAROLINA v. FRANK LEVITT BASDEN

No. 7018SC344

(Filed 24 June 1970)

1. Arrest and Bail § 3— arrest without warrant — armed robbery — lawfulness of arrest

The entry of police officers into the house in which the defendant and his companions were hiding, and the arrest without warrant of the occupants therein for the offense of armed robbery, *held* proper and lawful, where (1) the felony of armed robbery had been committed at an ABC

store, (2) within a few minutes after the robbery the officers discovered in the driveway of the house the automobile which they reasonably believed had been used in the robbery, (3) all curtains on the windows of the house were drawn, and (4) the occupants of the house failed to respond to the officers' knock at the front door. G.S. 15-41(2), G.S. 15-44.

2. Arrest and Bail § 3— arrest without warrant — lawfulness of arrest

The arrest without warrant of the defendant for armed robbery, the defendant having been discovered hiding in the attic of a house, *held* lawful where the discovery and arrest of the defendant occurred after the owner of the house had admitted the officers by the front door. G.S. 15-41(2).

3. Searches and Seizures § 1— search incident to valid arrest

The warrantless search of the defendant's person which was made by officers after the defendant's lawful arrest and which resulted in the discovery of money taken from an ABC store, *held* incident to a valid arrest and came within the constitutional limitations for a valid warrantless search.

4. Criminal Law § 77— statement made during the search of defendant's person — admissibility

Defendant's statement to a police officer, made during a search of defendant's person, that the money taken from his right front pocket was "yours" and the money in the right rear pocket was "his," which statement was volunteered to the officer after defendant's arrest for armed robbery, *held* admissible on the trial of defendant for armed robbery.

5. Criminal Law § 84— objection to evidence obtained by search and seizure — procedure for admissibility

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.

6. Criminal Law § 84— voir dire into lawfulness of search — failure to make findings of fact

Failure of the trial court to make findings of fact following a *voir dire* hearing into the admissibility of evidence obtained by a warrantless search, *held* not fatal where there was no conflict in the evidence on the *voir dire*.

7. Criminal Law §§ 76, 84— voir dire — conflicting evidence — findings of fact

When conflicting evidence is offered at a *voir dire* hearing held to determine the admissibility of evidence, the trial judge must make findings of fact to show the basis of his rulings on the admissibility of the evidence offered.

APPEAL by defendant from *Collier, J.*, 17 November 1969 Session of GUILFORD Superior Court.

The defendant, Frank Levitt Basden (Basden), and Dwight Anthony White and Johnny Douglas Hunter, Jr., were charged in bills of indictment with the offense of armed robbery, a violation of G.S. 14-87. Basden pleaded not guilty. Testimony of the State's witnesses, including their accounts of what the defendant related to them, tends to establish the following factual setting for this case: On the morning of 28 October 1969 Basden was riding around in Greensboro, N. C., with Messrs. White and Hunter, together with Robert Carr and one Johnson. The five men decided to rob an ABC store. They parked Carr's black and white Chevrolet (title to which was later found to be registered in the name of Carr's father but which was being driven by Robert Carr) on the street in the vicinity of the residence of one Betty Jones and transferred to a white Buick convertible. A rifle was taken from the trunk of the Chevrolet and placed in the Buick. This was observed by Betty Jones, who promptly called the police, giving them the license number of the Buick and describing the suspicious circumstances which she had observed. Officer Pegram arrived and checked the parked Chevrolet. Meanwhile, the five men drove in the Buick to the ABC store at the Southgate Shopping Center, arriving about 11:00 a.m. Johnson and White went into the store while the others waited outside in the Buick. Johnson had a .38 pistol. Hunter later went inside with a .22 caliber rifle. The three men who entered the store ordered the store clerks at gunpoint to open the cash registers. They took cash from the registers and then all five men fled from the scene with the stolen currency and coins and rode in the white Buick convertible back to the parked Chevrolet, where they again switched cars, leaving the white Buick convertible parked. They then drove the Chevrolet to Carr's home in Greensboro, where the money was divided among the five participants in the robbery. Betty Jones had observed the black and white Chevrolet being driven away from the place it had been parked in the street near her home and again called officers.

Officers in the area had been alerted that the robbery had taken place and that the robbers had fled the scene of the robbery in a white Buick convertible. As a consequence of this information and the information given them by Betty Jones, the officers found the parked Buick and began searching for the black and white Chevrolet. Between 11:15 and 11:30 a.m., Detective Andrews spotted the Chevrolet in the driveway of Carr's residence, positively identifying it. He also noted that all windows at the residence were closed and all curtains were drawn. Some four police cars carrying officers arrived at the scene and Detective Andrews ordered the officers to

move in. Uniformed policemen and detectives went to the front of the house and knocked at the door. Sergeant Pegram, after observing the officers knocking at the front door, walked around to the back door, which was closed but not locked. He heard some scuffling inside, opened the door and entered the house. He first encountered Robert Carr, who was standing in the hallway adjacent to the kitchen and dining area. He informed Carr that he was under arrest. Carr, however, eluded Officer Pegram and got away down the hall and into the living room. Testimony indicates that Carr then went to the front door, opened it, and ran into the arms of the police on the front porch. In the meantime, Sergeant Pegram had come face to face with White, who was standing in the hall near a small table. Pegram immediately placed White under arrest.

Policemen entering the Carr residence then noticed that there were marks on the wall near the small table and under the trap door leading to the attic. The plywood panel in the ceiling was pushed back and a slight sound was heard in the attic. Officers warned the suspected occupants of the attic that tear gas would be used if they did not come down. At this time defendant Basden and Johnson appeared and were brought down through the trap door. A tear gas bomb was readied and the other occupant of the attic was ordered to come out. After tear gas was shot into the attic and after a small fire which the gas bomb started was put out, Hunter was found attempting to hide under some insulation near the end of the attic. A .38 pistol was also found in the attic.

Basden was placed under arrest immediately on being brought down from the attic. As he was being led from the residence, he was searched by Sergeant Booth of the Greensboro Police Department. Some $438.00 was removed from his right front pocket and $158.00 was removed from his right rear pocket. Basden told Officer Booth that the money in his right front pocket was "yours" and the money in the right rear pocket was "his." Basden had not been questioned at this point, and volunteered the remark as the money was being removed from his person during the initial search. At the time the officers entered the Carr residence they did not have a search warrant nor did they have a warrant for the arrest of any of the occupants.

Following his arrest Basden was taken to the Greensboro Police Department. After receiving *Miranda* warnings, he initially made one statement, only to change his statement after a short time in jail. He was again given the *Miranda* warnings before making the second statement. In his second statement Basden admitted to

Detective Hart substantially what has been summarized above. He declined to have a lawyer present during the period in which he made his admissions but requested that an attorney be provided for him at trial.

During the course of the trial, Hunter and White changed their pleas to guilty of armed robbery, and the jury was told to consider the case only as it applied to Basden. Basden offered no evidence at the trial and was found guilty of armed robbery. From prison sentence of 24 to 30 years imposed on the verdict, he appeals to this Court, assigning as error that facts discovered and evidence obtained as a result of an allegedly illegal search and seizure were admitted into evidence at his trial.

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

Joseph D. Franks, Jr., for defendant appellant.

PARKER, J.

[1] All of appellant's assignments of error are directed to the trial court's rulings overruling his objections to testimony of the police officers concerning who and what they discovered in the Carr residence, including particularly the testimony as to the discovery of the defendant himself therein, the discovery of the money in his pockets, and his incriminating statement concerning the money. All of the assignments of error are based upon appellant's contention that the search of the Carr residence, which was admittedly made without a search warrant, was illegal and that therefore all evidence obtained as a result of the search was inadmissible at the trial. The validity of this contention presents the sole question to be decided on this appeal.

G.S. 15-44 provides as follows:

> "If a felony or other infamous crime has been committed, or a dangerous wound has been given and there is reasonable ground to believe that the guilty person is concealed in a house, it shall be lawful for any sheriff, coroner, constable, or police officer, admittance having been demanded and denied, to break open the door and enter the house and arrest the person against whom there shall be such ground of belief."

G.S. 15-41(2) provides as follows:

> "A peace officer may without warrant arrest a person:"
>
> * * * * *

"(2) When the officer has reasonable ground to believe that the person to be arrested has committed a felony and will evade arrest if not immediately taken into custody."

In this case the crime of armed robbery, a felony, had been committed. Because of the alertness of the witness, Betty Jones, in observing and making prompt report to the police concerning the suspicious activities of defendant Basden and his companions, and because of the prompt and effective action of the police themselves, the Chevrolet car, which the police had reasonable grounds to believe had been used by the robbers, was located in the driveway to Carr's residence only a few minutes after the robbery occurred. All curtains on the residence windows were drawn. Under these circumstances the police clearly had reasonable ground to believe that the persons guilty of committing the felony were concealed in the house. Uniformed police officers, some of whom had arrived in front of the house in clearly marked police patrol cars, went to the front door and knocked, thereby seeking admittance. Failure of the occupants to respond to the request for admittance would constitute an effective denial of the request. Only after these events occurred did Sergeant Pegram proceed to the unlocked back door, open it, and enter the house. Thus, uncontradicted evidence in this case establishes the existence of all of the factors required by G.S. 15-44 for a lawful entry and arrest.

[2] Furthermore, the uncontradicted evidence establishes that the owner of the residence, Robert Carr, opened the front door from the inside, thereby admitting into the residence the officers who had been standing at the front door demanding admittance. It was after these officers had entered the residence through the door opened to them by the householder himself that the defendant Basden was found concealed in the attic. Under the circumstances of this case we hold that Basden's arrest was also lawful under G.S. 15-41(2).

[3, 4] The search of defendant's person made by the officers as he was being led from the residence and which resulted in discovery of the money in his pockets was incident to a valid arrest and came within the constitutional limitations for a valid warrantless search, set forth in *Chimel v. California*, 395 U.S. 752, 23 L. Ed. 2d 685, 89 S. Ct. 2034. The uncontradicted evidence discloses that the statement made by the defendant as to ownership of the money in his pockets was volunteered by him and was not made in response to any interrogation by the police. We find no error in the trial court's admissions of evidence, and all of appellant's assignments of error brought forward on this appeal are overruled.

Appellant has made no assignment of error to the admission of testimony as to his statement made to the police in which he fully confessed to his part in committing the robbery. This testimony was admitted only after the trial court had properly held a *voir dire* hearing from which the court found as facts that the defendant had been properly forewarned of his constitutional rights as required by *Miranda* and that defendant's statement had been voluntarily and understandingly made.

[5-7] 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. In the present case, when defendant objected to the testimony of the police officers concerning what they observed in the Carr residence, the trial court properly held a *voir dire* hearing in the absence of the jury relative to the circumstances under which the officers had entered the building. The court failed, however, to make findings of fact in this regard, but at the conclusion of the *voir dire* hearing merely overruled defendant's objections. When conflicting evidence is offered at a *voir dire* hearing held to determine the admissibility of evidence, the trial judge must make findings of fact to show the basis of his rulings on the admissibility of the evidence offered. *State v. Moore,* 275 N.C. 141, 166 S.E. 2d 53. While it is the better practice for the trial judge to make findings of fact and enter them in the record in all such cases, where, as here, there was no conflict in the evidence at the *voir dire,* the trial judge's failure to make findings of fact is not fatal. *State v. Bell,* 270 N.C. 25, 153 S.E. 2d 741; *State v. Keith,* 266 N.C. 263, 145 S.E. 2d 841; see also *State v. Williams,* 274 N.C. 328, 163 S.E. 2d 353.

In the defendant's trial and the judgment appealed from we find

No error.

CAMPBELL and VAUGHN, JJ., concur.

THOMAS WOODROW DIXON, PETITIONER v. STATE OF NORTH CAROLINA, RESPONDENT

No. 6918SC544

(Filed 24 June 1970)

Criminal Law §§ 23, 135; Homicide § 13— first-degree murder — guilty plea — coercive effect of death penalty

On post-conviction hearing to review the constitutionality of defendant's sentence of life imprisonment imposed upon his plea of guilty to first-degree murder, which plea was entered after defendant's attorney had explained to defendant the alternatives available to him and the possible consequences of those alternatives, the court properly found, upon sufficient evidence, that defendant's plea of guilty was freely and voluntarily entered; and there was no merit to defendant's argument that the death penalty constituted a coercive effect upon defendant so as to render his guilty plea under [former] G.S. 15-162.1 involuntary.

ON certiorari to review the judgment of *Shaw, J.*, at the 15 May 1969 Session of GUILFORD Superior Court.

The petitioner was tried in the Superior Court of Guilford County, North Carolina, in July 1962 on a valid bill of indictment charging him with first degree murder. After the State had presented its evidence and rested its case, the petitioner, under the provisions of G.S. 15-162.1, entered a plea of guilty to murder in the first degree, and the Honorable Frank M. Armstrong, Judge presiding, entered judgment that the defendant be imprisoned for life.

On 19 March 1969, in the Superior Court of Guilford County, the petitioner was afforded a plenary hearing before the Honorable Eugene G. Shaw who entered the following judgment:

"JUDGMENT DENYING PETITION IN POST CONVICTION HEARING CASE — FILED: 3/20/69

"This cause coming on to be heard, and being heard on this the 19th day of March, 1969, in the Guilford County Courthouse at a Session of the Superior Court of Guilford County by the undersigned Resident Judge of the Superior Court.

"The petitioner and his court-appointed attorney, Benjamin D. Haines, were present and each announced that they were ready for this trial. The Assistant Solicitor, E. Steve Schlosser, Jr., was present and announced his readiness for this trial.

"The Court had Mrs. Marie Hall, who is one of the official court reporters of Guilford County, present and had her take down the evidence to the end that she might, in due course, submit a transcript thereof to the Court. Mrs. Hall has now sub-

mitted a transcript of the evidence to the Court and, after having read and studied the contents of the evidence, the Court now renders its decision.

"The Court finds and determines that this is a proceeding instituted by the petitioner herein under Article 22 of Chapter 15 of the General Statutes known as the Post Conviction Hearing Act by filing a petition herein on the 21st day of January, 1969. The Solicitor of this Solicitorial District filed an answer on the 14th day of March, 1969. The petitioner's court-appointed attorney was appointed on February 20, 1969.

"The Court finds and determines that the petitioner, in his petition or at this trial, after being duly sworn, testified or stated and contended in open court that his legal or constitutional rights were denied or violated before, during and after his trial before the Honorable Frank M. Armstrong, Judge Presiding on the 9th day of July, 1962.

"The defendant contends that during his trial before Judge Frank M. Armstrong on the 9th day of July, 1962, his constitutional rights under the Fifth and Sixth Amendments of the Constitution of the United States were violated.

"The defendant further contends that G.S. 15-162.1, under which he was permitted to enter a plea of guilty of murder in the first degree, is unconstitutional.

"The Court asked the petitioner and his attorney if the petitioner asserts or contends that there were any other denials or violations of his constitutional or other legal rights before, during or after said trial, and the petitioner and his attorney each answered that there were none.

"The Court heard the petitioner and his attorney and heard and considered all the competent evidence offered by the petitioner and the State, and at the conclusion of the evidence the petitioner, his attorney and the Solicitor for the State each stated that they had no further or other evidence they desired the Court to consider.

"In consideration of all the competent evidence offered and considering the arguments of counsel, the Court finds the facts in this case to be as follows:

"FINDINGS OF FACT

"1. That the defendant petitioner was duly arraigned in the

Superior Court of Guilford County on a bill of indictment returned by the grand jury of Guilford County at the June 11, 1962, Criminal Session of the Superior Court of said County charging that the defendant petitioner, Thomas Woodrow Dixon, on the 12th day of May, 1962, with force and arms, at and in said County, feloniously, willfully, premeditatedly and deliberately, and of his malice aforethought, did kill and murder Edward Ford against the form of the statute in such case made and provided, and against the peace and dignity of the State.

"2. At his arraignment in the Superior Court the defendant entered a plea of not guilty of the crime charged in said bill of indictment and elected on said plea of not guilty to have the jury pass upon and determine his guilt or innocence.

"3. On July 9, 1962, Frank M. Armstrong, Judge Presiding over the Guilford Superior Court, issued over his hand an order and directed that fifty names be summoned to act as jurors or so many of them as may be necessary so to do in the trial of this action. Said order directed that such number of persons, freeholders, qualified to act as jurors from the body of said county to be and appear at the Courthouse in the City of Greensboro, Guilford County, North Carolina, at 10:00 A.M. on the 10th day of July, 1962, to the end that so many of them may be chosen, sworn and impaneled may act as jurors in said action. In due course, the Sheriff returned to the court a list containing the names of fifty jurors.

"4. That, from the panel of regular jurors drawn for the July 9, 1962, Criminal Session of the Superior Court of Guilford County and from the special venire of fifty jurors so drawn, the Solicitor for the State and counsel for the Defendant finally selected a panel of 12 jurors and one alternate juror to try the case.

"5. That the defendant petitioner was represented by Luke Wright and Karl N. Hill, Jr., who are able, capable and experienced lawyers of the Greensboro Bar and are men of great ability who were employed by the father of the defendant petitioner to represent said defendant petitioner and who did represent said defendant petitioner in an able and diligent manner after having had time to prepare and adequately and properly present said case for trial.

"6. That the State of North Carolina and the defendant petitioner proceeded with the selection of the jury which con-

sumed all of the first day of the trial and the State commenced its introduction which lasted until Thursday, July 12, 1962. At the Thursday session the defendant, together with his father, his wife and step-mother, had a conference with Mr. Hill and Mr. Wright in the lawyers' room and at that time the defendant petitioner expressed himself as not in favor of entering a plea of guilty of murder in the first degree. It appears from the transcript that the defendant would have been willing to enter a plea of guilty of murder in the second degree, but the Court had indicated that it would not accept the tender of such plea.

"Thereupon the trial continued and the State completed its evidence, at which time counsel asked the Court to indulge the defendant for a few minutes for a further conference with his counsel and his father, his wife and his step-mother. At that conference, Mr. Wright pointed out to the defendant petitioner that in his opinion the defendant was going to be convicted of something and there was some possibility that he could be convicted of murder in the first degree without any recommendation being made by the jury and the Judge would have to impose the death sentence. Mr. Wright also pointed out that the jury could convict the defendant of murder in the first degree and recommend mercy, in which event his punishment would be limited to life imprisonment. Mr. Wright also pointed out that the jury could convict the defendant petitioner of murder in the second degree, but Mr. Wright explained there was no guarantee of a second-degree verdict.

"Analyzing the effect of the two pleas of guilty of first-degree murder and second-degree murder, Mr. Wright then explained that if a plea of murder in the first degree was submitted to and accepted by the Court, the punishment would be limited to life imprisonment; that, as a matter of fact, if the defendant was of good behavior during his imprisonment he might look forward to a parole or release from prison in about ten years.

"Mr. Wright then explained that if a verdict of murder in the second degree should be returned it is probable that Judge Armstrong would impose a sentence of thirty years against the defendant, in which event, upon a showing of good behavior, the defendant might look forward to a parole or release from imprisonment in about seven and one-half years.

"According to Mr. Wright's analysis of contemplated judgment to be imposed by the Court, in either case it appeared that there was only a difference of two and one-half years between a plea

of guilty of murder in the first degree and guilty of murder in the second degree. That is, of course, if Mr. Wright had correctly analyzed what the Court might do in the event of either plea. Mr. Wright assured the defendant petitioner and his relatives present that he, Mr. Wright, stood ready to continue with the trial of the case and to render to the defendant his best professional efforts.

"The defendant, in considering the effect of the two pleas which he might enter, inquired from his relatives present what they thought he should do. His father advised him to plead guilty and his wife gave him similar advice and then he said he would enter a plea of guilty of murder in the first degree. By way of summary it was Mr. Wright's opinion that from a standpoint of punishment there would likely be only a difference of two and one-half years resulting from a plea of guilty of murder in the first degree and a plea of guilty of murder in the second degree.

"7. The tender of plea was signed by Thomas Woodrow Dixon and his counsel, Luke Wright, and stated that the undersigned, Thomas Woodrow Dixon, having been arraigned on a bill of indictment pending in said Court charging him with the crime of murder in the first degree on the 12th day of May, 1962, and being fully advised by his undersigned counsel, Luke Wright, privately retained by the defendant to represent him in this case, hereby tenders to the State his plea of guilty of murder in the first degree and said bill of indictment with full knowledge that in the event of the acceptance of his plea by the State, with the approval of the Court, the legal effect will be the same as a jury verdict of guilty of murder in the first degree with recommendation by the jury in open court that the punishment be imprisonment for life in the State's prison and that the judgment be pronounced in the event of such acceptance of his said plea now tendered will be a judgment that he be confined in the State's prison for the full term of his natural life. The plea was accepted by Edward K. Washington, Solicitor of the Twelfth Solicitorial District of North Carolina, and was approved by Frank M. Armstrong, Judge Presiding.

"That the tender of plea so signed by the defendant petitioner stated that it was executed with the full knowledge that in the event of the acceptance of his plea by the State, with the approval of the Court, the legal effect would be the same as a jury verdict of guilty of murder in the first degree with recom-

mendation by the jury in open court that the punishment be imprisonment for life in the State's Prison and that judgment accordingly would be entered against the defendant by the Presiding Judge. The Court finds that the plea thus submitted by the defendant was submitted with full knowledge of all the facts after he had entered a plea of not guilty at his arraignment and when the case was first called for trial; that said plea was not demonstably [sic] coerced by anyone but was entered voluntarily by the defendant. It is apparent that the defendant endeavored to secure the approval of the court of a plea of guilty of murder in the second degree as shown by the statement of the defendant (on page 29 of the transcript) about the possibility of entering a plea in this case before he actually entered a plea. At the bottom of the page, Mr. Dixon stated that he was trying to get them (the Solicitor) to accept a plea of second degree. He stated that he believes the Court was asked about that. He also stated that he asked a couple of times to see if he couldn't get it. Those negotiations were taking place while the State was putting on its evidence and before the point in the trial when the State rested its case. The defendant stated that he could not remember shooting Mr. Ford at that time, and as a matter of fact he still does not remember it.

"8. That, after said plea of guilty, said defendant petitioner was lawfully sentenced by the Honorable Frank M. Armstrong, Judge of the Superior Court, who was present and presiding at such session of court, to be imprisoned in the State's Prison for the term of his natural life; that a commitment dated July 12, 1962, was duly and properly issued and the petitioner began to serve said sentence and is now imprisoned thereunder and is serving said sentence in the State Prison System.

"9. That said sentence for the full term of his natural life imposed by the Court upon the defendant is not in excess of that permitted by law.

"10. That a transcript of the prior trial is not necessary for a proper determination of this matter.

"Based upon the foregoing findings of fact, the Court is of the opinion and finds and concludes as a matter of law:

"1. That the petitioner, Thomas Woodrow Dixon, had a fair and impartial trial and none of his constitutional or other rights were denied or violated in any respect before, during and after his trial at the July 9, 1962, Criminal Session of the Superior Court of Guilford County.

"2. That the petition and motion of the petitioner for his release and a new trial should be denied and dismissed.

"3. That the said petitioner is imprisoned by virtue of a legal and final judgment of a court of competent jurisdiction; that he is not unlawfully restrained of his liberty; that the time during which he may be legally detained has not expired; and that he should be remanded to the custody of the North Carolina Department of Correction.

* * *

"IT IS THEREFORE ORDERED, ADJUDGED AND DECREED and the Court holds, rules, and adjudges as follows:

"1. That the petitioner, Thomas Woodrow Dixon, had a fair and impartial trial and none of his constitutional or other rights were denied or violated in any respect before, during or after his trial at the July 9, 1962, Criminal Session of the Superior Court of Guilford County on the said bill of indictment bearing Docket No. 13676.

"2. That the said petition and motion of the petitioner for his release and a new trial are hereby denied and dismissed.

"3. That the said judgment and sentence of the Court entered at the July 9, 1962, Criminal Session of the Superior Court of Guilford County is legal, valid and proper and was entered in full compliance with due process of law; was rendered by a court of competent jurisdiction, and the same is in all respects ratified, confirmed, and approved, and that the petitioner's imprisonment thereunder is legal, valid and proper and is in full compliance with the provisions of the Constitution of the United States and the laws and Constitution of the State of North Carolina.

"4. That the petitioner be, and he is hereby remanded to the custody of the North Carolina Department of Correction immediately to serve and complete as provided by law the said sentence as heretofore imposed.

"5. It is further ordered that one copy of the judgment be forwarded by the Clerk of Superior Court of Guilford County to each of the following: the Director of the North Carolina Department of Correction; the Solicitor of this District; the Attorney General of North Carolina; the petitioner herein, and

to Benjamin D. Haines, Attorney at Law, who represented the petitioner at this hearing.

"This the 15th day of May, 1969.

"EUGENE G. SHAW
Resident Judge of the Superior
Court, 18th Judicial District
of North Carolina."

Robert Morgan, Attorney General, and Jean A. Benoy, Deputy Attorney General, for the State.

Benjamin D. Haines for the petitioner appellant.

HEDRICK, J.

The petitioner's sole contention is that *United States v. Jackson,* 390 U.S. 570 (1968), applies to North Carolina procedure and that the death penalty, in conjunction with G.S. 15-162.1, creates a fear and threat of the imposition of the death penalty in a defendant and constitutes a coercive effect upon a defendant sufficient to render any plea he tenders involuntary. The defendant cites the case of *Alford v. North Carolina,* 405 F. 2d 340 (4th Cir. 1968), in support of this proposition.

The United States Supreme Court, in the recent case of *Brady v. United States,* 397 U.S. 742, 25 L. Ed. 2d 747, 90 S. Ct. 1463 (1970), held that *Jackson, supra,* did not render all pleas of guilty entered to avoid the death sentence involuntary, *per se.* White, J., speaking for the majority, said:

> "Plainly, it seems to us, *Jackson* ruled neither that all pleas of guilty encouraged by the fear of a possible death sentence are involuntary pleas nor that such encouraged pleas are invalid whether involuntary or not. *Jackson* prohibits the imposition of the death penalty under § 1201(a), but that decision neither fashioned a new standard for judging the validity of guilty pleas nor mandated a new application of the test theretofore fashioned by courts and since reiterated that guilty pleas are valid if both 'voluntary' and 'intelligent.' See *Boykin v. Alabama,* 395 U.S. 238, 242, 23 L Ed 2d 274, 279, 89 S Ct 1709 (1969)."

The Supreme Court went on to state that the plea of guilty is more than merely an admission of past conduct; it is the defendant's consent that a judgment of conviction may be entered against him without a trial. "Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient

awareness of the relevant circumstances and likely consequences." Although agents of the State cannot produce a plea by actual or threatened physical harm or by mental coercion which overbears the will of the defendant, it is proper for the State to encourage pleas of guilty at every important step in the criminal process. "For some people, their breach of a State's law is alone sufficient reason for surrendering themselves and accepting punishment. For others, apprehension and charge, both threatening acts by the Government, jar them into admitting their guilt. In still other cases, the post-indictment accumulation of evidence may convince the defendant and his counsel that a trial is not worth the agony and expense to the defendant and his family." All of these circumstances which produce guilty pleas are valid even though the State has produced the primary factors which encouraged the defendant to enter the plea.

Justice White went on to set out the standard to be used to determine the voluntariness of a defendant's plea. It is:

> "The standard as to the voluntariness of guilty pleas must be essentially that defined by Judge Tuttle of the Fifth Circuit Court of Appeals:
>
> "'[A] plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel, must stand unless induced by threats (or promises to discontinue improper harassment), misrepresentation (including unfulfilled or unfulfillable promises), or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business (e. g. bribes).'
>
> "Under this standard, a plea of guilty is not invalid merely because entered to avoid the possibility of a death penalty."

In *Parker v. North Carolina,* 397 U.S. 790, 25 L. Ed. 2d 785, 90 S. Ct. 1458 (1970), a companion case to *Brady, supra,* the defendant asked the Supreme Court to hold his guilty plea involuntary and invalid because it was induced by a North Carolina statute providing a maximum penalty in the event of a plea of guilty lower than the penalty authorized after a guilty verdict and because the plea was the product of a coerced confession. In holding the defendant's plea valid, the Court said:

> "It may be that under *United States v. Jackson,* 390 US 570, 20 L Ed 2d 138, 88 S Ct 1209 (1968), it was unconstitutional to impose the death penalty under the statutory framework which existed in North Carolina at the time of Parker's plea.

Even so, we determined in *Brady v. United States,* 397 U.S. 742, 25 L Ed 2d 747, 90 S Ct 1463, that an otherwise valid plea is not involuntary because induced by the defendant's desire to limit the possible maximum penalty to less than that authorized if there is a jury trial. In this respect we see nothing to distinguish Parker's case from Brady's."

See also *Garner v. State,* 8 N.C. App. 109, filed 27 May 1970.

Clearly, from the holdings handed down in the three cases cited above, there was nothing in the present case which would render the guilty plea invalid. Judge Shaw found as a fact that the plea of guilty was entered freely and voluntarily and was not in any way coerced.

We hold that the findings and conclusions made by Judge Shaw after the defendant's post conviction hearing are supported by the evidence, and the judgment entered on 20 March 1969, denying the petitioner a new trial, is affirmed.

Affirmed.

MALLARD, C.J., and MORRIS, J., concur.

MARJORIE KALE v. FRED DAUGHERTY AND JOHN PARNELL

No. 6926SC233

(Filed 24 June 1970)

1. Evidence § 26; Boating— admissibility of exhibit — identification of exhibit

In the plaintiff's action to recover for personal injuries sustained by her when gasoline from a defective fuel line caught fire in a motorboat owned and operated respectively by the defendants, the trial court properly excluded from evidence a plate bearing the words, "Caution — Operate Blower At Least Five Minutes Before Starting Engine," the plaintiff contending that the plate or one similar to it was beside the ventilator button on the boat, where there was no testimony on the trial that the proffered exhibit, or a plate similar to it, had been in fact attached to the boat.

2. Boating; Negligence § 37— boating accident — gasoline fire — personal injury — instructions on negligence of owner

In plaintiff's action to recover damages for personal injuries sustained by her when gasoline from a defective fuel line caught fire in a motorboat owned and operated respectively by the defendants, plaintiff was not

prejudiced by the trial court's instruction to the jury that the defendant owner "had no duty to the plaintiff in this case to repair the boat," where the plaintiff had alleged negligence by the owner, not in failing to make repairs, but in the manner in which he attempted to make the repairs, and where the trial court correctly instructed the jury on this aspect of negligence raised by the allegations.

3. Boating; Negligence § 37— boating accident — gasoline fire — instructions on negligence of operator

In plaintiff's action to recover damages for personal injuries sustained by her when gasoline from a defective fuel line caught fire in a motorboat owned and operated by the defendants, plaintiff may not contend on appeal that the trial court placed an undue burden on her by instructing the jury that they should find the operator negligent only if he knew or in the exercise of ordinary prudence under the circumstances should have known that the boat was in defective condition at the time he attempted to start the motor, where the challenged instruction was in conformity with plaintiff's own theory that a person of ordinary prudence, who either knew or in the exercise of reasonable care should have known of the possibility of leaking gasoline from the defective fuel line, would not have attempted to start the motor without first activating the engine ventilation fan or lifting the motor hood.

4. Negligence § 1— unavoidable accident

An unavoidable accident, as understood in the law of torts, can occur only in the absence of causal negligence.

5. Negligence § 37— instructions on unavoidable accident

Proper instructions on negligence, burden of proof, and proximate cause will usually render unnecessary an additional instruction on unavoidable accident.

6. Boating; Negligence § 37— boating accident — instructions on unavoidable accident

In an action for injuries arising out of motorboat fire, the trial court did not err in instructing the jury that they should answer the issue of negligence in favor of defendants if they found there was an "unavoidable accident," where the aspect of "unavoidable accident" was not unduly emphasized by the court but served only to call the jury's attention to the fact that they were under no necessity, under the facts of the case, to find that someone was at fault.

APPEAL by plaintiff from *Ervin, J.*, 14 October 1968 Schedule "B" Civil Session of MECKLENBURG Superior Court.

This is a civil action in which plaintiff seeks to recover damages for personal injuries sustained by her when gasoline caught fire in the motor compartment of a boat owned by defendant Daugherty and operated by defendant Parnell in which plaintiff was riding as a passenger. Plaintiff alleged defendant Daugherty was negligent in that:

"(a) He knew or should have known that the boat and motor was defective and dangerous as a result of the leaking gas line and he failed to warn the plaintiff of such danger;

"(b) He attempted to repair the leaking gas line and negligently repaired it so that gasoline fumes would accumulate under the hood surrounding the engine and ignite when there was a spark in the engine compartment."

Plaintiff alleged defendant Parnell was negligent in that:

"(a) He knew or should have known that the boat and motor were in a defective condition and that gasoline could or might leak from the defective fuel line and accumulate under the hood covering the engine. Nevertheless, he attempted to start the engine without ventilating the engine compartment, thereby causing the fumes to ignite;

"(b) He failed to warn the plaintiff of the danger of the gasoline fumes igniting and burning her."

Plaintiff alleged that she was severely burned as a "proximate result of the defendants' joint and concurrent negligence as aforesaid."

Defendants answered, denying negligence.

Evidence at the trial tended to show: Daugherty was the owner of a sixteen-foot Aristocraft inboard-outboard motorboat equipped with a 110 hp. four cylinder converted Chevrolet Mercruiser engine located at the rear of the boat. The engine was covered by a fiber glass hood. For ventilation of the motor, the boat was equipped with air scoops which forced air through the engine compartment when the boat was moving. In addition, the boat was equipped with a blower or fan which could be activated by a button on the dashboard and which could be used to ventilate the engine compartment. The engine was started by means of a button at the dashboard.

On the day prior to plaintiff's injury, Daugherty brought the boat from his home in Gastonia and placed it in Lake Wylie. He had difficulty starting the motor, and on lifting the hood of the engine saw that gasoline had leaked from a small crack not more than a quarter of an inch in length in the plastic fuel line where the line was connected to the fuel pump. He pulled the line from the metal nipple over which it was fastened and cut off the cracked portion of the line. He then reattached the line over the nipple and clamped it. There was evidence indicating this was done a second time on the same day.

On the following day plaintiff went with Mark Conrad Knoop to

Lake Wylie, where Knoop had been invited by defendant Daugherty to go water skiing with Daugherty's boat. During the day trouble was again experienced with the boat, and defendants Daugherty and Parnell, together with Knoop, took the boat out to look for the trouble. Daugherty raised the hood and found that a little hairline crack had again formed in the fuel line next to the nipple. He again went through the same procedure of cutting and reattaching the line. Gasoline in the boat was then flushed out with water and wiped up with a rag, after which the boat was driven at high speed with the hood raised while Daugherty watched the line to see if it was going to crack. The boat was run in this fashion for approximately twenty minutes. The line did not leak and did not form a crack and was pliable. The boat then returned to the pier and Daugherty went ashore.

Defendant Parnell then took the boat out again for the purpose of pulling a skier. Plaintiff and others were passengers in the boat, plaintiff riding in the rear next to the engine. The skier had difficulty getting up out of the water, and a number of starts and stops were made. When the skier finally did get up and was riding on top of the water, the engine started losing power and the skier started sinking slowly back into the water. The motor then came to a complete stop. Parnell, who was driving, put the gear in neutral and pushed the starter button. There was an explosion and flames swept from the engine compartment across the bottom of the boat, severely burning plaintiff. Parnell did not operate the blower before pushing the starter button.

The jury answered issues as follows:

"1. Were the injuries of the plaintiff caused by the negligence of the defendant Daugherty, as alleged in the Complaint?

"ANSWER: No.

"2. Were the injuries of the plaintiff caused by the negligence of the defendant Parnell, as alleged in the Complaint?

"ANSWER: No.

"3. How much, if anything, is the plaintiff entitled to recover for her injuries?

"ANSWER: ....."

From judgment that plaintiff recover nothing of either defendant, plaintiff appealed.

Ernest S. DeLaney, Jr., for plaintiff appellant.

Carpenter, Golding, Crews & Meekins, by John G. Golding, for defendant appellees.

PARKER, J.

[1] Appellant's first assignment of error is directed to the court's action in excluding from evidence a small plate or plaque on which appeared the words:

> "Caution — Operate Blower At Least Five Minutes Before Starting Engine."

Appellant's counsel contends this plaque or one similar to it was on the dash beside the ventilator button on defendant Daugherty's boat at the time it was being operated by defendant Parnell on the occasion when plaintiff was injured. While there was testimony indicating that instructions of some nature concerning ventilation of the engine may have been affixed to the dash of the boat, no witness testified either that the exhibit offered had in fact been attached to the boat or that a plaque with similar language had been attached thereto. In the absence of any proper identification there was no error in excluding the exhibit from evidence. Stansbury, N.C. Evidence 2d, § 117, p. 264.

[2] Appellant contends there was error in the judge's instruction to the jury that the defendant Daugherty "had no duty to the plaintiff in this case to repair the boat." For purpose of passing on this assignment of error, we do not find it necessary on this appeal to determine the exact extent of the duty to repair owed by the owner of a motorboat to socially invited guests on board. (For cases discussing the duty owed by the owner or operator of a motorboat to persons aboard, see Annotation, 63 A.L.R. 2d 343, at page 355.) The quoted language in the court's charge, to which plaintiff excepted, appears only as the introductory phrase in a sentence in which the court added immediately thereafter the instruction: "[B]ut the Court instructs you that if he did undertake to repair it, that he would owe a duty to the plaintiff to exercise reasonable care under the circumstances in the manner in which he undertook to repair the boat." The court had previously correctly instructed the jury as to the inherently dangerous nature of gasoline and the duty owed by one handling such a dangerous instrumentality to use due care commensurate with the known danger. Plaintiff alleged negligence on the part of Daugherty, not in failing to make repairs, but in the manner in which he attempted to make them. All of the evidence was to the effect that defendant Daugherty did in fact attempt to repair his boat. The court properly instructed the jury that

defendant Daugherty owed to plaintiff the duty to exercise reasonable care in the manner in which he undertook to make the repairs. The jury could not have been misled to plaintiff's prejudice by the court's passing reference to absence of a duty which plaintiff had neither alleged nor sought to prove was breached by defendant Daugherty.

In the charge as a whole, considered contextually, the court correctly instructed the jury as to the duty of defendant Daugherty, the owner of the boat, to exercise due care, not only in making the repairs which he did attempt to make, but also as to his duty to make reasonable inspection of his boat and to warn plaintiff of any dangerous condition which such a reasonable inspection would have revealed. These were the only respects in which plaintiff alleged or sought to prove defendant Daugherty negligent. Appellant's assignments of error directed to the court's charge to the jury relative to the first issue are without merit and are overruled.

[3] Appellant also assigns as error portions of the court's charge to the jury on the second issue relating to negligence on the part of defendant Parnell, the operator of the boat. In this connection appellant complains that the court placed an undue burden on her by instructing the jury in effect that they should find for the plaintiff on the second issue only if they should find that defendant Parnell knew or in the exercise of ordinary prudence under the circumstances should have known that the boat was in defective condition at the time he attempted to start the motor. These instructions, however, simply followed plaintiff's own theory, as alleged in her complaint, as to the manner in which defendant Parnell was negligent. Plaintiff did not allege, nor did the evidence tend to show, that the operator of the boat would have been negligent under all circumstances by attempting to start the motor without first activating the blower which ventilated the motor compartment. Her allegations were that the operator was negligent in that "[h]e knew or should have known that the boat and motor were in a defective condition and that gasoline could or might leak from the defective fuel line and accumulate under the hood covering the engine," and that "[n]evertheless, he attempted to start the engine without ventilating the engine compartment." There was evidence that while the boat was in motion ventilation for the engine compartment was normally accomplished by means of the air scoops provided for that purpose. All the evidence indicated that the boat had been in motion up until only a moment before the explosion. Plaintiff's theory as to defendant Parnell's negligence, at least insofar as disclosed by her allegations and

evidence, was predicated on the assumption that a person of ordinary prudence, *who either knew or in the exercise of reasonable care should have known of the possibility of leaking gasoline from the defective fuel line,* would not have attempted to start the motor without first activating the blower fan or lifting the motor hood. Appellant cannot now successfully complain that the court charged the jury in conformity with her own theory of the case.

[4-6] Finally, appellant contends there was error when the court instructed the jury they should answer the first and second issues in favor of defendants if they should find there was an "unavoidable accident," as that term was defined by the court. "An unavoidable accident, as understood in the law of torts, can occur only in the absence of causal negligence." *Baxley v. Cavenaugh,* 243 N.C. 677, 92 S.E. 2d 68. Therefore, proper instructions on negligence, burden of proof, and proximate cause will usually render unnecessary an additional instruction on unavoidable accident. We do not find the instruction in the present case erroneous, however, since it was not unduly emphasized by the court and served only to call to the jury's attention the fact that they were under no necessity, under the facts shown by the evidence in this case, to find that someone was at fault. See Annotation, Unavoidable Accident Instruction, 65 A.L.R. 2d 12.

Under instructions which we find free from reversible error the jury has found plaintiff's injuries were not caused by the negligence of either defendant. On the record before us, we find

No error.

MALLARD, C.J., and BRITT, J., concur.

STATE OF NORTH CAROLINA v. LEE MAY

No. 7018SC323

(Filed 24 June 1970)

1. Criminal Law § 150— defendant's right of appeal — interference by trial court

It was an unwarranted interference with defendant's right of appeal where the trial court, upon learning of defendant's intention to appeal, struck defendant's suspended sentences and imposed active sentences.

2. Arrest and Bail § 6; Obstructing Justice; Assault and Battery § 15— defendant's scuffle with officer — instructions on defendant's right of self-defense

Where, in a prosecution charging defendant with resisting arrest and with obstructing an officer in the performance of his duties, the defendant offered evidence that the officer had struck the first blow and that defendant was forced in self-defense to take the actions which resulted in the charges against him, the trial court should have instructed the jury to acquit defendant if they found that he was legitimately exercising a right of self-defense; the court's instruction merely that the jury "will take into consideration in arriving at your verdict" the defendant's lawful exercise of self-defense, *held* insufficient and is reversible error.

APPEAL by defendant from *Crissman, J.*, 16 February 1970 Criminal Session, GUILFORD County Superior Court.

Defendant was charged in separate warrants, proper in form, with resisting arrest and with willfully delaying and obstructing a public officer while in the process of discharging the duties of his office. Both offenses arise under G.S. 14-223.

The evidence indicated that J. L. Proffitt, (Proffitt) a highway patrolman, placed one Maxine Russell under arrest for operating an automobile while under the influence of an intoxicant. Mrs. Russell asked that her twelve-year-old daughter be taken to the home where they resided. Defendant apparently lived at the same address. The daughter was carried to the house and left there after she informed the officer that there was an adult present to care for her. The patrolman and an acquaintance who was accompanying him then proceeded with Mrs. Russell toward the police station. On the way Mrs. Russell insisted that they return to the house to make certain that an adult was there. Proffitt agreed to do so in order to "double check" on the presence of an adult. Upon returning to the house, Proffitt went to the door and shined his flashlight on defendant as defendant came out of the house. From this point the evidence is substantially in conflict.

The State's version is as follows: Defendant cursed loudly and told the officer to get the light out of his face. When cautioned by the officer about his language, defendant said he could curse if he wanted to as he was on his own property. Defendant, still cursing, followed Proffitt back to the patrol car, and when Proffitt opened the door and started to get into the car, defendant pushed the door against him. At that point Proffitt told the defendant that he was under arrest. Proffitt then started around the door and as he approached defendant, defendant swung at him and Proffitt defended himself by throwing defendant to the ground and spraying him in

the face with mace. While the scuffle was taking place Mrs. Russell opened the door and ran toward the house. Proffitt left defendant and pursued Mrs. Russell who voluntarily returned to the patrol car. Warrants were served on defendant the following day.

Defendant testified in his own behalf and offered the testimony of Mrs. Russell and her daughter. Defendant's version of what occurred is summarized as follows: When Proffitt shined the light in defendant's face, defendant said: "Get that damm light out of my eyes." Proffitt replied: "What in the hell is wrong with you? Are you drunk?" Defendant walked peacefully to the car with Proffitt and on the way Proffitt told him: "If I could get you in that road, I would arrest you." Defendant further testified: "When he got to the car, and when he went to open the door, he snatched it and struck me right in the ankle. I shoved the door right back. He hit me right up the side of my head, and I fell down on one knee. On the way down I heard him say 'You're under arrest.' I came up with a left, and I said 'Like hell, I am,' and hit him. There were eight or ten licks passed. I hit him a few, and he hit me a few. He sprayed that mace in my eyes. There is a bank over there, and I fell against the bank. He kicked me in the chest. I was half blinded." Defendant denied that he had been drinking anything "stronger than a cup of coffee."

The jury returned verdicts of guilty as to both charges. The record reflects that after the verdicts were returned the following transpired:

> "COURT: In Case No. 69-Cr-64572, let this defendant be confined to the county jail for a period of six months to be assigned to work under the supervision of the State Department of Correction. This sentence is suspended for a period of five years on condition that he be of general good behavior and not violate any of the laws of this State or Federal Government, and on the further condition that he pay a fine of one hundred dollars and the court costs.
>
> In Case No. 69-Cr-64573, let this defendant be confined to the county jail for a period of four months to be assigned to work under the supervision of the State Department of Correction. This sentence to begin at the expiration of 69-Cr-64572. And this sentence is suspended for a period of five years on condition that he be of general good behavior and not violate any of the laws of this State or Federal Government, and that he pay a fine of twenty-five dollars and the court costs.

MR. SMITH [Defendant's Counsel]: He stated that he wants to appeal. I am retained. There is no expense to the State in the matter.

COURT: Let's make it a little different then.

Let this defendant be confined to the county jail in 69-Cr-64572 for a period of six months to be assigned to work under the supervision of the State Department of Correction.

In 69-Cr-64573, let the defendant be confined to the county jail for a period of four months to be assigned to work under the supervision of the State Department of Correction. This sentence to begin at the expiration of the sentence in 69-Cr-64572.

Let the record show that this defendant gives notice of appeal in open court. Further notice is waived; that he is allowed fifty-five days within which to serve and perfect his appeal, and that the State is given twenty-five days thereafter within which to prepare and serve countercase. Let the appearance bond be one thousand dollars and the cost bond two hundred dollars.

MR. SMITH: Does the record show that the court changed the sentence after the defendant notified the court that he was giving notice of appeal?

COURT: I don't know what the record shows. The record is here. I changed it, and I have a right to, and I could have increased it.

EXCEPTION NO. 9

That is all. Let him be in custody until he has furnished bond."

Defendant excepted to the entry of the judgment and appealed assigning numerous errors.

Robert Morgan, Attorney General, by Sidney S. Eagles, Jr., Assistant Attorney General, and Russell G. Walker, Jr., Staff Attorney, for the State.

Norman B. Smith for defendant appellant.

GRAHAM, J.

[1] Defendant assigns as error the court's action in changing the suspended sentences and imposing active sentences upon learning of defendant's intention to appeal.

"In criminal cases the right of appeal by a convicted defendant

from a final judgment is unlimited in the courts of North Carolina. This right of appeal is a substantial right. G.S. 15-180; *S. v. Hodge,* 267 N.C. 238, 147 S.E. 2d 881; *S. v. Darnell,* 266 N.C. 640, 146 S.E. 2d 800; *S. v. Grundler,* 251 N.C. 177, 111 S.E. 2d 1; *S. v. Blades,* 209 N.C. 56, 182 S.E. 714. In *S. v. Calcutt,* 219 N.C. 545, 15 S.E. 2d 9, we held that the execution of a sentence in a criminal action may not be suspended on conditions that conflict with the defendant's right of appeal." *State v. Rhinehart,* 267 N.C. 470, 148 S.E. 2d 651.

In *State v. Patton,* 221 N.C. 117, 19 S.E. 2d 142, after the trial judge imposed sentence that prayer for judgment be continued on certain conditions, defendant entered notice of appeal. Thereupon the judge ordered the previous sentence stricken and imposed a sentence of 90 days in jail. In remanding the case for resentencing the Supreme Court, speaking through Devin, J., (later C.J.) stated:

> "While undoubtedly the presiding judge had the power to change his judgment at any time during the term in his sound discretion (*S. v. Godwin,* 210 N.C., 447, 187 S.E., 560), yet it seems here, under the circumstances described in the record, the action of the judge was induced by the defendant's expression of his intention to appeal. This tended to impose a penalty upon the defendant's right of appeal and to affect the exercise of his right to do so. C.S., 4650; *S. v. Calcutt,* 219 N.C., 545, 15 S.E. (2d), 9; *S. v. Burgess,* 192 N.C., 668, 135 S.E., 771.
>
> It may be noted that in the same statute wherein provision was made for the organization of this Court, in 1818, it was declared that appeals might be taken from the sentence or judgment of the Superior Court 'in any cause of action, civil or criminal,' thus establishing the policy, ever since adhered to, of unlimited right of appeal to the Supreme Court by any party aggrieved. This right ought not to be denied or abridged, nor should the attempt to exercise this right impose upon the defendant an additional penalty or the enlargement of his sentence. Doubtless the trial judge felt impelled to change the sentence by the fact that he understood the defendant had consented to the judgment first imposed. But the defendant's consent to the terms of the judgment did not constitute a waiver of his right of appeal for errors to be assigned. The defendant would have had the right to appeal even if he had pleaded guilty. In *S. v. Calcutt, supra,* the judgment, which was imposed after the defendant in that case had pleaded guilty, was held to affect his right of appeal and was stricken out for that reason. In the language

of *Chief Justice Stacy,* 'His appeal was allowed, and it is not to be supposed that any penalty was attached thereto or imposed as a result thereof.' "

The State has made no effort to distinguish the case at hand from the *Patton* case. We think it indistinguishable. The proper procedure would ordinarily be to remand the case to Superior Court for resentencing; however, for the reasons hereinafter set forth, a new trial is necessary.

[2] The theory of defendant's defense, as shown by his evidence, was that he was assaulted by the officer before he had interferred in any manner with the officer in the performance of his duties and before he had been lawfully arrested; and that the blows he struck were administered in the exercise of his right of self-defense. Irrespective of the persuasiveness of the State's evidence to the contrary, defendant was entitled to have his theory presented to the jury under proper instructions. By his assignment of error number 5, defendant has challenged the sufficiency and the accuracy of the court's instructions on self-defense.

Although the court charged in several places that defendant contended he did not interfere with the officer or offer resistance but merely defended himself, the only instructions specifically dealing with the right of a person assaulted to defend himself is the following portion of the charge which is excepted to by defendant:

"Now, members of the jury, if you are satisfied that this officer attacked in any way this defendant, and that the defendant was placed in a position of having to defend himself, then the court charges you that if you are so satisfied that he was merely repelling force with force such as was necessary under the circumstances to protect himself, he not being in any way in the wrong himself, then the court charges you that you will take that into consideration in arriving at your verdict; the burden being upon the State in each of these cases to satisfy you beyond a reasonable doubt of the guilt of the defendant."

The above instruction is insufficient and erroneous in several respects. See *State v. Lee,* 258 N.C. 44, 127 S.E. 2d 774; *State v. Fletcher,* 268 N.C. 140, 150 S.E. 2d 54; *State v. Anderson,* 230 N.C. 54, 51 S.E. 2d 895; 1 Strong, N.C. Index 2d, Assault and Battery, §§ 8, 15. While defendant was not charged with assaulting the officer, the actions which he contends he took in self-defense are those which the warrants charge constitute the unlawful interference and the resistance to arrest. Consequently, the jury should have been

properly charged on the principle of self-defense under this factual situation and that if they were satisfied defendant was legitimately exercising a right of self-defense it would be their duty to acquit him, not simply to take it into consideration in arriving at their verdict as the court charged.

We refrain from discussing the other assignments of error in that the questions raised may not reoccur upon retrial.

New trial.

MALLARD, C.J., and MORRIS, J., concur.

MARY E. RUSSELL MILLIKAN v. L. T. HAMMOND, SR., TRUSTEE, DEANE F. BELL, TRUSTEE, MRS. JACK BRYAN (HAZEL) WEAVER, SR., JACK BRYAN WEAVER, JR., JOSEPH FRANKLIN MILLIKAN, ARZA MILLIKAN, WILLIAM D. GLENN AND WIFE, SUE G. GLENN

No. 7019SC185

(Filed 24 June 1970)

Pleadings § 25— demurrer for misjoinder of parties and causes

In plaintiff's action, against numerous individuals and trustees, seeking (1) a permanent restraining order against a foreclosure proceeding, (2) the reformation of a certain deed to show the plaintiff as a grantee, (3) the reformation of another deed to show that it is a purchase money deed of trust, and (4) the setting aside of a sale of personal property, the trial court properly granted the demurrers of each defendant on the ground that there is a misjoinder of causes of action and parties. G.S. 1-123, G.S. 1-127.

APPEAL by plaintiff from *Lupton, J.*, 7 November 1969 Session, RANDOLPH County Superior Court.

To the complaint filed by plaintiff, each defendant demurred. Each demurrer was sustained, and plaintiff appealed.

Ottway Burton for plaintiff appellant.

Coltrane & Gavin, by T. Worth Coltrane, for defendant appellee Joseph Franklin Millikan.

Miller, Beck and O'Briant, by G. E. Miller, for defendant appellee Arza Millikan.

L. T. Hammond, Sr., Trustee, In Propria Persona.

Turner, Rollins, Rollins & Suggs, by Robert V. Suggs, for defendant appellee Jack Bryan Weaver, Jr.

Walker, Bell & Ogburn, by John N. Ogburn, Jr., for defendant appellees Mrs. Jack Bryan (Hazel) Weaver, Sr., William D. Glenn, Sue G. Glenn, and Deane F. Bell, Trustee.

MORRIS, J.

Briefly summarized, plaintiff's complaint alleges:

1 — 3. residence of plaintiff and defendants.

4. That on 20 June 1964, Jack Bryan Weaver, Sr. and Hazel Weaver conveyed an one-half undivided interest in certain described property in Guilford County, the deed being of record in Book 2157, at page 745, Guilford County Registry. (The grantee is not alleged.)

5. That on 24 January 1966, plaintiff and her husband, Joseph Franklin Millikan, purchased the remaining one-half interest in the property described in paragraph 4 from William D. Glenn and wife, Sue G. Glenn; that, by mistake, the law firm of Walker, Anderson, Bell and Ogburn prepared a deed to Joseph Franklin Millikan (recorded in Book 2256, at page 734, Guilford County Registry) rather than to plaintiff and her husband, Joseph Franklin Millikan, as tenants by the entirety as was done when "the first one-half (½) undivided interest in this same property" was acquired.

6. That defendant Deane F. Bell was named Trustee in a deed of trust prepared by the same firm in which "the property located in Sumner Township, Guilford County" was conveyed to secure a note for $6700, the deed of trust being recorded in Book 2265, at page 617, Guilford County Registry. (The grantor and payee of the note are not identified.)

7. That Jack Bryan Weaver, Sr. died on 5 March 1966; that the same firm represented his estate; that defendant Hazel C. Weaver qualified as administratrix and filed a final accounting; that in her initial accounting, she listed as an asset of the estate a $6700 secured note but in the final accounting "no accounting was shown for the receipt of this secured note."

8. That from 1 February 1965 until February 1969 plaintiff assisted her husband in his business but received nothing for her labor; that she was forced to remove herself for her own safety "from the business which is located on the property hereinbefore described in paragraph 4."

9. That plaintiff instituted a suit against defendant in Ran-

dolph County and that "this plaintiff incorporates by reference said suit in full in this complaint as if set out in full and that the defendant Joseph Franklin Millikan has stated to the plaintiff that he will get rid of the plaintiff's interest in said property one way or the other." (The suit referred to is an alimony without divorce action.)

10. That there is of record in Book 2167, at page 579, Guilford County Registry what purports to be a deed of trust "on a one-half (½) right, title and interest" in the properties lying in Sumner Township, Guilford County, as well as property in Level Cross Township, Randolph County. The real and personal property conveyed thereby are described. The grantors, trustee, and noteholder are not identified.

11. That the paper writing the plaintiff signed should have conveyed only the Guilford County property, the Randolph County property being plaintiff's homeplace in which defendant Joseph Franklin Millikan has no interest; that the paper writing provides for monthly payments of $277.56 and contains an acceleration clause; that this is not correct; that it should have provided for payment of the entire balance at any time within 10 years from the date and that no interest would be due on any of the principal amount; that "the homeplace was mortgaged for Five Thousand and 00/100 ($5,000.00) Dollars at the First Union Bank in Randleman, North Carolina."

12. That the instrument does not recite that it is a purchase money deed of trust; "That the entire paper writing in Book 2167, page 579, Office of the Register of Deeds of Guilford County is incorporated by reference in this complaint as if set out in full."

13. That on 19 July 1969, plaintiff was advised by L. T. Hammond, Sr., Trustee, by letter that Mrs. Jack Weaver, Sr., had demanded that he institute a foreclosure proceedings "on this deed of trust executed by the plaintiff and the defendant Joseph Franklin Millikan." That notwithstanding the fact that the payments were not in arrears under "this purchase money mortgage which was not drawn correctly", L. T. Hammond, Sr., proceeded with foreclosure and with Deane F. Bell, Trustee, went to the premises on 19 August 1969 and attempted to hold a sale.

That defendant Millikan locked the doors and refused to let potential buyers inside where defendant Hammond was purportedly conducting a sale; that no one bid on the property; that defendant Hammond announced another sale to be held the following week, contrary to G.S. 45-21.21; that notwithstanding failure to comply

with the statute and "proceeding to sell on a void instrument" defendant Hammond, Trustee, did hold another sale on 26 August 1969; that defendant Jack Bryan Weaver, Jr., attempted to buy the real property for $6000; that report of sale was filed on 28 August 1969; that the reasonable market value of the property is in excess of $15,000 and unless the illegal foreclosure is restrained and permanently enjoined, plaintiff will be irreparably damaged.

14. That defendant, Arza Millikan, uncle of defendant Joseph Frank Millikan, purchased the personal property at a bid of $500; that no report of sale was made; that this is no sale since defendant Arza Millikan did not intend to buy the property but "was set up by defendant Joseph Franklin Millikan to deprive the plaintiff of her rights in the property"; that the reasonable market value of the property was $5000.

15. That the attempted foreclosure by defendant Hammond is void because no money is due on "the purchase money deed of trust" recorded in Book 2167, at page 579, until 20 June 1974.

16. That the "activity" of defendant Hammond "based upon a conspiracy by the said Joseph Franklin Millikan, Jack Bryan Weaver, Jr. and the said Hazel C. Weaver and the said Deane F. Bell, Trustee, and William D. Glenn" is to "freeze out" and rid plaintiff of her interest in the real estate and unless "the defendants" are permanently restrained from "proceeding further under these instruments", plaintiff will be irreparably damaged; that the price bid at the "attempted sale" was grossly inadequate; buyers were locked out; defendants had not complied with legal advertising; that at the second sale defendant Millikan locked the doors and refused to let potential buyers in with full knowledge of defendant Hammond. The names of persons attending the second sale are listed, three of whom are not parties to the action. Four of the defendants are not listed as attending.

17. That the attempted foreclosure proceedings are irregular and void.

18. That notice of lis pendens was filed the day the action was instituted in both Guilford and Randolph Counties.

19. "That it will be harsh and highly inequitable and will work an irreparable loss and hardship on the plaintiff whose work and labor for the last four (4) years have been invested in this property to allow said purported foreclosure proceedings to proceed and that all of the defendants can be placed in status quo without injury to any of them by enjoining the attempted foreclosure proceedings of

the defendants and allowing the plaintiff to reform and modify the instruments as they should be reformed and modified and that the plaintiff is ready, willing and able to comply with the deed of trust and credit instruments as they should be. That a fraud has been perpetrated upon the plaintiff and unless the defendants and each of them are enjoined permanently from proceeding upon foreclosure of her property, she will be irreparably damaged."

Plaintiff prays:

(1) That defendants "and each of them" be enjoined permanently from proceeding further "on the attempted foreclosure sale" of the property described in the paper writing recorded in Book 2167, at page 579, Guilford County Registry.

(2) That the paper writing recorded in Book 2256, at page 734, Guilford County Registry, be reformed and modified "to show that the grantors (sic) are Joseph Franklin Millikan and the plaintiff, instead of Frank Millikan alone."

(3) That the paper writing recorded in Book 2167, at page 579, Guilford County Registry, be reformed to show that the principal sum of $25,000 shall be due on or before 20 June 1974; that it is a purchase money deed of trust; that the Randolph County property be deleted; that any reference to foreclosure on the Randolph County property be deleted.

(4) That "the said defendants" be temporarily restrained, pending a hearing on the issues, against proceeding further against the real and personal property described in Book 2167, at page 579, Guilford County Registry.

(5) That plaintiff have and recover of defendants $2000 "for damages as a result of this illegal and unlawful activity."

(6) That the complaint be used as an affidavit upon which to base such orders of the court as would be proper.

(7) That the sale of personal property to defendant Arza Millikan be set aside.

(8) For such other and further relief as might be proper.

Each demurrer was based upon the ground that there is a misjoinder of parties and causes. The order, in each instance, sustaining the demurrer was based upon the fact that upon the face of the complaint there appeared to be a misjoinder of causes of action and parties defendant. Each order was entered on 7 November 1969. On the same date, the court entered an order dissolving the temporary

restraining order theretofore entered and directed that since the issue of whether plaintiff is entitled to have the foreclosure restrained has not been decided on its merits, the last and final bid of $6000 not be confirmed, and if the noteholders and trustee should decide to proceed with foreclosure, the resale be advertised in the manner required by law for original or first foreclosure sales with a starting bid of $6000.

Plaintiff in her brief states that "the trial court's ruling in this matter was not only puzzling but erroneous." She cites no authority for this position. She does state that the action for separate maintenance, support for two minor children, and counsel fees "is the motivating background in this matter." We do not question the truth of this statement. However, regardless of the "motivating background", plaintiff has obviously attempted to state several causes of action in one complaint, all of which do not affect all the parties and none of which is separately stated.

We do not discuss whether the complaint would be sufficient under the new Rules of Civil Procedure. The complaint was filed on 8 September 1969 and the judgments from which plaintiff appeals were signed and entered on 7 November 1969. Plaintiff candidly concedes that Chapter 1A of the North Carolina General Statutes was not effective until 1 January 1970, but she contends that "The trial court was in error under the old Code in dismissing these actions."

G.S. 1-123 provided for the uniting, in the same complaint, of several causes of action "of legal or equitable nature, or both, where they all arise out of —

1. The same transaction, or transaction connected with the same subject of action.

2. Contract, express or implied.

3. Injuries with or without force to person or property.

4. Injuries to character.

5. Claims to recover real property, with or without damages for the withholding thereof, and the rents and profits of the same.

6. Claims to recover personal property, with or without damages for the withholding thereof; or,

7. Claims against a trustee, by virtue of a contract, or by operation of law.

But the causes of action so united must all belong to one of

these classes, and, except in actions for the foreclosure of mortgages, must affect all the parties to the action, and not require different places of trial, and must be separately stated."

A cursory reading of the complaint reveals that plaintiff has improperly united causes of action in contravention of the statute and has also failed separately to state the causes of action also in contravention of the statute. Each demurrer properly set out the causes of action which were improperly united. Under the provisions of G.S. 1-127 entitled Grounds for Demurrer, the trial court properly sustained the demurrers.

Affirmed.

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

CHARLES F. KEIGER AND MAMILEE ENTERPRISES, INC. v. THE WINSTON-SALEM BOARD OF ADJUSTMENT; J. A. HANCOCK, ROY SETZER, C. C. SMITHDEAL, JR., JOHN MANNING, WILLIAM F. THOMAS, SAM OGBURN AND MRS. MARTHA CATES; AND THE WINSTON-SALEM-FORSYTH COUNTY PLANNING BOARD; F. GAITHER JENKINS, ZEB B. STEWART, A. L. EVANS, HAMPTON D. HAITH, CLIFTON E. PLEASANTS, H. C. PORTER, J. C. SMITH, M. C. BENTON, JR., AND DAVID W. DARR

No. 7021SC327

(Filed 24 June 1970)

1. Municipal Corporations § 30— zoning — denial of special use permit for mobile home park

Municipal Board of Adjustment did not exceed the power delegated to it by a municipal zoning ordinance in denying petitioners' application for a special use permit to construct a mobile home park upon land zoned "Highway Business," notwithstanding the plan for the proposed mobile home park complied with the requirements of the "Table of Conditional Uses Requiring Special Use Permits" set forth in the ordinance.

2. Municipal Corporations § 30— zoning — special use permit — consideration of "public interest"

Provision of a municipal zoning ordinance which requires the Board of Adjustment to consider "the public interest" in acting upon an application for a special use permit is invalid, since it permits the Board to go further than the declared objectives of the ordinance in determining what will adversely affect the public interest.

3. Municipal Corporations § 30— zoning — denial of special use permit by Board of Adjustment — failure of Planning Board to make specific findings

Board of Adjustment's denial of petitioners' application for a special use permit to construct a mobile home park was not invalidated by failure of the City-County Planning Board to make specific findings of compliance or noncompliance with the applicable requirements of the ordinance for issuance of a special use permit in its report recommending denial of the permit.

4. Municipal Corporations § 30— zoning — special use permit — delegation of administrative power — constitutionality of ordinance

Provision of a municipal ordinance giving the municipal Board of Adjustment authority to grant or deny a special use permit based upon its consideration of the information submitted, the findings of the City-County Planning Board, and "the purpose and intent of this ordinance," such declared objectives of the ordinance being set forth therein in detail, *is held* a constitutional delegation of administrative power and not a delegation of legislative power.

APPEAL by petitioners from *Exum, J.*, 5 January 1970 Civil Session, FORSYTH Superior Court.

This is an appeal from a judgment affirming the action of the Winston-Salem Board of Adjustment in denying an application for a special use permit to construct a mobile home park upon a 14.5-acre site owned by petitioner Mamilee Enterprises, Inc. The land is part of a larger tract lying in the vortex of the intersection of Hartford Street and Reynolda Road. The larger tract was zoned B-3 or "Highway Business," however, the 14.5-acre portion is not itself adjacent to Reynolda Road but adjoins Hartford Street, applicant's undeveloped land, and land owned by others which is in the process of being developed as a single-family residential subdivision.

On 20 August 1969 petitioners applied to the Board of Adjustment for a special use permit, as is required in Section 29-7.F of the zoning ordinance. The plans disclose what appears to be a carefully designed mobile home park for 102 units. After due advertisement and notice, a public hearing was held on 4 September 1969.

On 3 September 1969 the director of planning for the Planning Board wrote a letter to the Board of Adjustment stating that the Planning Board had reviewed the petitioners' application and voted to recommend its disapproval. The letter continued: "The Board concluded that Hartford Street could not safely accommodate traffic generated by a mobile home park of the size proposed and that a mobile home park would not be a compatible use of the land in relation to the single-family homes on Hartford Street."

At the public hearing, the petitioners' evidence, together with exhibits, tended to show that the plan for the mobile home park proposed by the petitioners complied with the requirements set out in the "Table of Conditional Uses Requiring Special Use Permits" of Section 29-7.F. The attorney for the petitioners contended that once these conditions are met the Board of Adjustment must approve the special use permit requested. In executive session the Board members considered the portion of Section 29-19.A.2.c.(1) which provides as follows:

> "In acting upon the application for a special use permit the Board of Adjustment shall consider, and base its decision upon, the information submitted, the findings of the City-County Planning Board, the purpose and intent of this ordinance, and the public interest."

As was summarized by the chairman of the Board of Adjustment, "Strenuous opposition to the request had been shown, this consisting of statements under oath by the developer of an adjoining residential subdivision and by a representative of a lending agency, the submission of a petition containing 184 signatures of persons opposing, and statements of several property owners present." After general discussion the Board of Adjustment voted unanimously to deny the special use permit requested.

The cause came on to be heard in the superior court on writ of certiorari as provided by statute. Respondents tendered a motion to dismiss on the ground that the questions raised have been rendered moot by a subsequent ordinance passed by the Board of Aldermen on 3 November 1969 rezoning the part of the property in question from B-3 and R-6 to R-4, a category which does not allow special use permits for the construction of a mobile home park. Motion to dismiss was denied. The court considered the contention, the evidence, the zoning ordinance, and the case of *Jackson v. Board of Adjustment*, 275 N.C. 155, 166 S.E. 2d 78 (1969).

In view of the *Jackson* decision, the court considered the matter as though the zoning ordinance did not include the words "and the public interest." The court concluded:

> "Disregarding the words 'and the public interest' appearing in * * * Section 29-19.A.2.c.(1), the action of the Board of Adjustment denying petitioners' application is clearly based upon purposes set forth in Section 29-2 of the Zoning Ordinance, such as 'to lessen congestion in the streets,' and 'the preservation of property values.' "

The decision of the Board of Adjustment denying petitioners' application for special use permit was ordered affirmed and petitioners appealed.

R. Kason Keiger for petitioner appellants.

Womble, Carlyle, Sandridge & Rice by William F. Womble and Zeb E. Barnhardt, Jr., for respondent appellees.

BRITT, J.

[1, 4] Respondents contend that although petitioners may have satisfied the mobile home park requirements set out in the zoning ordinance, Section 29-7.F "Table of Conditional Uses Requiring Special Use Permits," this alone does not entitle petitioners to a special use permit. Petitioners contend that the Board of Adjustment's denial of the permit was an action in excess of its lawful power as an administrative agency of the municipality. The issues before us are: first, whether the Board of Adjustment exceeded the power delegated to it in the municipal ordinance, and, second, whether the power purportedly delegated by the ordinance to the administrative board is a legislative power and therefore constitutionally invalid. It is our opinion that the Board of Adjustment's action is consistent with the authority delegated to it by ordinance, and that the delegation itself is permissible under both the statutory grant of power and the constitutional standard established in *Jackson v. Board of Adjustment,* 275 N.C. 155, 166 S.E. 2d 78 (1969).

The ordinance provides that certain uses are permitted within a B-3 district as a matter of right upon meeting certain conditions set out in Section 29-7.E, and certain other uses are permitted upon issuance of a special use permit as provided in Section 29-7.F. Motels, hotels, nursery schools, and mobile home parks are among those uses within the purview of Section 29-7.F which establishes the following requirements:

> "The Board of Adjustment may authorize the issuance of a special use permit, as provided in Section 29-19.A.2.c(1), for uses included in the following table, but only in the districts where such uses are permitted, and only after receiving from the City-County Planning Board a report finding that the proposed building or site will comply with all applicable requirements of this ordinance and after public notice and public hearing."

The "Table of Conditional Uses Requiring Special Use Permits"

which is a part of Section 29-7.F establishes detailed site requirements (five paragraphs) and other requirements (four paragraphs). The following procedure is established in Section 29-19.A.2.c.(1):

> "(1) *Special Use Permits.* Applications for special use permits may be approved by the Board of Adjustment after such board receives a report thereon from the City-County Planning Board and holds a duly advertised public hearing in each case, provided that the Planning Board shall not be required to review and report on applications for nursery schools, kindergartens, riding stables, shooting ranges, auto hobbyists, or dwellings in other than principal buildings. The Planning Board, in cases requiring its review, shall submit its recommendation in writing to the Zoning Officer not more than 60 days after receipt of a written request from the Zoning Officer for review of the application, unless such period is extended by the City Manager or the Board of Aldermen. *In acting upon an application for a special use permit the Board of Adjustment shall consider, and base its decision upon, the information submitted, the findings of the City-County Planning Board, the purpose and intent of this ordinance, and the public interest.* No provision of this ordinance shall be interpreted as conferring upon the Board of Adjustment the authority to approve an application for a special use permit for any use except as authorized in Section 29-7.F. and 29-11.B. In approving an application for the issuance of a special use permit the Board of Adjustment may impose additional reasonable and appropriate conditions and safeguards to protect the public health, safety, morals, and general welfare, the value of neighboring properties, and the health and safety of neighboring residents." (Emphasis added.)

The "purpose and intent" clause of the ordinance clearly purports to delegate to the Board of Adjustment the power to consider the "declared objectives" of the ordinance in determining whether to grant a special use permit. The "purpose and intent" or "declared objectives" are set out in Section 29-2:

> "This ordinance is adopted for the purpose of promoting the health, safety, morals, and general welfare of the community consisting of all the area within the corporate limits of the City of Winston-Salem and all the area within one mile in all directions beyond the City corporate limits as they now exist and as said City limits shall hereafter be fixed. The community is divided into districts deemed best suited to carry out the pur-

poses of this ordinance, in accordance with a comprehensive plan designed to lessen congestion in the streets; to secure safety from fire, panic, and other dangers; to promote health, safety, and the general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; to facilitate the adequate provision of transportation, water, sewerage, schools, parks, and other public requirements; to provide a basis for planning for the sound and harmonious development of the community in the interest of the general welfare and the preservation of property values; and to provide for a fair and proper administration of this ordinance and its orderly amendment.

Toward achieving these objectives, there are hereby established within the districts into which the community is divided, uniform regulations governing the erection, construction, reconstruction, alteration, repair, or use of buildings, structures, land, and water; such regulations being made with reasonable consideration, among other things, as to the character of the districts and their peculiar suitability for particular uses, and with a view to conserving the value of buildings and encouraging the most appropriate use of land and water throughout the community."

[2] The "public interest" clause purports to delegate the power, as the court said in *Jackson v. Board of Adjustment, supra,* "to go further than the declared objectives of the ordinance in determining what will adversely affect the public interest," and is for that reason constitutionally invalid. The "findings of the City-County Planning Board" clause, as we read it, requires that the Board of Adjustment consider those findings which the Planning Board has made. An application for a mobile home park permit is within those cases which the Planning Board must "review and report on" because mobile home parks are not among those uses expressly excluded.

[3] While Section 29-7.F provides that the Board of Adjustment may issue a special use permit "* * * only after receiving from the City-County Planning Board a report finding that the proposed building or site will comply with all applicable requirements of this ordinance * * *," the ordinance does not prohibit the Planning Board from making findings regarding factors which may be beyond the Section 29-7.F "applicable requirements" but are within the "declared objectives" of the ordinance. Although the Board of Adjustment could not lawfully issue a permit on the basis of the Planning Board's report in this case because there was no finding of

compliance "with all applicable requirements," the failure of the Planning Board to make specific findings of compliance or noncompliance with the detailed requirements set out in the Section 29-7.F table does not invalidate the Board of Adjustment's denial of a permit. There is nothing in the ordinance which indicates that the findings which were made are beyond the intended purview of the Planning Board. Indeed, Section 29-19.A.2.c.(1) characterizes the Planning Board's report as a "recommendation" rather than as a narrowly-defined set of findings.

[4] The power which has been delegated and exercised in the instant case is consistent with the statutory grant in G.S. 160-172 and G.S. 160-178 and the constitutional standard set by *Jackson.* G.S. 160-172 provides that a municipal zoning ordinance may "* * * provide that the board of adjustment or the local legislative body may issue special use permits or conditional use permits in the classes of cases or situations and in accordance with the principles, conditions, safeguards, and procedures specified therein, and may impose reasonable and appropriate conditions and safeguards upon such permits." G.S. 160-178 provides that a board of adjustment "shall also hear and decide all matters referred to it or upon which it is required to pass under any such ordinance."

In the *Jackson* case the court said that a clause purporting to delegate to a board of adjustment the power to determine, and act upon the determination that "the granting of the special exception will not adversely affect the public interest," was constitutionally impermissible because it "was intended to permit the Board of Adjustment to go further than the declared objectives of the ordinance in determining what will adversely affect the 'public interest.'" To permit the board to go further than considering the declared objectives of the ordinance would be to delegate to that board a legislative rather than administrative power. In *Jackson* the ordinance in question also purported to delegate to the Board of Adjustment the power to "* * * grant such permit 'in accordance with the principles, conditions, safeguards and procedures specified in this ordinance,' or * * * to deny the permit 'when not in harmony with the purpose and intent of this ordinance.'" The court upheld this delegation of power as one properly administrative in nature: "* * * Thus far, it is the ordinance, not the Board of Adjustment which determines the circumstances, the existence of which calls into play the provision for the exception, the board having authority to determine only the existence or absence of those circumstances. This determination is a matter of administration, not a delegation

of the legislative power to change or add to the law as fixed in the ordinance."

Petitioners have strenuously contested the soundness of a procedure which would make it easier for them to build an abattoir than a well-planned modern mobile home park, but our duty is to pass upon its legality rather than its wisdom. The Board of Adjustment heard competent evidence and made findings of fact supported by that evidence; the procedure followed was consistent with the ordinance and the ordinance is consistent with applicable statutes and constitutional requirements.

Like the superior court, we have not considered or passed upon respondents' contention that the questions raised by petitioners have been rendered moot by an ordinance enacted by the Winston-Salem Governing Board on 3 November 1969 rezoning the property in question from B-3 and R-6 to R-4. Proper procedures are available to the parties to determine the effect of that ordinance should they desire a determination.

The judgment of the superior court is

Affirmed.

BROCK and HEDRICK, JJ., concur.

STATE OF NORTH CAROLINA v. WILLETTE SMITH

No. 7026SC244

(Filed 24 June 1970)

Criminal Law § 76— admissibility of confession — inducement by promise not to indict defendant on another charge

In this prosecution for attempted armed robbery, finding by the trial court that a written waiver of right to remain silent and to counsel at a police interrogation and a written confession executed by defendant were freely and voluntarily given was not supported by the voir dire evidence, and the waiver and confession were improperly admitted in evidence, where defendant testified on voir dire that she executed the documents only after a police officer showed her an article which he claimed was marijuana and which he said was found in defendant's pocketbook, and that the police told her that she would not be charged with possession of marijuana if she signed the waiver and confession, the State's only evidence to contradict defendant's testimony was of a negative character, and the State's evidence showed that the matter of marijuana came up

in defendant's presence before she signed the documents and that one officer made statements to defendant of such nature as to offer defendant a hope that she would not be prosecuted for possession of marijuana if she signed the waiver and confession.

APPEAL by defendant from *Snepp, J.*, 17 November 1969 Schedule "B" Criminal Session, MECKLENBURG Superior Court.

By bill of indictment proper in form, defendant was charged with attempted armed robbery on 20 May 1969. She pleaded not guilty, the jury returned a verdict of guilty as charged, and the court rendered judgment that defendant be placed in the custody of the Department of Corrections as a "Committed Youthful Offender" for not more than ten years pursuant to the provisions of Article 3A, Chapter 148 of the General Statutes of North Carolina. Defendant appealed.

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

Charles V. Bell for defendant appellant.

BRITT, J.

The sole question presented by this appeal relates to the admissibility into evidence of a written "waiver of right to remain silent and right to counsel during the interview" and a written confession executed by the defendant. She contends that soon after her arrest and while she was in custody of police, a police officer showed her an article which he claimed was marijuana and which he said he found in her pocketbook; that the police told her if she would sign the waiver and confession she would not be indicted for possession of marijuana; that her execution of said documents was induced by hope or extorted by fear, rendering them involuntary and inadmissible.

Before the documents were admitted in evidence, the trial judge conducted a voir dire in the absence of the jury at which three police officers and the defendant testified. Thereafter, the trial judge found as a fact that the waiver was intelligently and voluntarily executed by defendant and that the confession was not obtained by threat or promise; the court concluded as a matter of law that the confession was made by defendant after having been fully advised of her constitutional rights and was made voluntarily and intelligently, without any promise of leniency, coercion or duress. The State contends that the trial judge's findings of fact are fully sup-

ported by the evidence presented at the voir dire and the findings of fact fully support his conclusions of law.

In *State v. Chamberlain,* 263 N.C. 406, 139 S.E. 2d 620 (1965), our Supreme Court held a defendant's confession involuntary and ordered a new trial. We quote from the opinion by Parker, J. (later C.J.), at pages 410-411:

> "In addition to the undisputed facts, we have this evidence: Defendant testified on the preliminary hearing that a deputy sheriff told him they had two armed robbery charges against him, and they could also bring a charge of kidnapping Riggins against him, that kidnapping carried a life sentence, and that if he would cooperate and sign a confession that he had participated in the two armed robberies, they would drop the kidnapping charge and do their best to prevent an indictment for kidnapping. That two or three days later he made the confession to two police officers of Laurinburg that the State introduced in evidence against him. That his confession was false and he made it because he was afraid he would be indicted for kidnapping. J. B. Odom, a police officer of Laurinburg testified for the State: 'I won't say that the word kidnapping was not mentioned, but it was never mentioned by me.' Two deputy sheriffs talked to defendant, one of whom was dead when the instant case was tried. The other testified kidnapping was not mentioned in his presence. The State's evidence in respect to whether or not kidnapping was mentioned to defendant is entirely of a negative character, and does not amount to a complete negation of defendant's testimony in respect to what a deputy sheriff said to him about kidnapping.
>
> It seems obvious from the totality of circumstances surrounding the making of the confession, particularly the testimony of defendant that his confession was induced by what a deputy sheriff said to him about kidnapping, which carried a life sentence, and the negative and unsatisfactory evidence of the State in reply thereto, that defendant's confession was extorted by fear and was not voluntary on his part, and that its admission in evidence was in violation of principles of law clearly stated as early as 1827 in *S. v. Roberts,* 12 N.C. 259, and continuously repeated in decisions of this Court since, deprived him of that fundamental fairness essential to the very concept of justice, and denied him due process of law guaranteed by the 14th Amendment. * * *"

In *State v. Fuqua,* 269 N.C. 223, 152 S.E. 2d 68 (1967), the court

declared a confession involuntary and awarded a new trial. We quote from that opinion by Branch, J., at page 228:

> "In the instant case the police officer while questioning the defendant, then in jail custody, said to defendant: 'That if he wanted to talk to me then I would be able to testify that he talked to me and was cooperative.' This statement by a person in authority was a promise which gave defendant a hope for lighter punishment. It was made by the officer before the defendant made his confession, and the officer's statement was one from which defendant could gather some hope of benefit by confessing. The total circumstances surrounding the defendant's confession impels the conclusion that there was aroused in him an 'emotion of hope' so as to render the confession involuntary."

In *State v. Fox,* 274 N.C. 277, 163 S.E. 2d 492 (1968), in an opinion by Sharp, J., it is said at page 292:

> "It has been the law of this State from its beginning that an extrajudicial confession of guilt by an accused is admissible against him only when it is voluntary. *State v. Vickers,* 274 N.C. 311, ... S.E. 2d .....; *State v. Gray,* 268 N.C. 69, 150 S.E. 2d 1; *State v. Warren,* 235 N.C. 117, 68 S.E. 2d 779; *State v. Roberts,* 12 N.C. 259. When an investigating officer 'offers some suggestion of hope or fear . . . to one suspected of crime and thereby induces a statement in the nature of a confession, the decisions are at one in adjudging such statement to be involuntary in law, and hence incompetent as evidence. . . .' (Citations omitted.) *State v. Biggs,* 224 N.C. 23, 26-27, 29 S.E. 2d 121, 123. Whether conduct on the part of investigating officers amounts to a threat or promise which will render a subsequent confession involuntary and incompetent is a question of law, and the decision of the trial judge is reviewable upon appeal. *State v. Biggs, supra.*"

A review of the evidence elicited at the voir dire in the instant case discloses:

Defendant's pertinent testimony is summarized as follows: "In a way" she was forced to sign the paperwriting (confession). The officers showed her something in a container which they said they obtained from her pocketbook and which they said was marijuana. The officers told her if she would sign the paper which they had prepared that they would throw the marijuana away and that is the reason she signed it. She has heard nothing more about the

marijuana and the part of the paperwriting connecting her in any way with robbing a cab driver is not true. She did not have any marijuana in her pocketbook.

Pertinent testimony of Officer Fesperman is summarized as follows: The matter of marijuana came up in defendant's presence before she signed the statement. Officer Crenshaw could have talked to her about the marijuana. Officer Sloop did talk to her about it; he had the marijuana in his hands and told her it looked like marijuana. "I did not hear him say that they wouldn't prefer any charges against her about the marijuana. * * * I did not tell Willette Smith that no case or charges would be preferred against her if she would sign this statement. Officer Sloop came in and said the cigarette looked like marijuana, and when we finished interrogating her to bring her to the vice squad, that they would indict her for it, and she asked me, she said, 'Is he going to sign a warrant against me for this stuff here?' I said, 'He is not running this case or this investigation.' I said, 'Mr. Crenshaw and myself is running it and if I want to charge you with it, I will, and he's got nothing to do with it.' I said, 'Now, you tell me about the robbery,' and which she did." He never told her that if she signed the statement that she would not be indicted for the possession of marijuana; he did not promise her anything.

Pertinent testimony by Officer Crenshaw is summarized as follows: He did not hear any conversation between defendant and Officer Sloop before she signed any waiver or confession. It is possible that Officer Sloop did talk with her because there were a couple of rooms in which the police receive telephone calls and Crenshaw was in and out of the room. He did not hear anyone say that marijuana was found in defendant's pocketbook and if she would sign the paperwriting and the waiver nothing would be done about the marijuana.

Officer Sloop did not testify on voir dire; neither did Officer McCullough who, according to the evidence, was present when the subject of marijuana was discussed.

As was the case in *State v. Chamberlain, supra,* it appears to us that "the totality of circumstances surrounding the making of the confession," particularly the testimony of defendant that her confession was induced by what the officers said to her regarding her being prosecuted for possession of marijuana, and "the negative and unsatisfactory evidence of the State in reply thereto," that defendant's confession was extorted by fear and was not voluntary on her part. It would also appear that what Officer Fesperman told

defendant (quoted above) was more calculated to arouse in defendant an "emotion of hope" so as to render the confession involuntary than was true in *State v. Fuqua, supra.*

The uncontradicted evidence discloses that the waiver and confession of defendant were not freely and voluntarily given within the meaning of the decisions of our Supreme Court and are incompetent as a matter of law. Their admission in evidence against defendant constituted prejudicial error which entitles her to a

New trial.

BROCK and HEDRICK, JJ., concur.

JOSEPHINE SNEAD, EMPLOYEE, PLAINTIFF v. SANDHURST MILLS, INC., EMPLOYER; LIBERTY MUTUAL INSURANCE COMPANY, CARRIER, DEFENDANTS

No. 7020IC203

(Filed 24 June 1970)

1. Master and Servant § 96— appeal from Industrial Commission — questions presented

In passing upon an appeal from an award of the Industrial Commission, the Court of Appeals is limited in its inquiry to the questions of whether there was any competent evidence before the Commission to support its findings and whether such findings justify the Commission's legal conclusions and decisions.

2. Master and Servant § 96— findings by Industrial Commission — appellate review

The findings of the Industrial Commission are conclusive on appeal if they are supported by any competent evidence even though there is evidence to support a contrary finding.

3. Master and Servant § 94— sufficiency of evidence to support award

In this Workmen's Compensation proceeding, findings by the Industrial Commission are supported by competent evidence and justify its conclusion that plaintiff's temporary total disability terminated on a specified date and that plaintiff sustained a 5% permanent partial disability to her back as a result of the accident in question.

4. Master and Servant § 69— "disability" defined

"Disability" as used in the Workmen's Compensation Act means impairment of wage earning capacity rather than physical impairment.

5. Master and Servant §§ 66, 69— total disability to work — mental condition resulting from accident — insufficiency of evidence

Plaintiff's evidence was insufficient to support her contention that she is entitled to compensation for total disability to work on account of a hysterical conversion reaction resulting from her injury, where the only medical evidence directly relating any disability as the result of a mental condition to the accident in question assigned a 5% disability as a result of plaintiff's psychological problem, the amount of permanent disability found by the Commission.

APPEAL by plaintiff from an opinion and award of the North Carolina Industrial Commission of 12 November 1969.

On 19 July 1968, plaintiff sustained an injury, compensable under The North Carolina Workmen's Compensation Act, G.S. 97-1 *et seq.*, while employed by Sandhurst Mills, Inc. She thereafter entered an agreement with her employer for payment of temporary total disability up to and including 19 December 1968. On 21 April 1969 a hearing was held before Deputy Commissioner Leake for the sole purpose of determining what amount, if any, plaintiff is entitled to recover for temporary total disability or for permanent disability.

On 8 May 1969, Deputy Commissioner Leake filed an order finding and concluding that plaintiff was temporarily totally disabled from 19 July 1968 through 19 December 1968, and that she had sustained a 5% permanent partial disability to her back as a result of the accident of 19 July 1968. Plaintiff appealed to the Full Commission which, on 10 November 1969, adopted the opinion and award of the Hearing Commissioner. Plaintiff appealed from the order of the Full Commission to this court.

John Randolph Ingram for plaintiff appellant.

Mason, Williamson and Etheridge by James W. Mason for defendant appellees.

GRAHAM, J.

Plaintiff contends that she is entitled to compensation for total disability to work because of a conversion reaction caused by her physical injury resulting from the accident and that the Commission erred in failing to make findings to this effect.

It was stipulated at the hearing that all medical reports on file with the Commission could be received into evidence. These reports indicate that plaintiff has been examined by at least nine medical doctors regarding the complaints which she attributes to the accident. The 30 October 1968 report of Dr. Robert E. Miller, an orth-

opedic surgeon who treated plaintiff extensively, is typical of the various medical findings. His report states:

> "This is a further note on the above named patient, who was again in my office on October 8, 1968. At the present time, she is still complaining bitterly of pain in her back and radiation into the leg and buckling of the leg. On examination, I can find no evidence of muscle weakness. The recumbent leg tests are very minimally positive, as are the cross leg tests. The neurological examination remains within normal limits. She has marked tenderness in her lower back but she is very hyperreactive. I injected the lower back with Xylocaine, advised her to continue to wear her corset. She states that she is unable to do the job that she is required to do and I would suggest if there is any possible way, that she be put to a lighter type job where she does not have to sit all the time. Perhaps a combination of sitting and standing would be of great benefit and *I think she could return to work if she would.* I still feel that there is a severe aspect of psychoneurosis here in addition to a moderate sprain of the lumbosacral spine." (Emphasis added).

The record shows that in response to Dr. Miller's suggestion, plaintiff was offered light work by her employer. The job would have permitted her to sit or stand, or alternate between sitting and standing. Plaintiff agreed to accept the job and to start work on 18 November 1968; however, she failed to do so and had not returned to work on the date of the hearing.

Dr. Archie Coffee, a neurosurgeon, examined plaintiff at Dr. Miller's request. He reported:

> "IMPRESSION: Hysterical conversion reaction — The differential diagnosis in this instance really rests between a hysterical conversion reaction and frank outright malingering. One cannot make a positive diagnosis of the latter at the present time. It is rather the examiner's feelings that this is most likely hysterical. Continued conservative measures with encouragement, and reassurance should be employed."

On 20 December 1968, Dr. Miller stated in a report to the defendant insurance carrier: "As far as her objective physical ability to work, I would think that she could work. I do not think that her present hysterical conversion reaction will allow her to work with the present mental attitude."

In February of 1969, plaintiff was admitted to the Moore

Memorial Hospital in Pinehurst under the care of Dr. William F. Hollister. In a report, dated 13 February 1969, Dr. Hollister stated:

> "Interpretation: I could find no evidence from the physical examination or study of the x-rays of the lumbar spine and pelvis of any physical reason for this patient's persistent complaints. The stocking distribution of hypesthesia and hypalgesia would indicate that there is no anatomical abnormality producing this condition.
>
> In view of these findings, a psychiatric evaluation was carried out by one of our staff psychiatrists, Dr. Donald Schulte, and his report can be obtained by writing to him directly to the Sandhills Mental Health Clinic, Pinehurst, N. C."

The record does not contain the report of the psychiatrist.

The latest report appearing in the record is that of Dr. R. L. May, dated 18 April 1969. He stated:

> "It is felt that the patient did sustain an injury as described in July 1968, to the area described, but there is very little objective evidence, if any, of real disability other than the fixation that the patient has developed because of this injury.
>
> Because of this, it is recommended that there is approximately five per cent (5%) disability, but I believe this is primarily a psychological problem."

[1] In passing upon an appeal from an award of the Industrial Commission, this court is limited in its inquiry to two questions of law, namely: (1) Whether there was any competent evidence before the Commission to support its findings; and (2) whether the findings of fact of the Commission justify its legal conclusions and decisions. *Byers v. Highway Comm.*, 275 N.C. 229, 166 S.E. 2d 649; *Petty v. Associated Transport*, 4 N.C. App. 361, 167 S.E. 2d 38.

[2, 3] It is well established that the findings of the Industrial Commission are conclusive on appeal if they are supported by any competent evidence and even though there is evidence which would support a finding to the contrary. *Eaton v. Klopman Mills, Inc.*, 2 N.C. App. 363, 163 S.E. 2d 17. It is our opinion, and we so hold, that the findings made by the Commission are supported by competent evidence and justify its conclusion that plaintiff's temporary total disability terminated on 19 December 1968.

[3-5] Plaintiff argues strenuously that the evidence raises the issue of her total disability to work on account of a "hysterical conversion reaction" resulting from her injury. It is true that

"'[d]isability' as used in the Workmen's Compensation Act means impairment of wage earning capacity rather than physical impairment." *Morgan v. Furniture Industries, Inc.*, 2 N.C. App. 126, 128, 162 S.E. 2d 619; *Burton v. Blum & Son,* 270 N.C. 695, 155 S.E. 2d 71; *Anderson v. Motor Co.*, 233 N.C. 372, 64 S.E. 2d 265. However, the only medical evidence directly relating any disability as the result of a mental condition to the accident in question is in the report of Dr. May. He specifically connected the two and assigns approximately 5% disability as a result of plaintiff's psychological problem. This is the exact permanent disability found by the Commission and supports completely the Commission's finding on this issue.

Plaintiff has not cited the case of *Morgan v. Furniture Industries, Inc., supra,* in support of her contentions. We nevertheless think it important to point out that in that case there was competent medical opinion evidence tending to show that plaintiff was totally disabled and incapacitated emotionally and physically to engage in any gainful work *as a result of a compensable injury.* For that reason the case was remanded to the Industrial Commission for findings on that determinative question. Here, such evidence is totally lacking. A person claiming the benefit of compensation has the burden of showing that the injury complained of resulted from the accident. *Henry v. Leather Co.,* 231 N.C. 477, 57 S.E. 2d 760. Even if plaintiff's evidence was sufficient to show that she is totally incapacitated as a result of a psychological problem, we think it totally insufficient to show that the problem was caused by the accident or her injury resulting from the accident. For the requisites of medical proof of causation see *Gillikin v. Burbage,* 263 N.C. 317, 139 S.E. 2d 753.

Affirmed.

MALLARD, C.J., and MORRIS, J., concur.

MYRTLE DESK COMPANY v. I. L. CLAYTON, COMMISSIONER OF REVENUE FOR THE STATE OF NORTH CAROLINA

No. 7018SC312

(Filed 24 June 1970)

1. Taxation §§ 29, 30— income tax — domestic corporation doing business within and without state — payroll allocation formula — commissions

In determining the percentage of net income allocable to this state for income taxation, a domestic corporation conducting business partly within and partly without the state was not entitled, in applying the payrolls allocation formula in G.S. 105-134(6)(a)(2), to include in the numerator and denominator of its payroll ratio the amounts that it had paid to certain sales representatives who were not employees of the corporation; there was no merit to the corporation's argument that the word *"commissions"* as used in the statute included amounts paid to non-employees if the amounts paid were in fact commissions.

2. Statutes § 5— construction of word of statute

A word of a statute may not be interpreted out of context but must be construed as a part of the composite whole and accorded only that meaning which other modifying provisions and the clear intent of the act will permit.

3. Statutes § 5— statutory construction — reference to title and context

Whenever the meaning of a statute is in doubt, reference may be had to the title and context.

4. Statutes § 5— statutory construction — departmental interpretation

The interpretation given to proposed legislation by the department proposing it is helpful to a court when it is called upon to interpret the legislation.

5. Taxation § 23— construction of tax statute — administrative interpretation

An administrative interpretation of a tax statute which has continued over a long period of time with the silent acquiescence of the Legislature should be given consideration in the construction of the statute.

6. Statutes § 7— construction of amendments — presumptions

In construing a statute with reference to an amendment it is presumed that the legislature intended either to change the substance of the original act or to clarify the meaning of it.

7. Taxation §§ 23, 29— amendment to income tax statutes — purpose

The purpose of the General Assembly in amending G.S. 105-134 was not to change the substance of the original act but was to clarify the original act so as to make it plain that the word "commissions," as used in the original act, meant "wages, salaries, commissions and any other form of renumeration paid to employees for personal services." Session Laws of 1967, Chapter 1110.

APPEAL by defendant from *Collier, J.*, at the 1 December 1969 Civil Session of GUILFORD Superior Court (High Point Division).

The facts are not in dispute and those thought to be essential to an understanding of the controversy are set out in the opinion. The case was heard by the court without a jury. The defendant, excepting to the court's conclusions of law and the entry of a judgment based thereon, appealed.

Womble, Carlyle, Sandridge and Rice by Murray C. Greason, Jr., for plaintiff appellee.

Attorney General Robert Morgan by Assistant Attorney General I. Beverly Lake, Jr., for defendant appellant.

VAUGHN, J.

[1] This case involves G.S. 105-134 as it existed during the tax years in question and as it related to the allocation of the net income of corporations to be taxed in this State. Prior to 1957 three methods of allocation were provided for foreign corporations. Those whose principal business in this State was manufacturing were required to allocate their entire net income to the State on the basis of a formula consisting of the ratios of property and manufacturing cost. Those whose principal business in the State consisted of selling were required to allocate their entire net income to the State upon the basis of a formula consisting of the ratios of property and sales. Those whose principal business in the State was other than manufacturing or selling were required to allocate their entire net income on the basis of their gross receipts ratio. Domestic corporations were taxed upon their entire net income except that those having an established business or investment in property in other states were permitted, in determining net income, to deduct income subjected to a net income tax by the other state which could not exceed the amount which could be allocated to such other state by the use of the applicable allocations formula for a foreign corporation.

The Revenue Act as subsequently amended, and as in effect during the time period involved in this case and with certain exceptions not material here, removed the distinction between foreign and domestic corporations for income tax purposes. The statute provided that a corporation conducting business partly within and partly without North Carolina should be taxed upon a base which reasonably represented the proportion of the business carried on within the State. The amendments also removed the separate formulas which had formerly applied to corporations primarily engaged in

manufacturing and corporations primarily engaged in selling. In determining the base which reasonably represents the proportion of the business carried on within the State, the statute provided that the allocation should be determined by applying to the net income the ratio or percentage arrived at by taking the arithmetic average of three ratios as follows: (1) The ratio of the value of property used in this State to the value of property elsewhere, (2) the ratio of payrolls in North Carolina to payrolls everywhere, and (3) the ratio of sales attributable to North Carolina to total sales everywhere.

The plaintiff is a North Carolina corporation and during the period in question was engaged in the business of manufacturing and selling office furniture in North Carolina and in selling its manufactured products outside North Carolina. The plaintiff brought this action against the Commissioner of Revenue under the provisions of G.S. 105-267 to recover a refund of income taxes and interest in the amount of $8,686.43, which sum plaintiff paid under protest pursuant to assessment of additional corporate income taxes made against plaintiff by the North Carolina Department of Revenue for the years 1962, 1963, 1964 and 1965. Since plaintiff conducted its business partly within and partly without North Carolina, it applied the income allocation formula provided in G.S. 105-134. In applying the income allocation formula, the plaintiff included in the numerator and denominator of its payrolls ratio amounts which it had paid to certain outside sales representatives who were not employees of the plaintiff. The plaintiff filed its income tax returns for these years upon such computation and for each of these years paid the tax produced thereby.

Upon the discovery of the use of such computation, the North Carolina Revenue Department adjusted the plaintiff's income tax returns by eliminating from the payrolls ratio of the plaintiff the amounts paid by it to the outside sales representatives, contending that G.S. 105-134(6)a.2 did not provide for the inclusion in the payrolls ratio of any compensation or payments made by a taxpayer to sales representatives or others who are not employees of the taxpayer. Based upon this adjustment the Revenue Department made an assessment of additional tax and interest against plaintiff. The plaintiff then made payment of the assessments under protest and in apt time made written demand upon the Commissioner for return. Such demand was denied and plaintiff instituted this action.

The trial judge concluded that the statute did not restrict the computation of the payrolls ratio portion of the allocation formula

to employee compensation. He held that payments made to outside sales representatives who were not employees could be included in the payrolls ratio computation of the taxpayer and entered a judgment for plaintiff in the amount stipulated to be correct under that interpretation of the statute. We reach the opposite conclusion.

The section of the General Statutes in question was, in pertinent part, as follows:

"§ 105-134. Corporations. Every corporation engaged in doing business in this State shall pay annually an income tax equivalent to six per cent of its net taxable income. The net taxable income of such corporation shall be determined as provided in this article.

". . . If the corporation is transacting or conducting its business partly within and partly without North Carolina, the tax shall be imposed upon a base which reasonably represents the proportion of the trade or business carried on within the State. . . . The . . . net income of the corporation shall be made in accordance with the following provisions:

. . .

. . .

"(6) . . .

a. Where the income is derived principally from the manufacture, production or sale of tangible personal property or from dealing in tangible personal property the corporation shall apportion its net apportionable income to North Carolina on the basis of the ratio obtained by taking the arithmetic average of the following three ratios:

1. Property. . . .

2. *Payrolls. The ratio of all salaries, wages, commissions and other personal service compensation paid* or incurred by the taxpayer in connection with the trade or business of the taxpayer in this State during the income year to the total salaries, wages, commissions and other personal service compensation paid or incurred by the taxpayer in connection with the entire trade or business of the taxpayer wherever conducted during the income year. For the purposes of this section, *all such compensation to employees* chiefly working at, sent out from or chiefly con-

nected with an office, agency or place of business of the taxpayer in this State shall be deemed to be in connection with the trade or business of the taxpayer in this State; all such compensation to general executive officers having company-wide authority shall be excluded from the numerator and the denominator of the ratio, and all such compensation in connection with income separately allocated under the provisions of this section shall be excluded from the numerator and denominator of the ratio. (emphasis ours)

3. Sales. . . ."

[1-3] In determining the percentage of net income which shall be allocated to this State for the purpose of income taxation, the statute thus recognized three income producing factors — property, payrolls, and sales. Appellee contends, in effect, that "commissions," as the word is used in the section providing for the payrolls ratio, is not limited to commissions paid to those on the corporate payroll but includes sums paid non-employee persons, firms, and corporations, if the sums so paid are "commissions." Black's Law Dictionary, 4th Ed., defines "commissions" as follows:

> "The compensation or reward paid to a factor, broker, agent, bailee, executor, trustee, receiver, etc., usually calculated as a percentage on the amount of his transactions or the amount received or expended."

A word of a statute may not be interpreted out of context but must be construed as a part of the composite whole and accorded only that meaning which other modifying provisions and the clear intent of the act will permit. 7 Strong, N. C. Index 2d, Statutes, § 5, p. 72. The view that "commissions" applies only to commissions paid to employees is consistent with the word "payrolls" which the legislature used as the heading of the subsection and followed with the words ". . . salaries, wages . . ." It is also consistent with the words ". . . all such compensation to employees . . ." in the second sentence. The view that it applies to commissions paid to a nonemployee "factor, broker, agent, bailee, executor, trustee, receiver, etc." would appear to be inconsistent therewith. It is the duty of the court to find the legislative intent. In seeking the intent it is the duty of the court, where the language of a statute is susceptible of more than one interpretation, to adopt the construction and practical interpretation which best expresses the intent of the legislature. *Mullen v. Louisburg,* 225 N.C. 53, 33 S.E. 2d 484. When-

ever the meaning of a statute is in doubt, reference may be had to the title and context. *Finance Corp. v. Scheidt, Comr. of Motor Vehicles,* 249 N.C. 334, 106 S.E. 2d 555.

[4] Our view of the legislative intent is bolstered by the legislative history of this section. Defendant's Exhibit #5 entitled "Report of the Tax Study Commission of the State of North Carolina," dated 10 November 1956, was received in evidence and identified as a report which was available to the General Assembly when G.S. 105-134(6)a.2 was enacted in 1957. On page 32 of the report is found the following:

> "IT IS RECOMMENDED that the payroll factor be defined to include all wages, salaries, and other compensations for personal services of *regularly employed employees* except that general executive officers' salaries be excluded from the ratio, with wages, salaries, etc. of employees attributed to the state of principal activity of the employee." (emphasis ours)

The appendix to this report contained proposed statutory provisions for allocation of income of interstate corprations. With the exception of four words not material here, G.S. 105-134(6)a.2 is identical to the proposed statutory provision dealing with "Payrolls" on page 107 of the report. The interpretation given to proposed legislation by the department proposing it is helpful to a court when it is called upon to interpret the legislation. *In Re Application for Reassignment,* 247 N.C. 413, 101 S.E. 2d 359.

[5] Plaintiff introduced true copies of its income tax returns for the years 1962, 1963, 1964, and 1965. Each of these returns were prepared on Department of Revenue forms which contained instructions for the taxpayer in the allocation of income. Included in the instructions for each of these years is the following:

> "(2) *Payrolls.* The ratio of all salaries wages, commissions and other compensation for *personal services rendered by employees,* [emphasis ours] paid or incurred by the corporation in connection with its business in North Carolina during the income year, to the total of such expenditures paid or incurred by the corporation in connection with its business conducted everywhere during the income years. All compensation paid to general executive officers *having company-wide authority* shall be excluded from both the numerator and denominator used in determining the ratio. All compensation paid in connection with income subject to direct allocation shall be excluded from both the numerator and denominator in determining the ratio."

The North Carolina Department of Revenue has, since its enactment, interpreted and administered the statute on the premise that amounts paid to non-employees could not be included in the payroll ratio. "An administrative interpretation of a tax statute which has continued over a long period of time with the silent acquiesence of the Legislature should be given consideration in the construction of the statute." *Yacht Co. v. High, Commissioner of Revenue,* 265 N.C. 653, 144 S.E. 2d 821.

[6, 7] "In construing a statute with reference to an amendment it is presumed that the legislature intended either (a) to change the substance of the original act, or (b) to clarify the meaning of it." *Childers v. Parker's, Inc.,* 274 N.C. 256, 162 S.E. 2d 481. The ambiguity in the statute which gave rise to the present litigation was removed by Chapter 1110 of the Session Laws of 1967, enacted after the institution of this suit. This act extensively revised all of Article 4 of the Revenue Act. The new section dealing with the payroll factor was clarified so as to make it plain that "compensation" to be included means "wages, salaries, commissions and any other form of remuneration paid to employees for personal services." G.S. 105-130.4. The legislative purpose was, we believe, to clarify the original act rather than as contended by appellee, to change its substance.

Reversed.

CAMPBELL and PARKER, JJ., concur.

H. T. MULLEN, JR., ADMINISTRATOR C. T. A. OF THE ESTATE OF WALTER W. SAWYER, JR. v. GWENDOLYN B. SAWYER

No. 701SC262

(Filed 24 June 1970)

Executors and Administrators § 20— debt of the estate — consent judgment to pay for children's college education

A consent judgment entered into by a father, his divorced wife, the two children of the marriage, and the father's second wife, wherein the father agreed to pay for the college education of the children, did not create a debt in the legal sense which would survive the father's death and become an obligation of the estate.

APPEAL by defendant from *Mintz, J.,* December 1969 Session of Superior Court held in CAMDEN County.

This proceeding was instituted for the purpose of selling certain real estate devised to the respondent herein in the will of Walter Wesley Sawyer, Jr. (Dr. Sawyer). It was alleged in the petition that it was necessary to sell the land in order to make assets for the payment of certain alleged debts of the decedent.

Petitioner H. T. Mullen, Jr., qualified as administrator c.t.a. of the estate of Dr. Sawyer in Camden County on 9 June 1969. Thereafter, two claims were filed with him. One of these claims was by Walter Wesley Sawyer, III (Walter). Walter asserted that the estate of Dr. Sawyer owed him the sum of $9,100 for educational expenses incurred by him under a 1958 consent judgment. The consent judgment was entered in the Superior Court of Pasquotank County at the February Term 1958 in an action entitled *Walter W. Sawyer, III, Sarah Margaret Sawyer, and Miriam Sawyer King v. Walter W. Sawyer, Jr., and wife, Gwendolyn B. Sawyer.*

The other claim filed with the petitioner herein was by Mrs. Sarah Margaret Foust (Sarah) for the amount of $2,700, with interest, for "delinquent child support payments" and a $16,000 claim for "future college education expenses."

Answering the allegations in the petition, the respondent alleges that Dr. Sawyer died on 8 October 1965 a resident of Virginia; that respondent qualified on Dr. Sawyer's estate in the office of the clerk of the Corporation Court, City of Norfolk, on the 14th day of October 1965; that no claim of any kind as pertains to the matters and things set forth in the petition filed herein was ever filed with the defendant as executrix of the last will and testament of Dr. Sawyer; that all debts, including costs of administration, Federal estate tax, North Carolina and Virginia inheritance taxes, were accounted for and paid; that the estate of Dr. Sawyer has been settled and closed in the State of Virginia where Dr. Sawyer and the respondent were domiciled at the time of Dr. Sawyer's death; and that the claims are barred by statute of limitations in Virginia and in North Carolina.

By consent, the matter was transferred to the civil issue docket of the Superior Court of Camden County. After the parties waived trial by jury, the case was heard by Judge Mintz at the December 1969 Session. After hearing the evidence of the parties, Judge Mintz entered a judgment making extensive findings of fact, conclusions of law, and adjudged that the property described in the pleadings be sold. The judgment, which was dated 19 December 1969, directed the administrator to pay from the proceeds thereof the sum of $8,950 to Walter; the sum of $2,400 to Sarah with interest thereon from

the date of the judgment; that the administrator shall "thereafter set aside, in his estate account, the sum of $12,000 to be paid and applied by him, in his discretion, to the expenses of a four year college education for Sarah Margaret Foust, as the same shall hereinafter accrue, together with an additional sum of $1,500.00 for such administrative expenses of said estate which may hereafter accrue; said administrator shall only pay and apply said sum of $12,000.00 to the college educational expenses of said Sarah Margaret Foust within the six (6) year period immediately following the date of this judgment."

The judgment required that the surplus assets of said estate, after providing for the payment of the items hereinabove set forth, shall be paid over to the "Virginia Executrix."

From the entry of this order, the respondent appealed to the Court of Appeals.

Small, Small & Watts by Thomas Watts for petitioner appellee.

Forrest V. Dunstan and Gerald F. White for respondent appellant.

MALLARD, C.J.

The judgment of Judge Mintz in this case covers almost eighteen pages of the record. In this judgment Judge Mintz made thirty-two findings of fact, fourteen conclusions of law, and there are nine different paragraphs in the adjudication portion of the judgment. To each of the findings of fact, except one, and to each conclusion of law, and to each paragraph of the judgment, the respondent excepts. There are eighty-two exceptions in the record and eighty-two different assignments of error. To each of the findings of fact excepted to, the respondent asserts in her exception that "same is not supported by competent evidence and is not supported by the findings of fact." The sole exception that does not have the above as the basis of the exception is that the defendant excepts to the conclusion of law designated (m) in said judgment to the effect that "(t)he marriage of Sarah Margaret Foust did not waive or invalidate her right to have the provisions of the 1958 consent judgment enforced."

To each of the nine separate parts of the adjudication in the judgment, the defendant excepts in the following language: "For that same is not supported by competent evidence, is not supported by the findings of fact, and is not supported by the conclusions of law, and is erroneous."

In addition, the eighty-second exception and assignment of error is that "the trial court committed prejudicial error in signing and entering the said foregoing judgment."

It was stipulated, among other things, that "the sum of $2,255.00 in federal estate tax was paid to the United States government as a result of the death of Dr. Walter W. Sawyer, Jr. The sum of $1,975.31 in Virginia inheritance tax was paid to the Commonwealth of Virginia as a result of the death of Dr. Walter W. Sawyer, Jr. The sum of $298.18 in North Carolina inheritance tax was paid to the State of North Carolina as a result of the death of Dr. Walter W. Sawyer, Jr. All such estate and inheritance taxes were paid by the Virginia Executrix."

It was further stipulated that "(n)o caveat has been filed against the will of Dr. Walter W. Sawyer, Jr., either in North Carolina or Virginia."

The evidence in this case tended to show that Walter and Sarah were children of Dr. Sawyer and his first wife, Miriam Sherlock Sawyer, who were divorced on 27 October 1954; that thereafter, Dr. Sawyer and the respondent herein were married and were living in Virginia at the time of his death; that Walter was born on 24 April 1944, and Sarah was born on 13 September 1949; and that Dr. Sawyer and his first wife entered into a separation agreement, and thereafter the consent judgment involved in this present action was entered into.

The consent judgment required Dr. Sawyer to make certain payments to Miriam Sawyer King "for the use and support of the two said minor children." In addition thereto, the following part of said consent judgment is pertinent for a proper understanding of this case:

> "It is further ORDERED that the defendant, Walter W. Sawyer, Jr. assume the burden of a four year college education for each of said children at the college of his choosing and that such time he shall deal directly with said minor children in supplying the necessary funds for their scholastic requirements, but in the event at any period during said four years of such college education aforementioned, either or both of said children should refuse to go or to continue with college at any interim period, or should either or both of said children fail to pass their work, or by misconduct be refused by the college authorities reentry thereto, then, in such event, the said defendant is relieved of further educational responsibilities."

Other parts of the consent judgment dated 3 March 1958 are quoted in an opinion of this court filed in the case of *Sarah Margaret Sawyer, by her Next Friend, Miriam S. Sawyer, and Walter W. Sawyer, III v. Gwendolyn Brinkley Sawyer,* reported in 4 N.C. App. 594, 167 S.E. 2d 471 (1969). In that case plaintiffs sought to recover of the defendant on the consent judgment. These same parties were also before this court upon an appeal by the plaintiffs from an order setting aside a judgment of default and inquiry. The opinion in that case is reported in 1 N.C. App. 400, 161 S.E. 2d 625 (1968).

The evidence also reveals that Walter, after having been graduated from high school in the Spring of 1962, attended Old Dominion College, the college of Dr. Sawyer's choice. Walter entered this college in the Fall of 1962 but voluntarily quit and withdrew that same Fall and did not thereafter attend the school chosen by his father.

The evidence tended to show that prior to his death on 8 October 1965, Dr. Sawyer had made the required support payments to his first wife for the support of the children as required by the 1958 consent judgment. At the time of Dr. Sawyer's death, the son, Walter, was twenty-one years of age. Sarah reached her eighteenth birthday on 13 September 1967, and it was stipulated that she did not receive any support from Dr. Sawyer or his estate from 8 October 1965 through 13 September 1967.

It was also stipulated that neither of Dr. Sawyer's children received any money from him for their college education with the exception of the money paid for the benefit of Walter during the time he lived in his father's home in Virginia and attended Old Dominion College. It was also stipulated "(t)hat the Will of Walter Wesley Sawyer, Jr. has been duly filed and probated by the Clerk of Superior Court of Camden County, North Carolina, and that H. T. Mullen, Jr. has been duly qualified and is acting in his fiduciary capacity as Administrator C.T.A. That there is no personal property of the estate of Walter Wesley Sawyer, Jr. to be found in the State of North Carolina."

The evidence in this case also tended to show that Sarah was graduated from high school in 1967 and that shortly thereafter, she was married. The date of her marriage is not given. However, it does appear from the evidence that a child was born of the marriage in May of 1968.

Petitioners assert in their brief: "This court previously held in

Sawyer v. Sawyer, 4 N.C. App. 594 at 599 (1969), that the burdens of support rested upon the father. By using the plural, this court clearly indicated both the support obligation and the education costs rested on the father." In making this contention, petitioners have misinterpreted the decision. What this court said in that opinion was: "A reading of the consent judgment in question reveals that the defendant in this case did not assume the burdens of support alleged in the complaint, but rather that they were upon Walter W. Sawyer, Jr." This language cannot be logically construed to mean that this court was holding in that case that the liability of the estate of Dr. Sawyer for the support or education of the children survived the death of Dr. Sawyer.

In the case of *Layton v. Layton,* 263 N.C. 453, 139 S.E. 2d 732 (1965), the Court said:

> " 'The relationship of parent and child is a status, and not a property right.' 67 C.J.S., Parent and child, § 2, p. 628. At common law it is the duty of a father to support his minor children. *Elliott v. Elliott,* 235 N.C. 153, 69 S.E. 2d 224; *Green v. Green,* 210 N.C. 147, 185 S.E. 651; *Blades v. Szatai,* 135 A. 841, 50 A.L.R. 232. And where a child is of weak body or mind and unable to care for itself after coming of age, the duty of the father to support the child continues as before. *Wells v. Wells,* 227 N.C. 614, 44 S.E. 2d 31, 1 A.L.R. 2d 905; 39 Am. Jur., Parent and Child, § 69, p. 710. The common law obligation of a father to support his child is not 'a debt' in the legal sense, but an obligation imposed by law. *Ritchie v. White,* 225 N.C. 450, 35 S.E. 2d 414. It is not a property right of the child but is a personal duty of the father which is *terminated by his death. Elliott v. Elliott, supra; Lee v. Coffield,* 245 N.C. 570, 96 S.E. 2d 726; *Blades v. Szatai, supra. These* common law principles have not been abrogated or modified by statute and are in full force and effect in this jurisdiction. G.S. 4-1; *Elliott v. Elliott, supra.*
>
> The support of a child by a parent may be the subject of contract and a father may by contract create an obligation to support his child which will survive his death and constitute a charge against his estate, in which case the ordinary rules of contract law are applicable. *Church v. Hancock,* 261 N.C. 764, 136 S.E. 2d 81; *Stone v. Bayley,* 134 P. 820; 39 Am. Jur., Parent and Child, § 69, p. 710. Such contracts are not against public policy, but there must be a clear intention that the obligation survive the death of the parent. *Stone v. Bayley, supra.*

'A consent judgment is the contract of the parties entered upon the records with the approval and sanction of a court of competent jurisdiction, and its provisions cannot be modified or set aside without the consent of the parties, except for fraud or mistake.' 3 Strong: N.C. Index, Judgments, § 10, p. 16; *Church v. Hancock, supra.* The consent order of January 1951 is a contract for the benefit of E. C. Layton's minor children. Our inquiry is whether it created a debt in a legal sense which survived his death and became an obligation of his estate. We look to the intent of the parties to be gathered from the contract. *Stone v. Bayley, supra; Goodyear v. Goodyear,* 257 N.C. 374, 126 S.E. 2d 113."

Applying the foregoing principles of law, we hold that the consent judgment did not create a debt in a legal sense which survived Dr. Sawyer's death and became an obligation of his estate. In so holding, we look to the intent of the parties as gathered from the consent judgment and conclude that by the terms of the consent judgment, it was not intended to create a debt which would survive Dr. Sawyer's death and become an obligation on his estate. We hold that the facts found by Judge Mintz, to-wit: that the estate is indebted to Sarah and Walter, are not supported by the law or the evidence. Therefore, the conclusions of law upon which the judgment is based are erroneous. The judgment entered herein is reversed.

Reversed.

MORRIS and GRAHAM, JJ., concur.

JULIA WARD CURRY v. JAMES BROWN

No. 704SC184

(Filed 24 June 1970)

1. Automobiles § 56— accident case — hitting car stopped on highway — sufficiency of evidence

Evidence presented by plaintiff, who was a guest passenger in the automobile driven by defendant, *held* insufficient to permit a jury finding of defendant's negligence in the accident resulting in injuries to plaintiff, where the evidence was to the effect that (1) defendant, driving within the speed limit, was following a station wagon in the extreme right-hand lane of a four-lane road; (2) as the two cars approached a curve the driver of the station wagon abruptly stopped upon being confronted

with a truck that was parked in the curve in their lane of travel; (3) defendant applied his brakes and turned his car into the left or inside lane, thereby successfully avoiding the station wagon but colliding with a hitherto unseen automobile that was parked in the inside lane beside the truck.

2. Automobiles § 11— presumption of negligence in rear-end collision — hitting unseen car on curve

The rule that the mere fact of a rear-end collision with the car ahead may furnish some evidence that the following motorist was negligent as to speed, following too closely, or failing to keep a proper lookout, *held* inapplicable in the case where the following motorist, in order to avoid a rear-end collision with a station wagon that had stopped abruptly on the curve of a four-lane highway, pulled over into the inside lane and collided with a hitherto unseen car that was parked in the inside lane.

3. Automobiles § 44— res ipsa loquitur — hitting vehicle parked on curve of highway

The doctrine of *res ipsa loquitur* was inapplicable in the case where the driver of a following automobile, in order to avoid a rear-end collision with a station wagon that had stopped abruptly on the curve of a four-lane highway, pulled over into the inside lane and collided with a hitherto unseen car that was parked in the inside lane.

4. Witnesses § 9— examination of opposing counsel's notes used in cross-examination

Trial court's refusal to compel defense counsel to furnish for inspection by plaintiff's counsel a written statement used by defense counsel in cross-examining the plaintiff, the statement purportedly having been signed by plaintiff, *held* not prejudicial in this automobile accident case.

APPEAL by plaintiff from *Cowper, J.*, 10 November 1969 Civil Session of ONSLOW Superior Court.

Plaintiff, a guest passenger riding in defendant's automobile, brought this civil action to recover damages for personal injuries which she alleges were caused by defendant's negligence when he drove his automobile into the rear of another vehicle. Plaintiff alleged that defendant was negligent in driving at an excessive speed, to wit, 55 miles per hour in a 35 mile per hour speed zone, in failing to keep a proper lookout, in failing to keep his automobile under proper control, and in other respects. Defendant denied negligence on his part.

At the trial plaintiff testified in substance as follows: She had known defendant for some time, and when he would see her he would give her a lift. On 2 August 1967 at about 4:30 or 5:00 p.m., she was walking along Bell Fork Road and saw defendant and he picked her up. She was seated on the front seat in the right-hand side and there were no other passengers in the car. Defendant was

traveling in a westerly direction and Bell Fork Road had two traffic lanes on the right and two traffic lanes on the left. Plaintiff didn't recall anything else until she woke up in a hospital. On the following day defendant visited her in the hospital and said he hit a car in the back.

The only other evidence presented concerning the collision was the adverse examination of the defendant, which plaintiff had taken prior to the trial and which was read to the jury. In this, defendant testified as follows:

"This accident took place at about 5:00 p.m. I picked up Julia Curry on Highway 24. I was traveling at approximately 35 miles per hour.

"I was traveling on Bell Fork Road behind another car and I didn't know a truck was parked in front of me and the car threw on brakes and I swerved on the left to miss him and there was a parked car. I couldn't see it. The curve was to my right. Due to the fact the van was in the curve, I wasn't able to stop. All I know is when the man threw on the brakes, and I threw on my brakes, and cut out, you know to go around him. There were two traffic lanes in the direction I was going. I was in the far right traffic lane next to the shoulder. The car was proceeding in the same direction I was traveling in. I do not know how close I was to their car, I wasn't on him, but I saw his taillights come on and I put on brakes and swerved to the left. I swerved to the left like anybody else would do. I just guess it was driver's instinct. I did not lose control of the car I was driving. I struck a 1963 or 1964 Chevrolet. This Chevrolet was in the left lane on the side of the truck and I struck the Chevrolet in the back."

* * * * *

"It is not a fact that I applied brakes and swerved to the left lane because I was coming upon the car too fast to slow down and stop before hitting it."

* * * * *

"I tried to stop from hitting the car.

"I didn't see the car that I struck when I pulled into the left lane, and I didn't know there was a car parked there and before I pulled out, I looked but I couldn't see the car. You always try to find out what is around the curve. I didn't know the car was parked there. I looked but I couldn't see."

* * * * *

"The curve I was going around when the accident happened curved to the right. I was following another vehicle. I don't know for how long I had been following the station wagon, I know a good distance.

"When I applied brakes and cut to the left lane, the accident happened pretty quick. I found out that there was no one occupying that van and there was no warning of any kind that the truck was parked in the road and because the road was curving to the right, I was unable to see the car in the left lane."

* * * * *

"I don't think that the station wagon which was in front of me struck the van."

At the close of plaintiff's evidence, defendant's motion for nonsuit was allowed, and plaintiff appealed.

Joseph C. Olschner for plaintiff appellant.

Marshall, Williams & Gorham, by Lonnie B. Williams for defendant appellee.

PARKER, J.

[1] Plaintiff's evidence, considered in the light most favorable to her and giving her benefit of every inference which may reasonably be drawn, was insufficient to permit a jury finding of any negligence on the part of defendant. The evidence discloses that defendant, while driving within the speed limit and following a station wagon in the extreme right-hand lane of a four-lane road, came to a curve to his right; that the driver of the station wagon "threw on the brakes" when confronted by a truck or van parked in the curve in their lane of travel; that defendant thereupon also applied his brakes and turned his car into the left or inside lane for traffic moving in his direction; that he was then suddenly confronted with a Chevrolet parked in the inside lane beside the van, and which he had been unable to see previously because of the curve and the parked van. Nothing in this evidence indicates that defendant was driving at excessive speed, failed to keep a proper lookout, failed to keep his car under proper control, was following too close, or was negligent in any respect.

[2, 3] It should be noted that the present case does not present a situation in which a following motorist collides with the rear of a vehicle moving ahead in the same direction. In certain of such cases, the mere fact of a rear-end collision with the car ahead may furnish

some evidence that the following motorist was negligent as to speed, following too closely, or failing to keep a proper lookout. *Clontz v. Krimminger,* 253 N.C. 252, 116 S.E. 2d 804. In the present case, however, all of the evidence establishes that defendant successfully avoided striking the station wagon which had been moving ahead of him and which stopped abruptly on coming upon the parked van. The collision occurred only when defendant, after successfully avoiding the station wagon, suddenly came upon the Chevrolet parked in the inside traffic lane. Thus the present case presents a very different situation than usually presented in the rear-end collision cases involving two vehicles moving in the same direction. Even in those cases the rule stated in *Clontz* is by no means to be mechanically applied. "Whether in a particular case there be sufficient evidence of negligence to carry that issue to the jury must still be determined by all of the unique circumstances of each individual case, the evidence of a rear-end collision being but one of those circumstances." *Racine v. Boege,* 6 N.C. App. 341, 169 S.E. 2d 913. "Where plaintiffs' evidence shows there was no negligence as to speed, lookout and close following, or that negligence in these respects could not have been a proximate cause of the collision and damage, the rule stated in the *Clontz* case does not apply." *Jones v. Atkins Co.,* 259 N.C. 655, 131 S.E. 2d 371. Such was the situation disclosed by the evidence in the case presently before us. The mere happening of the collision under the circumstances shown by the evidence in this record furnishes no basis for drawing any inference of negligence on the part of defendant and the principle announced in *Greene v. Nichols,* 274 N.C. 18, 161 S.E. 2d 521, does not apply. In that case our Supreme Court held that when an automobile leaves the highway without apparent cause and inflicts injury, an inference of the driver's actionable negligence arises which will take the case to the jury, the doctrine of *res ipsa loquitur* being applicable. In our opinion no such inference of driver negligence arises from the facts shown by plaintiff's evidence in the present case, and the judgment of nonsuit was properly entered.

[4] While plaintiff was testifying on cross-examination, defendant's counsel asked her a question concerning a prior written statement given by her. Plaintiff's counsel asked to see the statement, and now assigns as error that the trial judge failed to direct that the statement be given to him for examination, citing *Warren v. Trucking Co.,* 259 N.C. 441, 130 S.E. 2d 885. In that case plaintiff's counsel, while cross-examining a defendant witness, presented to the witness a photostatic copy of a written statement which had been previously given and signed by the witness and asked the witness

both to identify his signature and to read portions of the statement which were inconsistent with the testimony of the witness at the trial. Our Supreme Court held that under such circumstances it was error for the trial judge to refuse the request of defendant's counsel to see the statement, even though the statement was not introduced in evidence. In the present case it is not altogether clear from the record before us whether the written statement referred to was in possession of defendant's counsel while he was cross-examining the plaintiff or even whether the statement was present in the courtroom at any time during the trial. Therefore, on the record before us the question presented in the *Warren* case does not clearly arise. It is clear, however, that plaintiff's entire testimony, including her testimony given on cross-examination, bore no relationship whatsoever to the issue of defendant's negligence, since plaintiff was unable to recall anything concerning the collision or the relevant events leading up to it. Since nonsuit was properly entered because of plaintiff's failure to present sufficient evidence on the issue of defendant's negligence, error, if indeed any was committed, in failing to compel defendant's counsel to furnish the statement for inspection by plaintiff's counsel, could not have had any prejudicial effect on this appeal. The judgment appealed from is

Affirmed.

CAMPBELL and VAUGHN, JJ., concur.

STATE OF NORTH CAROLINA v. ROBERT EVANS

— AND —

STATE OF NORTH CAROLINA v. NELSON NAPOLEON JOHNSON

No. 7018SC291

(Filed 24 June 1970)

1. Criminal Law § 154— preparation of record on appeal — duty of appellant

It is the appellant's duty to see that the record on appeal is properly made up and transmitted to the Court of Appeals.

2. Criminal Law § 155.5— dismissal of appeal — failure to docket record on time

Appeal is subject to dismissal where the record on appeal was not docketed in the Court of Appeals within the ninety days allowed by Rule 5 and no order was entered in the superior court within the ninety days

which extended the time for docketing the record on appeal. Rules of Practice Nos. 17 and 48.

3. Criminal Law § 155.5— extension of time for docketing case on appeal — good cause

The extension of time for docketing the case on appeal in the Court of Appeals may be granted *only* upon a finding that there was good cause for the extension. Rule 5 of the Court of Appeals.

4. Criminal Law § 155.5— statement of case on appeal — extension of time

A judge who was not the trial judge was without authority to extend appellant's time to serve the statement of the case on appeal. Rule 50 of the Court of Appeals.

5. Criminal Law § 166— filing of supplementary brief — leave of the Court of Appeals

Defendants' "supplementary brief" which was filed after argument but without leave of the Court of Appeals was a violation of Rule 11.

6. Schools § 15; Criminal Law §§ 138, 147.5— disturbing school — mitigation of punishment by Court of Appeals

Although the defendants' appeals in a school disturbance prosecution were subject to dismissal for failure to comply with the rules of the Court of Appeals, the Court, in the exercise of its supervisory powers, reduced the defendants' sentences of imprisonment from twelve months to six months, where the statute mitigating the punishment for the offense had become effective on the day defendants were sentenced.

APPEAL by defendants from *Collier, J.*, 27 October 1969 Regular Session of Superior Court held in GUILFORD County.

Each of the defendants is charged in a separate warrant with unlawfully and wilfully disturbing and interrupting the James B. Dudley High School (high school) in violation of G.S. 14-273. The high school is located on Lincoln Street, Greensboro, North Carolina. The offense is alleged to have occurred on 9 May 1969. In the warrant against Robert Evans (Evans), it is alleged that he disturbed and interrupted the school "by conducting an unauthorized meeting in the hallway and the assembly area of the said school, and laughing loudly and clapping his hands as to disrupt classes being held at the said school." In the warrant against Nelson Napoleon Johnson (Johnson), it is alleged that he disturbed and interrupted the school "by conducting an unauthorized meeting in the hallway and the assembly area of the said school, and by using a device to amplify the voice."

The evidence for the State tended to show that these two defendants, Evans and Johnson, were two of the leaders of a crowd of

some seventy-five to three hundred people who went on the campus of the high school on 9 May 1969 and split into two groups. They made so much noise, most of which appeared to be directed against the principal of the school, Franklin J. Brown (Brown), that school had to be dismissed some hour and a half to two hours prior to the time of regular dismissal of school. Neither Evans nor Johnson was a student at the high school. Evans had been graduated from another high school the year before this occurrence, and Johnson was a student at "A. & T." "A. & T. State University" is located about two miles from the high school. Defendant Evans was in front of one of the groups of adult black men on the campus of the high school. The groups were chanting, "Damn Brown, Let My People Go." Evans was told that he would be arrested if he did not leave the campus; whereupon, he called the Director of Public Information and Publication of the Greensboro Board of Education a "white pig." Thereafter Evans entered the hallway of one of the buildings. People filled the hallway. The crowd in the hallway seemed to be directing its animosity and ill-will towards Brown. Brown was in the hallway when Brown told the police officers, "they have taken over my school." At that time Evans was very near to Brown. Johnson was in front of one of the groups and was involved in the general chanting. The high school was composed of several buildings. Inside the gymnasium Johnson got on a table and used a vocal amplifier to address a large crowd of people therein. While he was addressing the crowd, the police officers came and requested Johnson to leave. At that time someone in the crowd kicked one of the police officers, and the police officers left immediately. At that time there were some three hundred people in the gymnasium, some of them students from the high school and some of them students from the "A. & T. State University."

The defendants were found guilty by the jury of the crime with which they were charged and were sentenced to twelve months in the common jail of Guilford County and assigned to work under the supervision of the North Carolina Department of Correction.

From the sentences so imposed, each defendant gave notice of appeal to the Court of Appeals. The defendants were allowed fifty days to prepare and serve case on appeal, and the State was allowed twenty days after such service to prepare and serve countercase.

The appeal entries were entered on 30 October 1969. The sentence was imposed on 30 October 1969.

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

Lee, High, Taylor & Dansby by David M. Dansby, Jr., for defendant appellants.

MALLARD, C.J.

The record on appeal shows that the cases against these two defendants were consolidated with another case against a defendant named Vincent McCullough. The record on appeal does not disclose what happened to the case against the defendant McCullough. However, it is noted in the charge that the court did not instruct the jury with respect to the charge against the defendant McCullough. It is assumed, therefore, that the court dismissed the case against McCullough prior to submitting the case to the jury.

The record on appeal does not reveal how the cases got into the superior court. The record on appeal shows that the defendants were tried on warrants in the superior court but does not show how the superior court obtained jurisdiction. However, in a newspaper article inserted in the record by the defendants in support of the motion of the defendants for a mistrial, the following appears: "All three were convicted on the charges in the District Court, and appealed to Superior Court for jury trials."

[1] It is the appellant's duty to see that the record on appeal is properly made up and transmitted to the Court of Appeals. *State v. Stubbs*, 265 N.C. 420, 144 S.E. 2d 262 (1965).

The record does not reveal that these are indigent defendants.

[2] The State on 7 May 1970 filed a motion in this cause to dismiss this appeal. The State alleged that the defendants had failed to comply with Rule 5 of this Court in that the record on appeal was not docketed within ninety days and no order was entered in the superior court within ninety days of the entry of the judgment extending the time for docketing the record on appeal. The record on appeal was docketed in this Court on 29 March 1970. In December 1969 Judge Collier signed an order extending the time in which Evans could serve his statement of case on appeal to and including the 15th day of February 1970. On 17 December 1969 Judge Collier extended the time for the defendant Johnson to serve his statement of case on appeal to and including the 15th day of February 1970. It is observed that in neither of these orders was there any order made with respect to extending the time for docketing the record on appeal. The ninety days allowed for docketing the record on appeal expired on 29 January 1970, and at that time no order had been entered extending the time to docket the record on

appeal. In the case of *Roberts v. Stewart and Newton v. Stewart,* 3 N.C. App. 120, 164 S.E. 2d 58 (1968), *cert. den.* 21 January 1969, 275 N.C. 137, it is said: "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." Since this record on appeal was not docketed within ninety days as required by Rule 5 of the Rules of Practice in the Court of Appeals and since no order was obtained within the ninety days from the trial tribunal extending the time for docketing the record on appeal, the case is subject to be dismissed under Rule 17 and Rule 48 of the Rules of Practice in the Court of Appeals.

[3, 4] On 13 February 1970 Judge Kivett, without a finding that good cause existed for the extension of time to docket a case on appeal, attempted to extend the time of the defendants for docketing the case on appeal until 30 March 1970. This also was a violation of Rule 5 of the Rules of Practice in that Rule 5 requires that "the trial tribunal may, *for good cause,* extend the time not exceeding sixty days, for docketing the record on appeal." (Emphasis Added.) Moreover, in this same order Judge Kivett attempted to extend the time in which the defendants could serve statement of case on appeal to and including the 25th day of February 1970. In this order of Judge Kivett extending the time to serve case on appeal it was stated that it was "for good cause shown." However, Rule 50 of the Rules of Practice in the Court of Appeals, adopted by the Supreme Court of North Carolina on 18 February 1969, provides that *only* the trial judge may extend, for good cause and after reasonable notice to the opposing party or counsel, the time for service of the case on appeal and countercase or exceptions. Judge Kivett was not the trial judge and, therefore, was without authority to extend the time to serve the statement of case on appeal. The record reveals that the statement of the case on appeal was served on the solicitor on 24 February 1970, which was after the time granted by Judge Collier, the trial judge, for the extension of the time to serve the case on appeal. Therefore, the case on appeal was not served within the time as permitted under the Rules of Practice in the Court of Appeals.

[5] After this case was argued, the defendants filed what they called a "supplementary brief" without leave of the court to do so. This is in violation of Rule 11 of the Rules of Practice in the Court of Appeals which, among other things, provides that "no brief or written argument will be received after a case has been argued or submitted, except upon leave granted in open court, after notice to opposing counsel."

[6] On 9 May 1969, the date the defendants were charged with this offense, punishment was by fine or imprisonment, or both, in the discretion of the court. Thereafter, on 1 July 1969, the General Assembly of North Carolina, by Chapter 1224 of the Session Laws of 1969, changed the punishment for the offense with which the defendants are charged by making it "punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both." This act became effective on 1 October 1969 and was in effect on the day that the judge imposed the sentence on these defendants. In *State v. Spencer, et al,* 276 N.C. 535, 173 S.E. 2d 765 (filed 13 May 1970), the Supreme Court said:

> "We note, however, that while this appeal was pending the Legislature amended G.S. 20-174.1(b) to read as follows: 'Any person convicted of violating this section shall be punished by a fine not exceeding five hundred dollars ($500.00) or by imprisonment not exceeding six months, or both, in the discretion of the court.' (S.L. 1969, c. 1012) Since this amendment reduced the maximum punishment for violation of G.S. 20-174.1(a) while this appeal was pending, the change inures to the benefit of defendant Henry Johnson, Jr., who was given an active sentence of nine months by the trial judge. 'A judgment is not final as long as the case is pending on appeal.' *State v. Pardon,* 272 N.C. 72, 75, 157 S.E. 2d 698, 701, and authorities there cited. The judgment as to defendant Henry Johnson, Jr., is therefore modified so as to reduce his sentence from nine months to six months in the common jail of Hyde County."

The case should be dismissed for failure to comply with the Rules of this Court. However, acting under the supervisory powers of this Court and applying the above principles of law to the facts in this case, the judgment as to the defendant Evans should be and is modified so as to reduce his sentence from twelve months to six months in the common jail of Guilford County, and the judgment as to defendant Johnson is also modified so as to reduce his sentence from twelve months to six months in the common jail of Guilford County.

As modified, the judgment of the superior court is affirmed.

Modified and affirmed.

MORRIS and GRAHAM, JJ., concur.

BENJAMIN S. HARRISON, EXECUTOR OF THE ESTATE OF JENNIE S. HARRISON v. PEOPLES BANK AND TRUST COMPANY, TRUSTEES UNDER THE WILL OF JENNIE S. HARRISON; NAN DANIELS HARRISON; ANN DANIELS HARRISON COSSEBOOM AND HUSBAND, DAVID EARL COSSEBOOM; JASON STONE COSSEBOOM, MINOR; JAN IVERSON HARRISON, SINGLE; FRANCIS BUFF ALETA HARRISON, MINOR; THE UNBORN CHILDREN OF BENJAMIN S. HARRISON; THE UNBORN CHILDREN OF ANN DANIELS HARRISON COSSEBOOM; THE UNBORN CHILDREN OF JAN IVERSON HARRISON; THE UNBORN CHILDREN OF FRANCIS BUFF ALETA HARRISON; AND THE UNBORN CHILDREN OF BENJAMIN S. HARRISON; WILLIAM S. HOYLE, GUARDIAN AD LITEM; AND JAMES E. EZZELL, JR., GUARDIAN AD LITEM

No. 707SC178

(Filed 24 June 1970)

1. Wills § 41— rule against perpetuities

The rule against perpetuities provides that no grant or devise of a future interest in property is valid unless the title thereto must vest, if at all, not later than twenty-one years, plus the period of gestation, after some life or lives in being at the time of the creation of the interest.

2. Wills § 41— testamentary trust — violation of rule against perpetuities

Testamentary trust providing that the trust income should be paid to testratrix' son for life, that at the son's death a proportionate share of the corpus should be paid to each of testatrix' grandchildren who has then reached the age of 30, with income from the remaining trust corpus being paid to the grandchildren who are under age 30 and a proportionate share of the corpus being distributed to each such grandchild upon his attainment of the age of 30, and that the share of each grandchild who predeceases testatrix' son or who dies before reaching age 30, and without surviving issue, should go in equal shares to the surviving grandchildren and per stirpes to the surviving issue of any grandchild who predeceased testatrix' son or died before reaching age 30, with a per stirpes share of the income being paid to each such great-grandchild until he reaches age 25, at which time his share of the corpus will be distributed to him, *held* void as violative of the rule against perpetuities, the limitations to testatrix' unborn grandchildren or those grandchildren who have not reached age 30 upon death of testatrix, and to testatrix' great-grandchildren both being in violation of the rule.

APPEAL by defendants William S. Hoyle, Guardian ad litem and James E. Ezzell, Jr., Guardian ad litem from *Bundy, J.*, 8 December 1969 Session, NASH Superior Court.

This is an action for a declaratory judgment instituted by the executor of the estate of Jennie S. Harrison for the purpose of ascertaining whether or not the terms of a testamentary trust created by

the will of Jennie S. Harrison violate the rule against perpetuities. No issue of fact is involved.

The plaintiff alleged that the language contained in the will of Jennie S. Harrison bequeaths interests in the trust created thereby which will not vest within the time required by the rule against perpetuities and, therefore, that the property referred to in said trust should descend to the heirs at law of the testatrix. The defendants alleged that the interests created by the aforesaid testamentary trust do vest within the time required by the rule against perpetuities and, therefore, the said trust should be declared valid and the executor be directed to administer the same according to its terms.

Alternatively, the defendant, William S. Hoyle, Guardian ad litem, alleged that if the subject trust was found to be in violation of the rule against perpetuities because of the limitations to the testatrix's great-grandchildren, such limitations are severable from the limitations to the testatrix's grandchildren, thereby enabling the court to preserve the trust as to the latter stated interests.

No answer was filed by Ann H. Cosseboom and Jan Harrison, adult children of Benjamin S. Harrison. Peoples Bank and Trust Co., trustee, filed answer disclaiming any interest in the controversy and expressing its intention to renounce as trustee.

The case was tried without a jury. The sole question presented to the court for decision was the question of law as to whether Item 8 of the last will and testament of Jennie S. Harrison, deceased, established a valid testamentary trust. The court held the bequest to be violative of the rule against perpetuities and entered judgment in part as follows:

> "NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED, that said testamentary trust attempted to be set up in said Item 8 of said will is void and of no legal force or effect and that the plaintiff, Benjamin S. Harrison, as executor of the said will of Jennie S. Harrison, deceased, is directed to administer said estate and distribute the assets thereof without regard to said testamentary trust as if the same had not been a part of said will."

Defendants, William S. Hoyle, Guardian ad litem of the defendant, Frances Buff Aleta Harrison, a minor child of Benjamin S. Harrison, and the unborn children of Benjamin S. Harrison and James E. Ezzell, Jr., Guardian ad litem for Jason Stone Cosseboom and the unborn grandchildren of Benjamin S. Harrison, appeal.

Thorp and Etheridge by Stephen E. Culbreth for plaintiff appellee.

Dill and Fountain by William S. Hoyle for defendant appellant Hoyle, Guardian ad litem.

James E. Ezzell, Jr., for defendant appellant Ezzell, Guardian ad litem.

VAUGHN, J.

[1] "What is ordinarily denominated 'the rule against perpetuities' is as follows: No devise or grant of a future interest in property is valid unless the title thereto must vest, if at all, not later than twenty-one years, plus the period of gestation, after some life or lives in being at the time of the creation of the interest." *Clarke v. Clarke,* 253 N.C. 156, 116 S.E. 2d 449.

[2] The sole question presented by the appeal is whether the trial judge was correct in his conclusion that the trust created in the will of Jennie S. Harrison is invalid because it is violative of that rule. The portion of the will in controversy is as follows:

> "(8) After my executor shall have provided for the payment of the taxes, debts, and administration expenses due to be paid by my estate, I do devise, bequeath and convey all the remaining personal property not elsewhere disposed of elsewhere in this Will to The Peoples Bank & Trust Company of Rocky Mount, N. C. and its successors AS TRUSTEE, not for its own use and benefit, but on the hereinafter enumerated trusts, powers and authority:
>
> "A: — The property herein conveyed shall consist of such items as cash, bank accounts, certificates of deposit, Savings & Loan Accounts and deposits, bonds, notes and evidences of debt, insurance payable to my estate, shares of Stock in Mutual Funds and other corporations and companies, as well as choses in action or any kind and type of personal property.
>
> "B: — Without in any way limiting those powers and duties granted by the laws of the State of North Carolina to Trustees and to fiduciaries, I do hereby authorize and empower my trustee to receive, hold, invest, reinvest, buy, sell, and to otherwise invest or to refrain from investing, and to otherwise deal in the properties comprising this trust as my trustee, in the exercise of reasonable prudence, may deem proper and for the best interests of my beneficiary or beneficiaries under this trust.

"C: —During the Month of January of each year during the life of this trust my trustee shall figure the net profit of the trust, after the deduction of all expenses, charges and taxes for the preceding year. Each such preceding years profit shall be paid out during the year in regular and convenient monthly payments to my beneficiary or beneficiaries.

"Payments as outlined above shall be made to my son Benjamin for the duration of his life. After his death, it is my will and desire that his children share equally in the income and benefits of this trust, with their issue standing in the stead of deceased parents on a per stirpes basis thereto, but in the following manner:

"After the death of Benjamin, to any or all of his surviving children who shall then be thirty years of age or older, my trustee shall pay over his or her proportionate share of the corpus of the trust, either in money or in kind as my trustee shall deem to the best anvantage of the beneficiary being paid at the time; the trustees will then be relieved of further responsibility as to such share.

"As to such of Benjamin's surviving children as may not have reached the age of thirty years at the time of Benjamin's death, as each one of them reaches the age of thirty years, my trustee shall pay over to said child his or her proportionate share of the remaining corpus of the trust, and be relieved as to same.

"As to the children of Benjamin who shall have predeceased him or died before reaching the age of thirty years, and without leaving issue surviving them, their share or shares shall go in equal parts to Benjamin's surviving children and, on a per stirpes basis, to the surviving issue of any child or children of my son Benjamin who shall have predeceased him or have died before reaching the age of thirty years; this said issue to stand in the stead of the deceased parent as to said parent's equal share of the benefits under this trust.

"As to the shares of the surviving issue of such of Benjamin's children as have predeceased him or died before reaching the age of thirty years, their shares are to remain under the trust and handled as follows: As each one of said issue shall reach the age of twenty-five years, to said issue my trustee shall pay over his or her share of the remaining corpus of the trust, and my trustee shall thereby be released of further re-

sponsibility as to said share or shares. When all the corpus of the trust and the income therefrom has been disbursed, then my trustee shall be relieved of all duties and obligations under the trust.

"9: —At the present time my son Benjamin has the three previously mentioned children: Jan Iverson Harrison, Ann Daniels Harrison and Buff Aleta Harrison. If any additional child or children shall be born to him, said child or children shall share equally with these three as to the benefits under paragraph seven and eight of this Will."

It seems clear to us, and we so hold, that the trial judge was correct in his conclusion that the rule against perpetuities is violated by the quoted provisions of the will.

" 'The rule is one of law and not of construction, and it is to be applied even if it renders the express intent of the testator impossible of accomplishment. . . . In the case of wills, the time at which the validity of limitation is to be ascertained is the time of testator's death.' The Law of Real Property (3d Ed.): Tiffany, Vol. 2, secs. 393 and 400, pp. 153 and 163. 'If by any conceivable combination of circumstances it is possible that the event upon which the estate or interest is limited may not occur within the period of the rule, or if there is left any room for uncertainty or doubt on the point, the limitation is void. . . . The fact that the event does actually happen within the period does not render the limitation valid.' 41 Am. Jur., Perpetuities, sec. 24, pp. 69 and 70. *Moore v. Moore,* 59 N.C. 132." *Parker v. Parker,* 252 N.C. 399, 113 S.E. 2d 899.

The guardian ad litem for testatrix's grandchildren urges that even if the trust created by the will of Jennie S. Harrison is found to be in violation of the rule against perpetuities because of the limitations to the testatrix's great-grandchildren, the provisions for the benefit of the testatrix's grandchildren should be considered distinct and severable from the provisions relating to the great-grandchildren and, therefore, effective. We do not reach the questions raised by this argument for the reason that the limitation to testatrix's unborn grandchildren or those grandchildren who, upon the death of testatrix, have not attained the age of thirty, is also invalid. The rule against perpetuities condemns contingent interests which may not vest within the prescribed period.

"A remainder is vested when it is limited to an ascertained person or persons with no further condition imposed upon the

taking effect in possession than the determination of the precedent estate. * * * A remainder is contingent if the taking in effect in possession is subject to a condition precedent either as to the persons who are to take or as to the event upon which the preceding particular estate is to terminate." 33 Am. Jur., Life Estates, Remainders, etc. Secs. 66, 68 (1941).

Even if all of Benjamin S. Harrison's living children had attained the age of thirty at the time of testatrix's death, there is an express limitation over to those of his children who may be born after testatrix's death and who attain the age of thirty. It is possible that the events upon which the interest is limited may not occur within the period of the rule and the limitation is void. *Parker v. Parker, supra.*

Affirmed.

CAMPBELL and PARKER, JJ., concur.

DAVID DIXON ABDELLA v. WALTER A. STRINGFELLOW, III, AND WALTER A. STRINGFELLOW, JR., ORIGINAL DEFENDANTS

— AND —

WALTER A. STRINGFELLOW, III, AND WALTER A. STRINGFELLOW, JR., THIRD PARTY PLAINTIFFS v. JOHN G. MORRIS AND JOHN MOORE HINES, THIRD PARTY DEFENDANTS

No. 7014SC105

(Filed 24 June 1970)

Torts § 4; Automobiles § 43— automobile accident — multi-car collision — icy road — joinder of additional defendants

In an action for damages by a plaintiff who was injured when the automobile driven by the original defendant, who was also the third party plaintiff, collided into two automobiles which had earlier collided on an icy hill and which were being separated by the plaintiff and the drivers at the time of the second collision, the complaint of the third party plaintiff failed to state a cause of action for contribution against the third party defendants, the drivers of the two automobiles involved in the earlier collision, since the drivers owed no duty to the plaintiff to warn him of the dangerous conditions of the icy road, a fact of which the plaintiff was obviously aware, and since the plaintiff shared in any negligence of the drivers in failing to warn approaching motorists that the plaintiff was in a position of danger.

APPEAL by third party plaintiffs from *Braswell, J.*, 8 September 1969 Civil Session of DURHAM Superior Court.

On the night of 1 February 1966 five automobiles traveling east on Umstead Road at a point a few miles north of the City limits of Durham, N. C., passed over the crest of a hill, encountered ice on the eastern downhill slope of the road, skidded, and came to rest at various points along the road. The first, driven by Covington, came to rest on the right or south shoulder of the road with its rear partially upon the hard surface of the eastbound lane. The second, driven by Morris and in which plaintiff Abdella was riding as a passenger, avoided the Covington vehicle, but skidded completely around and came to rest some forty yards beyond the crest of the hill, with its front headed westwardly on the north shoulder of the road and with its rear sticking out into the westbound lane. The third, driven by Hines, skidded into the rear of the Morris vehicle and came to rest with its front bumper locked into the rear bumper of the Morris automobile and with its rear extending out over the center of the road. Morris, Hines, and Abdella all got out and undertook to dislodge the Morris and Hines automobiles from each other. The fourth vehicle, driven by Laughlin, skidded and came to a stop on the right-hand or south shoulder of the road opposite the Morris and Hines automobiles, with its rear end on and partially blocking the eastbound lane. The fifth automobile, owned by Walter A. Stringfellow, Jr., and being driven by his son Walter A. Stringfellow, III, came over the crest of the hill, also skidded, and collided with the rear of the Hines automobile, where Morris, Hines and Abdella were still trying to separate the Morris and Hines vehicles. Abdella was injured as a result of this collision. Shortly before these events occurred, Abdella, Morris, Hines and the driver of the Stringfellow car had all attended the same fraternity party.

Abdella brought this action against the Stringfellows, alleging his injuries were the proximate result of negligence on the part of the Stringfellow driver in operating his vehicle at a speed greater than prudent under existing circumstances, failing to keep a proper lookout, failing to keep his car under control, and in other respects. On motion of the Stringfellows, original defendants, Morris and Hines were made third party defendants. The Stringfellows filed a third party complaint in which, while denying any negligence on the part of the driver Stringfellow, they alleged that plaintiff Abdella's injuries were proximately caused by negligence of Morris and Hines, and praying judgment that if the Stringfellows should be adjudged liable to plaintiff Abdella in any amount, they be entitled to contribution from Morris and Hines. Hines demurred to the third party complaint of the Stringfellows on the grounds that it failed to state a cause of action, and the only question presented

on this appeal is the correctness of the trial court's judgment sustaining that demurrer.

The Stringfellows' allegations of negligence on the part of Morris and Hines in their third party complaint are contained in paragraph 18, which is as follows:

> "18. That each of the third party defendants, John Moore Hines and John G. Morris, once each of them had crossed the crest of such hill, was fully aware of the presence of ice on the eastern downslope of such hill, was fully aware that the presence of such icy surface on said downslope was not visible to, and would not be reasonably known to, automobiles approaching the hill crest from the west, nor to the many drivers who had left or would be leaving the fraternity party after said Morris and Hines, and who later would be approaching the same hill crest; each of them was further fully aware that one automobile, the Covington car, had already skidded partially down the hill on such ice, that another automobile, that driven by the third party defendant Morris had also skidded down the hill in such manner as to turn completely around, that a third automobile, that operated by the third party defendant Hines, had also skidded down the hill in such manner as to collide with the rear of the Morris automobile, and that yet another automobile, the Laughlin car had skidded down the hill and partially off on the shoulder of the eastbound lane; and each of said Morris and Hines further well knew, or in the exercise of reasonable care under the circumstances should have known full well, that another automobile or automobiles approaching such hill crest from the west, including the Stringfellow automobile, in all likelihood would commence sliding on the same icy surface on the eastern or downslope side of the hill, after passing such hill crest, in the same manner as had occurred to each of the first four automobiles, and particularly so when confronted with the dangerous condition presented by the presence of four stopped cars on the hard surface of the highway, each of them partially blocking various portions of the highway at various points, the presence of which could not be known to following motorists until they had crossed the hill crest and entered upon the icy downslope; notwithstanding which such dangerous circumstances and conditions of their own making, and which were well known to them, each of said third party defendants Morris and Hines negligently and carelessly failed to take any steps whatever, as he could and should have done under the circum-

stances, to go himself to the hill crest or to send someone else to the hill crest, or otherwise to take such reasonable steps as were required under the circumstances to warn and stop other automobiles, including that operated by said Stringfellow, which each of them knew would be approaching such hill crest and would be unaware of the hidden and dangerous conditions hereinabove described; and, on the contrary, each of said Morris and Hines, while deliberately disregarding all such safety precautions, negligently and carelessly devoted his efforts exclusively, and for a substantial period of time prior to the arrival of the Stringfellow automobile, to nothing other than efforts to separate said Morris and Hines automobiles, in a place and under circumstances of known danger and peril, in reckless and wanton disregard of the dangerous and perilous consequences likely to follow."

The third party plaintiffs Stringfellow appealed from the trial court's judgment sustaining the demurrer interposed by third party defendant Hines and ordering this action dismissed as to third party defendant Hines.

Newsom, Graham, Strayhorn & Hedrick, by James L. Newsom, for third party plaintiff appellants.

Spears, Spears, Barnes & Baker, by Alexander H. Barnes, for third party defendant Hines, appellee.

PARKER, J.

If the Stringfellows had brought an independent action against Morris and Hines to recover for any personal injuries and property damages incurred by the Stringfellows, their allegations as to negligence on the part of Morris and Hines might have sufficed to state a valid cause of action. *Saunders v. Warren,* 267 N.C. 735, 149 S.E. 2d 19. In such case Stringfellows' action would have been based on the theory that Morris and Hines owed them a duty to warn of the presence of the Morris and Hines vehicles on the roadway under the circumstances disclosed by the pleadings and that negligence on the part of Morris and Hines in failing to perform this duty proximately caused the personal and property damages incurred by the Stringfellows. Stringfellows' complaint, however, was not filed in an independent action in which they sought recovery for any damages caused directly to them by reason of any breach of duty owed by Morris and Hines to the Stringfellows. It was filed under the authority of G.S. 1B-8 (now replaced by Rule 14, Rules of Civil Procedure, G.S. 1A-1,

Rule 14) to obtain contribution from Morris and Hines on the theory that they were joint tort-feasors whose negligence proximately caused injuries to Abdella. As such, Stringfellows' third party complaint states a cause of action only if the facts alleged therein disclose that Morris and Hines negligently breached some duty which they owed directly to plaintiff Abdella. This the third party complaint fails to do.

Morris and Hines owed no duty to Abdella to warn him of the dangerous condition caused by the icy surface of the road and the stalled vehicles thereon. Abdella was as fully informed of these circumstances as were Morris and Hines. Nor did Morris and Hines owe to Abdella a duty to protect him from approaching vehicles by going to the top of the hill and warning the drivers of any approaching vehicles that Abdella was in a position of danger on the road ahead. If there was any negligence on the part of Morris and Hines in failing to give such a warning, then clearly Abdella shared in that negligence and would be barred from any recovery against Morris and Hines. The facts alleged in Paragraph 18 of the third party complaint do not disclose any basis for liability on the part of Morris and Hines for Abdella's injuries. Therefore, appellants have failed to state a cause of action for contribution against Morris and Hines, and the order sustaining the demurrer is

Affirmed.

CAMPBELL and HEDRICK, JJ., concur.

BERNIE H. PENCE v. FRANCES C. PENCE

No. 7020DC238

(Filed 24 June 1970)

1. Divorce and Alimony § 1— absolute divorce — transfer from superior to district court

Superior court had authority to transfer to the district court an action for absolute divorce which had twice ended in mistrial in the superior court; the district court had jurisdiction to try the action. G.S. 7A-244, G.S. 7A-259.

2. Divorce and Alimony § 2— absolute divorce — voir dire examination of jurors — proper questioning

In an action for absolute divorce based on one year's separation, trial court did not abuse its discretion in excluding, upon plaintiff's objection,

the following question asked by defendant to prospective jurors on *voir dire:* "Would you grant a divorce to the plaintiff solely on the evidence that he had been separated one year prior to the filing of this suit?"

3. Jury § 6— voir dire questioning of jurors — discretion of court

The trial court has broad discretion in the *voir dire* questioning of jurors.

4. Witnesses § 8— leading questions

Permitting leading questions is within the discretion of the trial court and will not be disturbed on appeal absent an abuse thereof.

5. Trial § 10— introduction on voluminous exhibit — remark by trial court

Trial court's remark in a divorce action that the jury did not have to read all of a 149-page medical records exhibit introduced by the wife was not an expression of opinion and did not prejudice the wife.

6. Divorce and Alimony § 2— husband's action for absolute divorce — submission of issues

Defendant wife in absolute divorce action was not prejudiced by trial court's refusal to submit issues to the jury relating to the constructive abandonment of her by the husband, where the trial court submitted an issue of wilful abandonment which the jury answered in the negative.

7. Trial § 11— argument to jury

Attorneys have wide latitude in arguing their case to the jury.

8. Appeal and Error § 31— broadside exception to the charge

An assignment of error that the court erred in the charge by not relating the law to the evidence and by giving unequal stress to the contentions of the parties, with no reference being made to the objectionable portions in the record, is broadside.

9. Divorce and Alimony § 18— counsel fees

Defendant wife in absolute divorce action failed to show that trial court abused its discretion in awarding her only $500 counsel fees.

10. Appeal and Error § 45— the brief — abandonment of exceptions

Assignment of error not brought forward in defendant's brief is deemed abandoned. Rule of Practice in the Court of Appeals No. 28.

APPEAL by defendant from *Webb, District Judge,* 13 October 1969 Session of RICHMOND County District Court.

Plaintiff instituted this action for an absolute divorce based on one year's separation. The defendant wife answered denying a legal separation, alleging defenses of constructive abandonment and non-support and praying that plaintiff be denied an absolute divorce and that she be awarded counsel fees and "defense money". The case was brought to trial twice in the Richmond County Superior

Court, both times ending in a mistrial. On 21 February 1969, the case was transferred, over defendant's objection, to the District Court of Richmond County, where the jury answered the issues in favor of plaintiff. Plaintiff was granted an absolute divorce in accordance with the jury verdict, and defendant appealed.

Webb, Lee, Davis and Sharpe by Joseph G. Davis, Jr., for plaintiff appellee.

Ottway Burton for defendant appellant.

MORRIS, J.

[1] Defendant's first assignment of error is concerned with the transfer of the case to the District Court, defendant contending that in view of the history of the case, this was error. Defendant cites no authority for this position and has shown no prejudice to her position by the transfer. It is clear that under G.S. 7A-244, the district court has jurisdiction of this type case and that G.S. 7A-259 gives the superior court authority to transfer such cases, on its own motion, to the district court. This assignment of error is overruled.

[2, 3] By assignment of error No. 2 defendant contends that the court erred in sustaining plaintiff's objection to the following question by defendant's counsel on *voir dire:* "Would you grant a divorce to the plaintiff solely on the evidence of the fact he had been separated one year prior to the filing of this suit?" Defendant cites no authority for this position, contending only that a one-year separation as a prerequisite for a divorce is so well entrenched in the minds of laymen in general that if the separation for one year be proved, the jury will grant a divorce as a matter of course. We do not agree. The trial court has broad discretion in the *voir dire* questioning of jurors. *Karpf v. Adams*, 237 N.C. 106, 74 S.E. 2d 325 (1953). See also 99 A.L.R. 2d 1, §§ 4 and 8. Defendant has shown no abuse of discretion, and this assignment of error is overruled.

[4] Defendant contends, by assignment of error Nos. 3 and 4, that the court erred in permitting plaintiff to be asked a leading question, the answer to which was nonresponsive and a conclusion. She also contends it was error to refuse to permit one of her witnesses to answer a question for purposes of corroboration. Defendant cites no authority for these positions. Permitting leading questions is within the discretion of the trial court and will not be disturbed on appeal absent an abuse thereof. *McKay v. Bullard,* 219 N.C. 589, 14 S.E. 2d 657 (1941). From the record, it appears that defendant

objected only to the question, giving no grounds for the objection and making no motion to strike the answer. This contention is without merit and is overruled. The evidence defendant attempted to elicit from her witness in response to her counsel's question, to which objection was sustained, was not corroborative of any testimony appearing in the record, was hearsay, and was properly excluded.

[5] By assignment of error No. 5 defendant contends that the court erred by expressing an opinion when allowing the introduction into evidence of one of defendant's exhibits. The exhibit in question consisted of 149 pages of medical records, portions of which were objected to by plaintiff as being irrelevant on the grounds that they referred to a prior accident. Plaintiff excepted to their introduction into evidence for the purpose of corroborating defendant's contentions about her medical treatment. Defendant objected to the following statement by the court: "Members of the Jury, that's a voluminous record of the hospital bills there, and unless you particularly want to, it's not necessary that you read them. However, you are certainly free to look at anything in the file, but I want to instruct you, you don't have to read everything in there." In holding that the trial judge did not express an opinion in a case the Court in *State v. Jones*, 67 N.C. 285 (1872), stated:

> "In such a case it will not be sufficient to show that he did or said what *might* have had an unfair influence, or that his words, when critically examined and detached from the context and from the incidents of the trial, are capable of an interpretation from which his opinion on the weight of the testimony may be inferred; but it must appear with ordinary certainty that his manner of arraying and presenting the testimony was unfair, and likely to be prejudicial to the defendant, or that his language, when fairly interpreted, in connection with so much of the context as is set out in the record, was likely to convey to the jury his opinion of the weight of the testimony."

We think this language is appropriate here. Defendant contends the statement intimated that her evidence was worthless and amounted to an instruction that the jury should disregard this part of her evidence. We do not agree. Defendant's counsel admitted that he did not expect the jury to read everything in the exhibit. We are of the opinion that the judge was merely trying to relieve any doubts on the part of the jury as to whether they were required to read every word of the exhibit, since he had already informed them it

was being admitted only for corroborative purposes. This assignment of error is overruled.

[6] Assignment of error No. 7 is related to the submission of issues to the jury. The court submitted four issues to the jury, number four relating to whether plaintiff had willfully abandoned defendant. The jury found that he had not. Defendant contends it was error for the court to refuse to submit two additional issues proposed by her, both of which concerned the alleged treatment of defendant by plaintiff and both of which would have weighed on the issue of constructive abandonment. Defendant cites no authority for this position nor does her answer allege any facts which would require the submission of the issues. The court in the charge adequately instructed the jury with respect to constructive abandonment. The jury by its verdict rejected defendant's contentions. This assignment of error is overruled.

[7] Defendant contends by assignment of error No. 8 that she was prejudiced by opposing counsel's argument and reference to matters outside the record concerning another case between the same parties. Attorneys have wide latitude in arguing their case to the jury. *Cuthrell v. Greene,* 229 N.C. 479, 50 S.E. 2d 525 (1948). Plaintiff's counsel did appear to go outside the record in his argument in telling the jury that defendant's counsel had also represented defendant in another pending action. Even if error be conceded, we do not deem it to be prejudicial. There was evidence from the defendant that both plaintiff's counsel and a deputy sheriff had testified in a criminal action against the plaintiff for nonsupport. Defendant also testified that she was plaintiff in a pending civil action for support. During argument of plaintiff's counsel the court instructed the jury that it should take the law from the court and not from the attorneys. The court in its charge further instructed the jury that they would take the evidence as it came from the witnesses and not from the attorneys. This assignment of error is overruled.

[8] Assignment of error No. 9 urges that the court erred in the charge by not relating the law to the evidence and by giving unequal stress to the contentions of the parties. This is a broadside exception, no reference being made to the objectionable portions in the record, and is overruled. *Lewis v. Parker,* 268 N.C. 436, 150 S.E. 2d 729 (1966).

[9] By assignment of error No. 10 defendant objects to the court's action in awarding only $500 counsel fees, suggesting an abuse of discretion. However, defendant has shown no abuse of discretion,

and this assignment of error is overruled. *Stadiem v. Stadiem,* 230 N.C. 318, 52 S.E. 2d 899 (1949).

[10] Assignment of error No. 6 was not brought forward in defendant's brief and is deemed abandoned under Rule 28, Rules of Practice in the Court of Appeals of North Carolina.

For the reasons stated herein the judgment is

Affirmed.

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

WAYNE FINANCE CORPORATION v. DAMON SHIVAR, JOE W. ALLEN, AND W. VICTOR VENTERS, T/AS JACKSONVILLE WHOLESALE AUCTION COMPANY

No. 704SC245

(Filed 24 June 1970)

1. Automobiles § 5; Estoppel § 4— transfer of title — failure to perfect liens on automobiles — estoppel

Plaintiff finance company was estopped from asserting its liens on automobiles whose certificate of title plaintiff had surrendered to defendant automobile auction company upon defendant's promise that it would sell the automobiles and deliver the proceeds to plaintiff in payment of its notes and chattel mortgages held by plaintiff, where (1) the certificates of title as delivered to defendant bore no indication of plaintiff's liens, (2) the plaintiff, prior to the effective date of G.S. 20-58 relating to the perfecting of security interests in automobiles, failed to record the chattel mortgages, and (3) the plaintiff, after the effective date of G.S. 20-58, failed to perfect its liens in the manner required by statute.

2. Sales § 3; Estoppel § 4— transfer of chattel — indicia of ownership — estoppel

Where one entrusts possession of a chattel to another and at the same time clothes him with indicia of ownership, the true owner or lien holder is estopped to claim ownership as against an innocent purchaser who pays value to the possessor in reliance on the indicia of title.

3. Estoppel § 4— equitable estoppel

Equitable estoppel is to be applied as a means of preventing injustice and must be based on the conduct of the party to be estopped which the other party relies upon and is led thereby to change his position to his disadvantage.

APPEAL by plaintiff from *Cowper, J.,* December 1969 Session, ONSLOW Superior Court.

The allegations of plaintiff's complaint may be summarized as follows: Plaintiff is a corporation engaged in the automobile finance business in Wayne County. Damon Shivar is also a resident of Wayne County. Defendants Allen and Venters are residents of Wayne County and are engaged in the business of operating Jacksonville Wholesale Auction Company in Jacksonville. Defendants are hereinafter referred to as Auction Company. Plaintiff is payee and owner of certain notes executed by Damon Shivar. The notes were secured by chattel mortgages on five automobiles. Plaintiff had financed a number of other automobiles for Shivar. The customary practice was for plaintiff to surrender the title certificates to Shivar upon his promise to sell the vehicles and then pay plaintiff the sum due on each vehicle, as it was sold. Following this custom, on or about 3 January 1962 Shivar asked plaintiff for the title certificates to the five vehicles and "represented to the plaintiff that he was going to take said automobiles to a car sale and he would deliver the proceeds from the said sale of automobiles to the plaintiff in payment of the notes and chattel mortgages held by the plaintiff; that relying on the representations of the defendant, Damon Shivar, the plaintiff surrendered the titles to said automobiles to the defendant, Damon Shivar." It appears that Shivar then delivered the automobiles to the defendant Auction Company and was permitted to draw sight drafts with the titles attached against the Auction Company in payment therefor. Shivar failed to pay plaintiff as he had agreed to do. Plaintiff made demand on the Auction Company for the return of the vehicles and, upon refusal, instituted this action.

Shivar filed no answer and the disposition of the case against him is not disclosed by the record.

At the conclusion of plaintiff's evidence, judgment of involuntary nonsuit was entered in the case against the Auction Company. Plaintiff appealed.

Sasser, Duke and Brown by John E. Duke and Herbert B. Hulse for plaintiff appellant.

Venters and Dotson by Carl V. Venters for defendant Auction Company.

VAUGHN, J.

[1] The plaintiff contends that the trial court committed error in allowing the defendants' motion for judgment of nonsuit. The following testimony presented by plaintiff is pertinent.

Mr. H. Blair Stevens, an employee of Wayne Finance Company, testified:

". . . At that time I gave Mr. Shivar these titles I had no chattel mortgage recorded at that time. In the titles, when I returned them to Mr. Shivar had no liens showing on them. I am familiar with the law at that time. I did know that the law in 1962 required that any liens against an automobile must be shown on the title. I did not deliver any of these titles back to Mr. Shivar until 1962, and several of the documents had been given to me in December, and two in January, on January 4.

"At that time the liens did not show on any of these titles. . . . I trusted Mr. Shivar with the title certificates without recording my mortgage or without putting any liens on the title . . . I entrusted him with these for the purpose of permitting him to carry them to the market and selling them. . . . I felt I was going to be paid when I released these titles to Mr. Shivar. We tried to locate Mr. Shivar for approximately a week after we released the titles and we were unable to do so. I turned the matter over to the FBI and they came in to assist us and he was arrested by them. He was convicted of the crime of fraud."

. . .

". . . On the cars that are purchased to have a lien recorded in the titles, the dealer would have to send through Raleigh and put it in his name and it is objection — it is just one of those things dealers object to. . . .

"I said it was customary to do it this way. I was aware that the law was different from my custom after the law was passed. . . ."

Damon Shivar testified for the plaintiff stating that:

"At the time I carried the cars and titles to Jacksonville Auto Auction, these titles were clear, they showed no liens. In fact, my arrangement with them was that the title had to be clear or the draft wouldn't clear. All of the drafts did clear. . . ."

The plaintiff called the defendant J. W. Allen, who testified:

". . . In order for a dealer to sell an automobile through our auction during that period of time he had to own the un-

encumbered title to the vehicle. He had to have a clear title to the vehicle. . . ."

It appears from plaintiff's own evidence that the certificates of title to the automobiles were delivered to the defendant Auction Company bearing no indication of the liens of the plaintiff. In fact the chattel mortgages were not recorded until after the delivery of the titles. The applicable statute, G.S. 20-58, effective 1 January 1962, is in part as follows:

"§ 20-58. Perfection of security interests generally. (a) Except as provided in G.S. 20-58.9, a security interest in a vehicle of a type for which a certificate of title is required is not valid against creditors of the owner or subsequent transferees or lien holders of the vehicle unless perfected as provided in this Chapter.

"(b) A security interest is perfected by delivery to the Department of the existing certificate of title if the vehicle has been previously registered in this State, and if not, an application for a certificate of title containing the name and address of the lien holder, the date, amount and nature of his security agreement, and the required fee. The lien is perfected as of the time of its creation if the delivery of the certificate or application to the Department is completed within ten days thereafter, otherwise it is perfected as of the time of delivery.

. . .

§ 20-58.1. Liens subsequently created. If an owner creates a security interest in a vehicle after the original issuance of a certificate of title to such vehicle.

(1) The owner shall immediately execute an application, on a form the Department prescribes, to name the lien holder on certificate, showing the name and address of the lien holder, the amount, date and nature of his security agreement, and cause the certificate, application and the required fee to be delivered to the lien holder.

(2) The lien holder shall immediately cause the certificate, application and the required fee to be mailed or delivered to the Department."

[1, 2] The plaintiff did not perfect a security interest pursuant to the statute nor did it, prior to the effective date of G.S. 20-58, record the chattel mortgages. The plaintiff did nothing to protect its

interest. Moreover, not only did it not perfect its security interest as required by the statute, but it allowed Shivar to have possession of the automobiles and the clear certificates of title. Since no lien appeared on the certificate of title when the defendant Auction Company gave value for the automobiles, the plaintiff is estopped from asserting its lien. It had no perfected security interest. Plaintiff gave to Shivar complete *indicia* of ownership, possession of the vehicles and clear certificates of title. Where one entrusts possession of the chattel and at the same time clothes him with *indicia* of ownership, the true owner, or as here the lien holder, is estopped to claim ownership as against an innocent purchaser who pays value to the possessor in reliance on the *indicia* of title. *Homes, Inc. v. Bryson,* 273 N.C. 84, 159 S.E. 2d 329. The rule is stated in *Hawkins v. Finance Corp.,* 238 N.C. 174, 77 S.E. 2d 669:

> "However, where the owner of a chattel clothes another not only with possession thereof, but also with such *indicia* of ownership as is reasonably calculated to mislead others having a right to rely thereon into believing that the ownership or power of disposition is vested in the bailee, and does so mislead a purchaser or encumbrancer, who, acting in reliance upon such apparent ownership or right of disposition, parts with value or extends credit to the bailee, in good faith and without knowledge, actual or constructive, of the true ownership of the property, such purchaser or encumbrancer will be protected and the true owner will be estopped from denying the possessor's right to sell or encumber the chattel. Under such circumstances, equity will not permit the true owner to gainsay the reasonable inference drawn from his conduct in clothing the possessor with such *indicia* of ownership. 19 Am. Jur., Estoppel, Sec. 68; 6 Am. Jur., Bailments, Sec. 129; American Law Inst., Restatement, Agency, Sec. 202; Annotations: 151 A.L.R. 690; 18 A.L.R. 2d 813. See also Annotation 95 A.L.R. 1319; *Bank v. Winder, supra; Mason v. Williams,* 53 N.C. 478; *Mason v. Williams,* 66 N.C. 564. The rule rests upon the broad equitable doctrine that where one of two equally innocent persons must suffer, he who has so conducted himself, by his negligence or otherwise, as to occasion the loss, must sustain it. *S. v. Sawyer,* 223 N.C. 102, 25 S.E. [sic] 443; *Bank v. Liles,* 197 N.C. 413, 149 S.E. 377; *Railroad Co. v. Kitchin,* 91 N.C. 39."

[3] Equitable estoppel is to be applied as a means of preventing injustice and must be based on the conduct of the party to be estopped which the other party relies upon and is led thereby to change

his position to his disadvantage. *Smith v. Smith,* 265 N.C. 18, 143 S.E. 2d 300. The elements and what is necessary to establish in order to estop one from asserting a right were clearly stated by Walker, J., in *Boddie v. Bond,* 154 N.C. 359, 70 S.E. 824. The test enunciated there has been repeatedly approved. *Hawkins v. Finance Corp., supra. Long v. Trantham,* 226 N.C. 510, 39 S.E. 2d 384; *Self Help Corp. v. Brinkley,* 215 N.C. 615, 2 S.E. 2d 889; *Martin v. Bundy,* 212 N.C. 437, 193 S.E. 831; *McNeely v. Walters,* 211 N.C. 112, 189 S.E. 114; *Scott v. Bryan,* 210 N.C. 478, 187 S.E. 756; *Thomas v. Conyers,* 198 N.C. 229, 151 S.E. 270; *Bank v. Winder,* 198 N.C. 18, 150 S.E. 489. The test is satisfied in the case at bar.

Plaintiff offered no evidence to support the allegations in its complaint and its argument on appeal that the Auction Company was the agent of Shivar. In fact, all the evidence tends to show the contrary.

Where only one inference can reasonably be drawn from undisputed facts, the question is one of law for the court. *Hawkins v. Finance Corp., supra.* There being no evidence to support plaintiff's claim, nonsuit was properly entered.

The judgment of the trial court is

Affirmed.

CAMPBELL and PARKER, JJ., concur.

STATE OF NORTH CAROLINA v. OLIVIA MASSENBURG

No. 707SC174

(Filed 24 June 1970)

Criminal Law § 76— admission of in-custody statements — failure to conduct voir dire hearing — prejudicial error

In this prosecution for second degree murder wherein defendant testified that she killed deceased in self-defense because he had hit, kicked, stomped and threatened her, the trial court committed prejudicial error in the admission of evidence of defendant's in-custody statements that she was glad deceased was dead and that she was not hurt, where the court conducted no voir dire hearing to determine whether the statements had been freely and voluntarily made by defendant after an intelligent waiver of her rights.

STATE *v.* MASSENBURG

APPEAL by defendant from *Bundy, J.*, 6 October 1969 Session of NASH Superior Court.

Olivia Massenburg, alias "Coot," was indicted for the murder of James Earl Williams (Williams), whose death occurred at her home near Nashville, N. C., on 31 May 1969. The solicitor announced that the State would not seek a conviction of first-degree murder but only of second-degree murder or manslaughter. Defendant pleaded not guilty.

At the trial defendant took the stand and admitted that she had stabbed Williams in the early morning of 31 May 1969, but contended she acted in self-defense. She testified that she provided a piccolo or jukebox for public use in her home; that at the time of the incident she, Williams, and others were there; that she and Williams got into an argument about some money in her purse, and that Williams hit her, temporarily blinding her; that when she regained her vision, Williams was still beating her; that she retreated to the kitchen, got a knife, and when he continued to advance on her and threatened to kill her, she stabbed him. Defendant further testified that her nose had bled and that her lip had been cut due to the blows and kicks given her by Williams.

The jury returned a verdict finding defendant guilty of second-degree murder. From judgment on the verdict imposing a prison sentence for a term of twenty-five years, defendant appealed, assigning as error (1) the admission in evidence over her objection of testimony as to certain inculpatory statements made by her while she was in custody, (2) the admission into evidence of testimony as to a statement made by one Helen Williams, not in defendant's presence, that "This is one that Coot Massenburg won't get out of," and (3) errors in the judge's charge.

Attorney General Robert Morgan, by Deputy Attorney General Harrison Lewis and Trial Attorney Robert G. Webb, for the State.

Fields, Cooper & Henderson, by Leon Henderson, Jr., for defendant appellant.

PARKER, J.

In the course of the testimony of the arresting officer, Deputy Sheriff F. L. Wood, a witness for the prosecution, the following colloquy took place:

> Witness: "I got out and looked at her and she kind of roused up at that time and looked at me, and I said, 'Coot,

what has happened out here?' At first she didn't say anything. I took hold of her to help her get up and she said —

OBJECTION.

I didn't ask her anything; she was just talking.

OBJECTION.

THE COURT: Did you say you asked her what had happened?

A Yes, sir.

Q At that time, Sheriff Wood, did you know what had happened?

A Yes, sir.

Q Did you know who had done the stabbing?

A Yes, sir.

OBJECTION AND MOTION TO STRIKE.

THE COURT: You knew by reports?

A Yes, sir.

THE COURT: All right, strike out that last answer. Ladies and gentlemen, don't consider what he said he knew by reports.

Q Now after you asked her the second time what happened, did she make any statements?

OBJECTION.

A She continued to talk from then on.

THE COURT: Let the jury go out a minute. Go in your room, ladies and gentlemen.

(The court takes a 10 minute recess, after which the jury is recalled to the courtroom.)

After I asked Coot what happened and she didn't say anything she and this small lady here that got on the stand, Edith Knight, she came to the car and assisted me in getting Coot in the car.

After Coot got in the car she roused up considerably and started talking vulgar language and I told her not to say anything else, to just sit pat, and we would be in Nashville in a little bit and she could talk all she wanted to.

After that she continued to talk more and more. She began to rouse up. At the time that I saw her, at the time, the 10

minutes we were coming to Nashville, she sobered up or got her mental faculties straightened out considerably on the way in.

Well, when I first saw her she was intoxicated enough to have been arrested for public drunkenness, should she have been on the road, but as I say, she sobered up, her mental condition got so much better before we got to Nashville and when she got here and walked up the stairs without any trouble.

I did not ask her any questions on the way to Nashville. I insisted that she not talk because she was vulgar and she was in the back seat and I was driving the car and I didn't want to have any conversation with her. I wanted to get to town.

* * * * *

Q On the way in after you had told her to be quiet and not say anything, what was it that she was saying?

OBJECTION. OVERRULED.

A She kept talking to herself and saying, 'The s.o.b., is dead and I am damn glad of it.'

OBJECTION AND MOTION TO STRIKE. DENIED.

She did not use the initials 's.o.b.' that's the reason I asked her to keep her mouth shut and not talk. And I came on in and put her in jail and pretty soon thereafter Sheriff Strickland and the rest of them came in and I was never involved in the case any more.

Q Sheriff Wood, about how many times would you say she made the statement on the way in that the s.o.b. is dead and I'm glad, or something to that effect?

OBJECTION. OVERRULED.

A It's a good 10 miles and I reckon she said it every mile coming in. I'd say approximately 10 times.

MOTION TO STRIKE. DENIED.

When we got up to the office Smith, who stays up to the jail there, and I believe Mr. Everett, the jailor, was there, I inquired of her, I said, 'Coot, if you've got any wounds or if you have been hurt I want to know it, I don't want to find out at 12 o'clock that you've been cut or you've been stabbed,' and she said, 'No, there's nothing wrong with me.'

OBJECTION AND MOTION TO STRIKE. OVERRULED.

> At that time I did not observe any visible blood or bruises. Never did see any. She did not ever tell me that she had been bruised or bloodied anywhere because I asked her about it.
>
> OBJECTION. OVERRULED."

The State, in its brief, candidly admits that evidence of these statements attributed to defendant was inadmissible in the absence of any *voir dire* hearing to determine whether the statements had been freely and voluntarily made by the defendant after an intelligent waiver of her rights. *State v. Catrett,* 276 N.C. 86, 171 S.E. 2d 398. No such hearing was held and no such determination was made in this case. The State contends, however, that the admission of evidence of these in-custody statements was not prejudicial in that defendant admitted killing Williams. We disagree. These statements were prejudicial in that they strike at the very basis of defendant's plea of self-defense. The statements were made after the defendant was taken into custody. It is not entirely clear whether defendant's statement that she was glad that Williams was dead was the product of the initial question asked by Deputy Wood. It is clear, however, that when defendant was asked by Wood whether she was hurt, she reportedly replied that there was nothing wrong with her. She testified on the stand that she only killed in self-defense because Williams had hit, kicked, stomped and threatened her. This would not be as credible to a jury after they were told that she had stated, shortly after the killing, that she was glad Williams was dead and that nothing was wrong with her.

Under the facts of this case, the statements allegedly made by defendant to Deputy Wood could well have been the product of in-custody questioning.

> "[I]n-custody statements attributed to a defendant, when offered by the State and objected to by the defendant, are inadmissible *for any purpose* unless, 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, supra.*

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.

CAMPBELL and VAUGHN, JJ., concur.

CARL O. STANCIL v. WILSON EARL BLACKMON AND LYNWOOD EARL STANLEY

No. 707SC217

(Filed 24 June 1970)

1. Automobiles § 44— automobile leaving road without apparent cause — res ipsa loquitur

When an automobile leaves the highway for no apparent cause, an inference of driver negligence arises which will take the case to the jury under the doctrine of *res ipsa loquitur.*

2. Negligence § 35— nonsuit for contributory negligence

Nonsuit on the ground of plaintiff's contributory negligence is proper only when the evidence establishes plaintiff's contributory negligence as a matter of law and not when other reasonable inferences may be drawn or when there are material conflicts in the evidence.

3. Automobiles § 73— error in allowing nonsuit for contributory negligence

In this action for injuries sustained when defendants' car left the road in front of plaintiff's car and allegedly caused a cloud of dust which so impaired plaintiff's vision that he could not see to maintain control of his car and ran it into a ditch, questions of whether plaintiff was speeding, whether plaintiff was following too closely and where the cars involved in the accident left the road were for the jury, and the trial court erred in allowing defendants' motions for nonsuit on the ground of contributory negligence.

APPEAL by plaintiff from *Bundy, J.,* 27 October 1969 Session, EDGECOMBE County Superior Court.

This is an action to recover for injuries sustained by plaintiff when his car ran off the road and into a ditch. Plaintiff alleges that his running off the road was caused by defendants' negligence in that the car driven by Blackmon ran off the road in front of him, causing a cloud of dust which so impaired plaintiff's vision that he could not see to maintain control of his car. The evidence in the

case consists of the testimony of plaintiff and one witness. Plaintiff's testimony in substance, except where quoted, tends to show the accident occurred about 2:00 a.m. on a Sunday morning as he and his wife were returning from a drag strip near Benson, North Carolina. Both plaintiff and defendant had taken part in the races. Plaintiff had two beers on the day of the accident, one around 3:00 p.m. after he had gotten off work and the other around 10:30 p.m. at the drag strip. Plaintiff testified that these drinks had no effect on him at all. When plaintiff left the drag strip he drove about one-half mile down the exit road to its intersection with N.C. Highway 242, where he made a right turn towards Benson. When he stopped at the intersection, the car driven by Blackmon was two or three cars in front of him. He was familiar with this particular stretch of road and testified that he was running around 55 or 60 miles per hour, that his speedometer was not connected, and that he was about eight or nine car lengths behind the car being driven by defendant Blackmon. Plaintiff testified that it had been announced at the drag strip that the police were patrolling the roads and that the people in attendance should not exceed the speed limit when leaving. When testifying as to whether there was a sign with a posted speed limit of 35 miles per hour, plaintiff stated "I know the curve is down there but I don't know whether it had 35 on it because the patrolman that come to the hospital told me the speed limit down there was 55 to 60 miles per hour. I did not see the curve sign I don't reckon and I don't know if I have ever seen it because I ain't looked for it." Plaintiff further stated "There were some cars in front of me and some cars behind me and I got down the road approximately three-quarters of a mile from the stop sign (at the intersection) to the curve and there were some cars in front of me and a car got down there and it looked like it hit the shoulder of the road and skidded. I saw it happen because I was behind the car. It hit the shoulder of the road and when the car skidded around the dust just boiled up — a whole pile of dust and all — and the car skidded back around in the road like it was going to turn clean around and come back and I didn't know whether it was going to hit me or me hit it or what so I locked the brakes. That is, the car skidded around and turned near about around in the road and on the shoulder and I couldn't see for the dust so I put on brakes and pulled my car hard to the right so that his car wouldn't hit me or I wouldn't hit him and his car skidded on down the road and went across the ditch and hit a man's light pole and when mine hit the bank it throwed me under the armrest and messed up my neck and arm and cut my leg." "Just at the first of the curve is where he hit

the shoulder of the road and then is when it skidded around sideways with him. He ran off the road just where the curve started, where the curve bends and all, he hit the shoulder there." "As to whether I am saying his car came to a stop on the highway without giving a signal, his car didn't completely come to a stop because the car was running fast enough where when it hit the shoulder it skidded around in the road and turned sideways and then is when he got it straightened out the other way and then is when it turned and went back down the other side of the road and went across the ditch and hit the light pole. The car didn't stop until it hit that light pole." Plaintiff's only witness testified that he saw plaintiff drinking a beer around 10:00 or 10:30 p.m. but that plaintiff was not under the influence of alcohol nor were his physical or mental faculties impaired. He stated that he "did not see the wreck happen. As I was coming down this same road I was behind them and I saw the two cars go into the curve. When I got to the curve, in the edge of the curve, the dust was everywhere and we just stopped . . ." The witness testified that he was about one-quarter of a mile behind the cars, that he couldn't tell how far apart they were and that he did not think they were speeding. When asked on cross examination to identify a photograph (defendants' exhibit #3) the witness stated that it "fairly and accurately represents the approach to this curve after you leave the crossroads and head toward the accident scene. . . . The sign located at the right side of the road has got a 35 mile limit on it. The sign tells how sharp the curve is, and has an arrow pointing, telling there is a curve, on the yellow sign. There is a small sign below that says 35 miles per hour." "This picture (defendants' exhibit #6) looks like the curve after where the accident happened, it's the same curve, I think, beyond the point of the accident."

At the close of plaintiff's evidence the court granted both defendants' motions for nonsuit. Plaintiff appealed.

Narron and Holdford by William H. Holdford for plaintiff appellant.

Battle, Winslow, Scott and Wiley by Robert Spencer for defendant appellees.

MORRIS, J.

[1] The only question to be determined on this appeal is whether the court erred in allowing defendants' motions for nonsuit. The doctrine of *res ipsa loquitur* applies to automobile accidents in some

circumstances. *Greene v. Nichols,* 274 N.C. 18, 161 S.E. 2d 521 (1968). It was there stated that "When a motor vehicle leaves the highway for no apparent cause, it is not for the court to imagine possible explanations. *Prima facie,* it may accept the normal and probable one of driver-negligence and leave it to the jury to determine the true cause after considering all the evidence — that of defendant as well as plaintiff." In view of this case, and in the absence of any explanation or findings in the record as to defendants' negligence, we assume the court granted the motions for nonsuit upon a finding that the plaintiff's own evidence established his contributory negligence as a matter of law.

[2] When considering a motion for nonsuit based on plaintiff's contributory negligence, the evidence must be viewed in the light most favorable to the plaintiff, and nonsuit is proper only when the evidence establishes plaintiff's contributory negligence as a matter of law and not when other reasonable inferences may be drawn or when there are material conflicts in the evidence. See 6 N.C. Index 2d, Negligence, § 35, and cases there cited.

[3] After reviewing the evidence in the light most favorable to plaintiff, we are of the opinion that such questions as whether plaintiff was speeding, whether plaintiff was following too closely and where the cars involved in the accident actually left the road, as they relate to a determination of whether plaintiff was contributorily negligent, should have been for the jury. We cannot say that contributory negligence on the part of the plaintiff has been so clearly established by his evidence that no other conclusion can reasonably be drawn therefrom.

New trial.

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

STATE OF NORTH CAROLINA v. ENORRIS CLINTON EDWARDS

No. 7014SC248

(Filed 24 June 1970)

1. Criminal Law § 166— abandonment of assignments of error

Assignments of error not brought forward and argued in the brief are deemed abandoned.

2. Criminal Law § 84— admission of evidence obtained by search without warrant — failure to object — necessity for voir dire

The trial court did not err in failing to conduct a voir dire hearing to determine the admissibility of evidence obtained by an officer's search of defendant's house where defendant did not object either to testimony by the officer that defendant consented to the search or to the admission of evidence obtained as a result of the search.

3. Criminal Law § 85— cross-examination of defendant — prior convictions

A defendant who takes the witness stand in his own behalf may be cross-examined by the State with respect to his past convictions of crimes, but the State is bound by his answers.

APPEAL from *Bowman, S.J.*, 8 December 1969 Criminal Session, DURHAM County Superior Court.

The defendant, Enorris Clinton Edwards, was charged in a valid bill of indictment with the felonious breaking and entering of the dwelling house of J. Cameron Coltharp, Jr.; larceny of a camera, watch, and certain other jewelry belonging to Mrs. Coltharp; and with the felonious receiving of the above personal property of Mrs. Coltharp.

The evidence showed that Mr. and Mrs. Coltharp lived in Durham, North Carolina, where Mr. Coltharp is a student in the divinity school at Duke University. On Saturday morning, 20 September 1969, Mr. Coltharp left Durham and came to Raleigh. His wife followed him to Raleigh later that day and they spent the night in Raleigh. Upon their return to their apartment on Sunday afternoon, Mrs. Coltharp discovered that two cameras and her jewelry were missing. Mrs. Coltharp was unable to find the kittens which she had left outside in the hall. She did find them inside the apartment. One kitten was in the bedroom where it had been shut up and the other three kittens were in another room at the opposite end of the hall.

On Sunday morning, 21 September 1969, Detective R. D. Ray, of the Durham Police Department, unaware of the Coltharp theft, went to the home of the defendant to search for some missing pocketbooks. Detective Ray requested and obtained from the defendant

permission to search the premises and told the defendant that he did not have a search warrant. At this time the detective saw a camera in the kitchen which the defendant said was his and which he said he had had for over a year. The detective saw some jewelry in the defendant's bedroom and was told by the defendant that the jewelry belonged to the defendant's wife and that it had been given to her by his mother and his wife's mother some months before. The detective left the defendant's home but returned later and told the defendant that a report had been received at the Police Department that some jewelry fitting the description of that found in the defendant's home had been reported stolen. Detective Ray asked the defendant if he would be willing for Mrs. Coltharp to inspect this jewelry and the defendant agreed to this. On this trip Detective Ray took possession of the camera and the jewelry.

The defendant took the stand and testified in his own behalf. He stated that Detective Ray visited him on Sunday, 21 September 1969, at about 11:00 A.M., and that he told him he did not have a search warrant but that he would like to search the house. The defendant testified that "he had nothing to hide and consented for the detective to search his house." The defendant denied having ever been in the Coltharp apartment and offered evidence of an alibi stating that he had been with his family on the night of the theft. The defendant, on cross-examination, admitted that he had been convicted of larceny on at least five prior occasions. The defendant's brother-in-law testified that he had committed the theft and that the defendant had had no part in it. He testified that he committed the theft on Friday night, 19 September 1969, at about 8:30 or 9:00; that he got the jewelry on Wednesday night and the cameras on Friday night; and that he got in the house by using a key he had found to the back door.

Mrs. Coltharp testified on rebuttal that she and her husband were home on Friday night from approximately 8:00 on and that there was nothing to indicate that anyone had been in their apartment while they were gone. She testified as to the location of the articles which were stolen, which location differed greatly from that described by the defendant's brother-in-law.

The jury found the defendant guilty of breaking, entering and larceny. From the prison sentence imposed, the defendant, through his court-appointed attorney, gave notice of appeal and requested that the court appoint an attorney to help him prepare and perfect his appeal to this Court. On 10 December 1969, an attorney was

appointed to assist the defendant and to represent him in his appeal to the Court of Appeals.

Robert Morgan, Attorney General, and William B. Ray, Staff Attorney, for the State.

A. H. Borland for the defendant appellant.

HEDRICK, J.

[1] The record on appeal in the present case contains no exceptions to the proceedings in the court below. The record does contain two assignments of error; however, the defendant has failed to bring them forward and argue them in his brief; therefore, they are deemed abandoned. Rule 28, Rules of Practice in the Court of Appeals of North Carolina.

We have, however, considered the two points argued by the defendant in his brief even though they are not supported by formal assignments of error.

[2] The defendant argues that the trial court committed reversible error in the present case when it failed to conduct a voir dire hearing *ex mero motu* to determine the admissibility of the evidence obtained as a result of the search of the defendant's house by the detective. The testimony at the trial disclosed that the defendant consented to the search of his house and offered no objection when asked if a search could be conducted.

In *State v. Virgil*, 276 N.C. 217, 172 S.E. 2d 28 (1970), the defendant complained that the officers searched his room and the interior of his automobile without a search warrant and without warning him of his constitutional rights. The evidence showed that the door to the defendant's room was open and that he told the officers they could go in and "help ourselves." The car was searched with his permission and he went so far as to unlock the car door for the officers and the trunk. The Court, quoting from *State v. Colson*, 274 N.C. 295, 163 S.E. 2d 376 (1968), said:

> " 'An individual may waive any provision of the Constitution intended for his benefit, including the immunity from unreasonable searches and seizures; and where such immunity has been waived and consent given to a search . . ., an individual cannot thereafter complain that his constitutional rights have been violated.' "

It was not necessary in this case that the trial judge conduct a

voir dire to determine the legality of this search. The witness testified that he searched with the permission of the defendant, and the defendant did not object to either the testimony of the witness, or to the admission into evidence of the property located and seized as a result of the search. The trial judge is not required under our system of criminal law to aid the defendant in his presentation of the defense. *State v. Morris,* 275 N.C. 50, 165 S.E. 2d 245 (1968). Since the defendant did not object to this testimony, the court was not required to conduct a voir dire.

[3] The defendant also contends that the court committed prejudicial error in allowing the solicitor to cross-examine the defendant about his prior convictions of larceny. This argument is without merit. It has long been the rule in North Carolina that a defendant that takes the witness stand in his own behalf may be cross-examined by the State with respect to his past convictions of crimes, but the State is bound by his answers. *State v. Brown,* 266 N.C. 55, 145 S.E. 2d 297 (1965). The questions propounded by the solicitor in the present case were within the bounds of the rules.

We have carefully examined the record on appeal and conclude that the defendant had a fair trial in the superior court free from prejudicial error.

No error.

BROCK and BRITT, JJ., concur.

JOHN HENRY LASSITER, ADMINISTRATOR OF THE ESTATE OF WILLIAM BOBBIE LASSITER, DECEASED v. DELPHINE G. JONES, ADMINISTRATRIX D.B.N. OF THE ESTATE OF THOMAS AUGUSTUS LASSITER, III, DECEASED, AND DICKERSON, INC.

— AND —

JOHN HENRY LASSITER, ADMINISTRATOR OF THE ESTATE OF DENNIS ALLEN LASSITER, DECEASED v. DELPHINE G. JONES, ADMINISTRATRIX D.B.N. OF THE ESTATE OF THOMAS AUGUSTUS LASSITER, III, DECEASED, AND DICKERSON, INC.

No. 701SC162

(Filed 24 June 1970)

1. Negligence § 6— res ipsa loquitur — applicability of doctrine

To invoke the doctrine of *res ipsa loquitur,* a plaintiff must show that an instrumentality was in the exclusive control of the defendant and

that the accident is such as does not occur in the ordinary course of things if the person having control of the instrumentality uses proper care.

2. Automobiles § 66— identity of driver — proof

The identity of the driver of a vehicle may be established by circumstantial evidence.

3. Automobiles § 42— accident on bridge — defective railing

As a general rule, a defective bridge railing will not be considered as the probable reason that a car might run off a bridge.

4. Automobiles § 44— res ipsa loquitur — car running off bridge

Doctrine of *res ipsa loquitur* was applicable to raise *prima facie* case of negligence against the driver of an automobile that ran through the railing of a temporary bridge and sank in a millpond.

APPEAL by defendant administratrix Delphine G. Jones from *Mintz, J.*, October 1969 Civil Session of Superior Court held in GATES County.

On 26 December 1967 plaintiff's intestate William Bobbie Lassiter, age 15, and plaintiff's intestate Dennis Allen Lassiter, age 16, were riding as guest passengers in an automobile being operated by their older brother, defendant's intestate, Thomas Augustus Lassiter, III (Thomas). The two younger brothers had no driver's license, but Thomas did have a driver's license. The boys were last seen alive at 1:00 a.m. with Thomas driving the car. They were found the next morning at 7:00 a.m. in the Green Mill Pond. The car had run off the road, through the temporary barrier on the temporary bridge, and into the pond. When found, the car was totally submerged and Thomas was found in the driver's seat. Plaintiff administrator filed suit against defendant administratrix and against Dickerson, Inc., which built the temporary bridge and railing, alleging concurrent negligence. A voluntary nonsuit was taken as to the defendant Dickerson, Inc., and the cases were submitted to the jury on the issues of the negligence of defendant's intestate, Thomas.

The cases were consolidated for trial, and upon the verdict and judgment for the plaintiff administrator in each case, defendant administratrix appealed to the Court of Appeals.

Jones, Jones & Jones by L. Bennett Gram, Jr., for plaintiff appellee.

Leroy, Wells, Shaw, Hornthal & Riley by L. P. Hornthal for defendant appellant.

MALLARD, C.J.

Plaintiff administrator in each case alleged that the defendant's intestate Thomas was negligent in the operation of the automobile in causing the automobile to leave the road and "drove the said automobile into the right-hand temporary bridge railing and into the mill pond whereby the automobile was totally submerged in water and plaintiff's intestate was killed." The plaintiff administrator invoked the evidentiary doctrine of *res ipsa loquitur* to support this allegation. The plaintiff administrator also alleged that the defendant Dickerson, Inc., was negligent in the construction of the temporary bridge and railing and that the negligence of Dickerson, Inc., "concurred and combined" with the negligence of Thomas to proximately cause injury to the plaintiff's intestates. Plaintiff administrator took a voluntary nonsuit as to defendant Dickerson, Inc., and the case was sent to the jury as to the negligence of defendant's intestate, Thomas.

The doctrine of *res ipsa loquitur* is an evidentiary rule which is expressed as follows:

> " 'When a thing which causes injury is shown to be under the management of the defendant, and the accident is such as in the ordinary course of things does not happen if those who have the control of it use the proper care, it furnishes evidence, in the absence of explanation by the defendant, that the accident arose from want of care.' When this combination of circumstances exists it is said that *res ipsa loquitur* — the thing speaks for itself." Stansbury, N.C. Evidence 2d, § 227.

It has been held by our court in *Greene v. Nichols,* 274 N.C. 18, 161 S.E. 2d 521 (1968), that when an automobile leaves the road for unexplained reasons, the doctrine of *res ipsa loquitur* arises so as to create a *prima facie* case of negligence against the driver of the automobile. See also *Cherry v. Smallwood,* 7 N.C. App. 56, 171 S.E. 2d 83 (1970).

[1] To invoke the doctrine, a plaintiff must show that the instrumentality was in the exclusive control of the defendant and that the accident is such as does not occur in the ordinary course of things if the person having control of the instrumentality uses proper care. *O'Quinn v. Southard,* 269 N.C. 385, 152 S.E. 2d 538 (1967).

[2] In the trial of the case the plaintiff administrator offered no evidence as to the negligent construction of the temporary bridge railing and took a voluntary nonsuit as to defendant Dickerson, Inc. The evidence in the case demonstrated that the inference could be drawn that the deaths of plaintiff's intestates were proximately

caused by the negligent operation of the automobile by Thomas. The identity of the driver of a vehicle may be established by circumstantial evidence. *Greene v. Nichols, supra.*

[3] As a general rule, a defective bridge railing will not be considered as the probable reason that a car might run off a bridge. *Love v. Asheville,* 210 N.C. 476, 187 S.E. 562 (1936).

In the application of the doctrine of *res ipsa loquitur,* it is not necessary that the plaintiff show conclusively that driver negligence was the sole proximate cause of the injury. *Greene v. Nichols, supra.* Plaintiff administrator alleged that driver negligence was a proximate cause of the deaths of his intestates. The evidence offered demonstrated that this conclusion could reasonably be drawn. It is clear in this case that the negligence, if any, of defendant Dickerson, Inc., in constructing the bridge and railing, did not cause the car operated by Thomas to run off the "thread of the road."

> "If a person's negligence is in any degree a proximate cause of the injury, he may be held liable, since he may be exonerated from liability only if the total proximate cause of the injury is attributable to another or others." 6 Strong, N.C. Index 2d, Negligence, § 10.

[4] The evidence, taken in the light most favorable to plaintiff, shows that the exclusive control of the car was in defendant's intestate Thomas and that the car ran off the road through the guard rail and into the pond. This is not a normal occurrence without negligence on the part of the driver. The doctrine of *res ipsa loquitur* properly applies.

In this case the defendant administratrix contends that the evidence of plaintiff administrator was conflicting as to whether there was ice or frost on the bridge. There was no evidence presented in this case as to whether there was ice on the bridge *at the time* the car ran off the road into the mill pond. There was no evidence as to skidding, and the general condition of the road is unknown. There was evidence that sometime prior to the occurrence the roadway was dry. There is no merit in defendant administratrix's contention. See *Cherry v. Smallwood, supra.*

We have reviewed all other assignments of error set forth by defendant administratrix and find no merit in them.

Affirmed.

MORRIS and GRAHAM, JJ., concur.

GIDEON TILLITT GODFREY v. JAMES H. PATRICK

No. 701SC46

(Filed 24 June 1970)

1. Estates § 3— accounting by life tenant

There is no requirement that a life tenant account annually to the court or to a remainderman.

2. Fiduciaries— annual accounts — discretion of court

While the court has the inherent power to require any appointed fiduciary to file periodic accounts, the court is not compelled as a matter of law to do so.

3. Estates § 5— action for waste — contingent remainderman

A contingent remainderman cannot maintain an action at law against the tenant in possession to recover damages for waste because it cannot be known in advance of the happening of the contingency whether the contingent remainderman will in fact suffer damage, the sole remedy of the remainderman being to seek an injunction to prevent the person in possession from committing future waste.

4. Estates § 3; Fiduciaries— timber proceeds — failure to require annual accounting by life tenant — discretion of court

The trial court did not abuse its discretion in failing to require a life tenant to account to the court annually for portion of timber proceeds to be administered by the life tenant in the nature of a trustee.

APPEAL by defendant from *Cohoon, J.*, 9 August 1969 Session of CAMDEN County Superior Court.

Plaintiff is the sole remaining child of Betty F. Tillitt, deceased, and is the owner of a life estate in a one-half undivided interest in certain lands devised by Betty F. Tillitt under her Last Will and Testament. Item 5 of the will provides as follows:

> "And it is my further will, and the foregoing is made subject to this, that during the life estate of my said children or any of them, if a majority of those living should decide that it was necessary for the good of all or any of my children that the timber should be sold from the lands above referred to, or any of them, I hereby give them full power and authority to sell same, or whatever portion thereof, that a majority of them living may think necessary, and I hereby vest them with full power and authority to make and execute all necessary deeds of conveyance to pass title to same, and the money arising from such sale or sales, I direct to be divided, as above provided for the division of land, each child having his or her equal share, and the descendants of any dead child to have the portion going to

him or her, if living, and it is my will that said money shall descend as land, or as it would had the timber not been severed from the land. And should any of my children die, leaving no child or children, before he or she may have spent the money arising from the sale of said timber, such residue shall descend to his living brother and sisters, just as hereinbefore provided for the land. But if any of my children shall need money, or shall require the expenditure of the same, during his or her life, this will place no bar on such expenditure, but should said money be invested in land, or other property, then such land or property shall go and descend, as hereinbefore mentioned, in case of the death of any of my said children, leaving no child or children, but in case any of my children die leaving child or children, then in that event, the remainder in all property herein devised to any child shall descend to his or her child or children in fee."

Defendant, as successor in interest of two lineal descendants of Betty F. Tillitt, has a contingent remainder interest in the one-half undivided interest in which plaintiff owns the life estate. He is the fee simple owner of the other one-half undivided interest.

Plaintiff instituted this action under the Uniform Declaratory Judgment Act (G.S. 1-253, *et seq.*) seeking an adjudication that she has the power and authority under Item 5 of the will to sell and convey timber on the lands and to divide the proceeds equally between plaintiff and defendant.

By judgment entered 9 August 1969, Judge Walter W. Cohoon made findings, concluded that plaintiff has the right to sell timber on the devised lands and to pass title thereto, and ordered as follows:

"IT IS, THEREFORE, ORDERED AND ADJUDGED that the Court has jurisdiction of this proceeding under the Declaratory Judgment Act.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that plaintiff, Gideon Tillitt Godfrey, as the sole surviving child of the testatrix, under Item 5 of Testatrix's will has the right to sell the timber on the lands devised and to pass title thereto; that if the plaintiff sells said timber, the proceeds from such sale, less the court cost in this action and expenses of said sale, if any, shall be disbursed as follows:

(a) One-half to the defendant, James H. Patrick, in fee;

(b) One-half paid to plaintiff, Gideon Tillitt Godfrey to

be administered by her in the nature of a trustee, with the right to expend such amounts as she may require for her needs during her lifetime, subject to be restrained by the contingent remaindermen in the event she attempts to dissipate said funds for purposes other than for her needs.

(c) That any residue of said fund remaining at the expiration of the life estate of the plaintiff will be disbursed as directed in the decision of the Supreme Court of North Carolina in the case of *P. P. Gregory v. Gideon Tillitt Godfrey, et als,* reported in 254 N.C. at page 217."

Defendant excepted to the judgment and appealed.

E. Ray Etheridge and John R. Jenkins, Jr., for plaintiff appellee.

Leroy, Wells, Shaw, Hornthal & Riley by J. Fred Riley for defendant appellant.

GRAHAM, J.

No exception was taken to any of the court's findings or conclusions and defendant states in his brief that he agrees as to the division of the proceeds. His sole contention is that the court erred in refusing to order plaintiff to account to the court at least annually for that portion of the timber proceeds to be administered by her in the nature of a trustee.

[1] Executors, administrators and collectors must file annual accounts with the court. G.S. 28-117. Trustees under a will are likewise required to file annual accounts pursuant to G.S. 28-53. However, we know of no requirement that a life tenant must account to the court or to a remainderman.

[2] Defendant's position is that even though plaintiff had no obligation to account under the will, she now occupies the position of a court appointed fiduciary and must therefore be ordered to account to the court. Conceding that the court has the inherent power to require any appointed fiduciary to file periodic accounts, in our opinion it does not follow that the court is compelled as a matter of law to do so. "It lies within the *discretion* of the court, if there is no relevant statute, to order an account of the trustee or his successor in interest, at the suit of any interested party, . . ." (Emphasis added). Bogert, Trust and Trustees (2d Ed.), § 963. "It is generally recognized that in a proper case an accounting by the life tenant *may* be required where it is necessary to protect the estate in remainder." (Emphasis added). 31 C.J.S., Estates, § 62, p. 124. "All

fiduciaries *may be* compelled by appropriate proceedings to account for their handling of properties committed to their care." (Emphasis added). *Lichtenfels v. Bank,* 260 N.C. 146, 148, 132 S.E. 2d 360.

[3, 4] Defendant argues strenuously that unless plaintiff is required to account, he will have no way of knowing whether the corpus is being dissipated. A contingent remainderman cannot maintain an action at law against the tenant in possession to recover damages for waste, because it cannot be known in advance of the happening of the contingency whether the contingent remainderman will in fact suffer damage or waste. *Strickland v. Jackson,* 261 N.C. 360, 134 S.E. 2d 661; *Edens v. Foulks,* 2 N.C. App. 325, 163 S.E. 2d 51. The sole remedy of a remainderman is to seek an injunction to prevent a person in possession from committing future waste. 56 Am. Jur., Waste, § 13, p. 459; *Richardson v. Richardson,* 152 N.C. 705, 68 S.E. 217; *Latham v. Lumber Co.,* 139 N.C. 9, 51 S.E. 780; *Gordon v. Lowther,* 75 N.C. 193, *Edens v. Foulks, supra.* This remedy, which is the only remedy defendant had in the first place, is expressly reserved in the court's order. In our opinion it has not been shown that the court abused its discretion in refusing to go further and require that plaintiff file annual accounts. It is true that since proceeds from the sale of the timber, rather than the standing timber, now constitutes the corpus, an unlawful disposition thereof will be more difficult to detect. This argument, however, is more properly directed to the discretion of the trial court.

Affirmed.

MALLARD, C.J., and MORRIS, J., concur.

IN THE MATTER OF: ALLAN EDWARD ROBERTS BORN: APRIL 10, 1955

No. 7021DC243

(Filed 24 June 1970)

1. Perjury § 2— subornation of perjury — requisites of proof

In a prosecution for subornation of perjury, the falsity of the oath of the alleged perjurer must be established by the testimony of two witnesses, or one witness and corroborating circumstances, sometimes called adminicular circumstances.

2. Perjury § 5— subornation of perjury — sufficiency of evidence

Testimony by a police officer and by a court family counselor was in-

sufficient to make out a case of subornation of perjury against a juvenile, there being no evidence of corroborating circumstances, where the testimony was merely to the effect that the officer and the counselor both heard the suborned witness, during a hearing on an automobile larceny charge against the juvenile, make two conflicting statements under oath upon a material feature of the case and also state that the juvenile had induced him to make the first statement, which was false.

3. Criminal Law § 147.5; Perjury § 2— power of Court of Appeals to overrule established precedent

The Court of Appeals is not at liberty to overrule the long line of cases in this jurisdiction which unanimously require two witnesses, or one witness with corroboration, to establish subornation of perjury.

4. Infants § 10— juvenile hearing — finding of delinquency

Where the evidence in a juvenile hearing was insufficient to convict the juvenile of subornation of perjury, there could be no finding that the juvenile was a delinquent. G.S. 7A-278(2).

APPEAL by respondent from *Henderson, District Judge,* 24 January 1970 Session of FORSYTH County District Court.

On 19 November 1969 a petition was filed in Forsyth County District Court alleging that Allan Edward Roberts, a juvenile, is delinquent in that:

> "[O]n November 15, 1969, at the Hobby Center at West Salem Shopping Center, and again on November 18, 1969, at Dalton Junior High School, he did procure Leroy Sonny Stanley, III, for the express purpose to suborn and incite said Leroy Sonny Stanley, III, to commit perjury upon the trial of Allan Edward Roberts on November 19, 1969, for the benefit of said Allan Edward Roberts in that he did beg Leroy Sonny Stanley, III, to give false testimony and stated to him, 'I want you to lie for me,' and said Leroy Sonny Stanley acting thereupon did on November 19, 1969, commit perjury."

After a hearing pursuant to G.S. 7A-277, *et seq.,* the court made findings including the following:

> "After hearing all the evidence in this case, the Court finds as fact that the defendant did procure, incite and suborn one Leroy Sonny Stanley, III, to give false testimony as a defense witness for him on his trial on November 19, 1969, in which case the Court further finds as fact the said Leroy Sonny Stanley, III, did commit perjury, and that said perjury was the direct result of the defendant Allan Edward Roberts' suborning the said Leroy Sonny Stanley, III, to commit perjury."

The court thereupon ordered and adjudged the respondent a de-

linquent child in need of the protection of the court and ordered that he be committed to the custody of the North Carolina Department of Juvenile Correction to be placed in a training school. The respondent, through privately employed counsel, appealed.

Robert Morgan, Attorney General, by Rafford E. Jones, Staff Attorney, for the State.

Barbara C. Westmoreland for respondent appellant.

GRAHAM, J.

[1, 2] In a prosecution for subornation of perjury, the falsity of the oath of the alleged perjurer must be established by the testimony of two witnesses, or one witness and corroborating circumstances, sometimes called adminicular circumstances. *State v. King,* 267 N.C. 631, 148 S.E. 2d 647; *State v. Allen,* 260 N.C. 220, 132 S.E. 2d 302; *State v. Lucas,* 247 N.C. 208, 100 S.E. 2d 366; *State v. Sailor,* 240 N.C. 113, 81 S.E. 2d 191. The State contends that the above requirement was met in that two witnesses, a police officer and the court family counselor, testified over objection that each of them heard Sonny Stanley testify under oath in a juvenile proceeding, wherein respondent was alleged to have stolen an automobile, that Stanley and the respondent had not stolen an automobile, but had hitchhiked up to Virginia and Maryland on the date the theft allegedly occurred. The witnesses also testified that later on the same date, Stanley returned into court and they heard him state under oath that he had lied in his earlier testimony in that he and respondent had in fact stolen the automobile. The witnesses also stated that Stanley had told them he had lied because respondent had asked him to do so. The testimony of Stanley tended to show that he had been induced to lie in court by respondent.

We cannot distinguish this case from *State v. Sailor, supra,* where the Supreme Court stated:

> "All that the evidence tends to show is that the alleged suborned witness at one trial swore, and at another time stated, that she did not purchase from defendant the whiskey found in her possession, and that she, on another trial swore, and at other times stated, that she did purchase the whiskey from defendant. And while there is testimony of officers, admitted for the purpose of corroboration, and tending to corroborate her as to what she had testified and stated, there is no evidence of corrobrating circumstances tending to show which statement was false. Indeed, the Attorney-General, in brief filed here, states:

'It is true that all the evidence presented goes directly back to the State's witness . . . the alleged suborned perjurer.' There is no evidence of any independent circumstance. Hence, motion of defendant for judgment as of nonsuit entered at the close of the State's evidence should have been sustained."

The recent case of *State v. King, supra,* reaffirms the principles of the *Sailor* case.

[3] It is true that perjury and the subornation of perjury are reprehensible and socially disturbing acts. It may well be, as the State suggests in its brief, that the better rule would not require two witnesses, or one witness with corroboration to establish subornation of perjury. However, this court is not at liberty to overrule the long line of cases in this jurisdiction which unanimously hold otherwise. Furthermore, we note that the rule followed for so long in this jurisdiction is not without reason. As stated by Justice Seawell in *State v. Hill,* 223 N.C. 711, 715, 28 S.E. 2d 100, ". . . the law, from ancient times, has not been willing to 'take one man's word against another' upon a question of veracity, since, roughly speaking, it merely establishes an equilibrium."

[2] The testimony of the police officer and the family counselor in this case simply went directly back to the testimony and statements made by the alleged perjurer. Accordingly, their testimony established no evidence of independent circumstances and under the authority of *Sailor* and *King* the evidence was insufficient to make out a case of subornation of perjury.

[4] The remaining question is whether there was sufficient evidence to permit a finding that respondent is a delinquent, even though the evidence was insufficient to convict him of the crime alleged in the petition. G.S. 7A-278(2) defines a delinquent as follows:

"(2) 'Delinquent child' includes any child who has committed any criminal offense under State law or under an ordinance of local government, including violations of the motor vehicle laws or a child who has violated the conditions of his probation under this article."

The case of *In re Alexander* (filed in this court on this date) involved this identical question. There, Parker, J., speaking for the court, stated:

"While juvenile proceedings should not be equated to criminal prosecutions nor should a finding of delinquency in such a proceeding be deemed synonymous with conviction of a crime, *In re Burrus,* 275 N.C. 517, 169 S.E. 2d 879, nevertheless certain

constitutional safeguards apply. *In re Winship,* 397 U.S. 358, 25 L.Ed. 2d 368, 90 S.Ct. 1068; *In re Gault,* 387 U.S. 1, 18 L.Ed. 2d 527, 87 S.Ct. 1428. The majority opinion in *Winship,* which was decided 31 March 1970, held that 'the constitutional safeguard of proof beyond a reasonable doubt is as much required during the adjudicatory stage of a delinquency proceeding as are those constitutional safeguards applied in *Gault* — notice of charges, right to counsel, the rights of confrontation and examination, and the privilege against self-incrimination.' While the record before us does not disclose what standard of proof was applied by the district judge in making the factual determination upon which the order here appealed from is based, the evidence in the present case was not sufficient, if this had been a criminal prosecution against an adult for larceny, even to justify submission of the case to a jury. In such case a judgment of nonsuit would have been required. It is no less required in a case in which a juvenile is involved, regardless of whether the nature of the proceedings require that the juvenile be designated a respondent rather than be designated as a defendant."

Following the principles enunciated by Judge Parker in the above case, we hold that the petition against respondent in this case should have been dismissed. Respondent's assignment of error with respect to the court's failure to do so is well taken.

Reversed.

MALLARD, C.J., and MORRIS, J., concur.

IN THE MATTER OF: DONALD RENE ALEXANDER

No. 7027DC204

(Filed 24 June 1970)

1. Infants § 10; Constitutional Law § 29— juvenile proceedings — constitutional safeguards

While juvenile proceedings should not be equated to criminal prosecutions nor should a finding of delinquency in such a proceeding be deemed synonymous with conviction of a crime, nevertheless certain constitutional safeguards apply.

2. Infants § 10— juvenile proceeding — sufficiency of evidence — standard of proof

Where the evidence in a juvenile hearing on a charge of larceny would

have been insufficient to go to the jury had the hearing been a criminal prosecution against an adult, the evidence was equally insufficient to support a finding that the juvenile was a delinquent in committing the larceny.

APPEAL by respondent from *Bulwinkle, District Judge,* October 1969 Session of GASTON District Court.

This juvenile court delinquency proceeding was commenced against the respondent, a fourteen-year-old boy, by verified petition dated 18 September 1969 in which it is alleged that respondent "is delinquent in that on Sept. 16, 1969 he did unlawfully steal one automatic radio portable tape player, the personal property of Kress Department Store, Gastonia, N. C. Value of the tape player $79.00." The petition was signed by Fred A. Mullis, Assistant Manager of Kress's. Summons was duly issued and served, and upon a finding as to respondent's indigency and the indigency of his parents, an attorney was appointed to represent him.

Evidence presented at the hearing, as summarized by the district judge, was as follows:

"Mike Robinson, an employee of Kress Department Store on September 16, 1969 testified that at some time between 5:30 and 6:00 on the 16th of September, after the curtains had been drawn on the doors of Kress & Co., he observed the juvenile in a squatting position near a counter near the Marietta St. exit for Kress's on which counter a portable radio tape player had been resting during the day. He testified that the portable radio tape player was found to be on the floor near the place where the juvenile was squatting, but that he did not see the juvenile actually touching it; that upon his approaching the juvenile, the juvenile got up and ran through the door out into Marietta St., even though he shouted at the juvenile and asked him to stop.

"He further testified that there was no one in the immediate area other than the juvenile at that time; that he had seen no person in the store at that time other than the minor who was not an employee of the store.

"He testified that the tape player in its position on the floor was not open as it had been when lying on the counter; that there had been no one near the counter that he had seen except the juvenile.

"On cross examination by the juvenile's attorney, Mike Robinson testified that he did not see the boy actually touch-

ing the tape player, he just saw that he was in a squatting position very close to where the tape player was found. He testified that he saw nothing in the hands of the juvenile as he went through the door. He testified that at the time that the door through which the juvenile exited was unlocked, but that in his opinion all of the other doors in Kress's were locked.

"Fred A. Mullis, Assistant Manager of Kress's, the Petitioner in this case, testified that he had made a thorough check of the store at 5:30, which was the closing time of the store, and in such check found that all of the doors except for the one through which the juvenile exited were locked with the curtains drawn; that on the outside of the doors, visible to the public there was posted a sign which stated closing hours at 5:30 Monday through Thursday.

"Mr. Mullis testified that in his search of the store he noted at 5:30 that there were no customers in the store; that no one had permission to be in the store after the closing hour; that he later saw the tape player on the floor and noted that it was not in the same position it had been at the time the store closed at 5:30. Mr. Mullis testified that the value of the tape player was $79.00.

"On cross examination, Mr. Mullis testified that he had not seen the juvenile in the store but that he had made certain all doors were locked other than the one door on the Marietta Street exit through which the juveline had exited. He testified that nothing was missing from the store but that this tape recorder was not in the same position as it had been during the day."

On this evidence the district judge entered an order containing the following:

"Court finds from sworn testimony that juvenile is delinquent in that he did commit larceny by taking one portable record player from S. H. Kress & Co."

Upon this finding, the court entered an order placing respondent on probation on condition that he (1) be and remain of good behavior and violate none of the laws of the State; (2) report to the probation officer at "which" (sic) time or times as the probation officer may require; (3) attend regularly the public schools so long as he remains within the required age group; and (4) be and remain at home at 8:00 p.m. until 7:00 a.m. "as determined by the Judge."

From this order, respondent appeals.

Attorney General Robert Morgan and Staff Attorney L. Phillip Covington for the State.

Robert C. Powell for respondent appellant.

PARKER, J.

The order appealed from is based on a finding that respondent is a delinquent "in that he did commit larceny by taking one portable record player from S. H. Kress & Co." The evidence presented was insufficient to support this finding.

[1, 2] While juvenile proceedings should not be equated to criminal prosecutions nor should a finding of delinquency in such a proceeding be deemed synonymous with conviction of a crime. *In re Burrus,* 275 N.C. 517, 169 S.E. 2d 879, nevertheless certain constitutional safeguards apply. *In re Winship,* 397 U.S. 358, 25 L. Ed. 2d 368, 90 S. Ct. 1068; *In re Gault,* 387 U.S. 1, 18 L. Ed. 2d 527, 87 S. Ct. 1428. The majority opinion in *Winship,* which was decided 31 March 1970, held that "the constitutional safeguard of proof beyond a reasonable doubt is as much required during the adjudicatory stage of a delinquency proceeding as are those constitutional safeguards applied in *Gault* — notice of charges, right to counsel, the rights of confrontation and examination, and the privilege against self-incrimination." While the record before us does not disclose what standard of proof was applied by the district judge in making the factual determination upon which the order here appealed from is based, the evidence in the present case was not sufficient, if this had been a criminal prosecution against an adult for larceny, even to justify submission of the case to a jury. In such case a judgment of nonsuit would have been required. It is no less required in a case in which a juvenile is involved, regardless of whether the nature of the proceedings require that the juvenile be designated a respondent rather than be designated as a defendant.

We do not pass upon appellant's additional contention that the petition in the present case was itself insufficient to support the court's order, since for failure of evidence the order must in any event be and is

Reversed.

MORRIS and HEDRICK, JJ., concur.

PINE STATE YARN MILLS, INC. v. THE TROUTMAN FOUNDRY, INC.

No. 7022SC214

(Filed 24 June 1970)

1. Trial § 21— motion for nonsuit — consideration of evidence

On motion for nonsuit the evidence must be taken in the light most favorable to the plaintiff.

2. Fires § 3— origin of fire — circumstantial evidence

Proof of the origin of fire may be established by circumstantial evidence.

3. Fires § 3— sparks from smokestack as cause of fire — sufficiency of proof

In order to recover for fire damage caused by negligence in permitting sparks to escape from a smokestack, it is not enough to show only that (1) the fire occurred and (2) defendant had a smokestack which in the past emitted sparks, but plaintiff must show that the fire in question originated due to a spark or sparks from defendant's smokestack.

4. Trial § 22— inference upon an inference

An inference of fact may not be based upon an inference.

5. Fires § 3— negligence in causing fire — emission of sparks from smokestack — sufficiency of evidence

Plaintiff's evidence was insufficient to be submitted to the jury on the issue of defendant's negligence in causing a fire which damaged plaintiff's building by permitting sparks to escape from its smokestack where it failed to show the cause of the fire or that smoke or sparks were emitted from defendant's smokestack on the date of the fire.

APPEAL by plaintiff from *Seay, J.*, 17 November 1969 Session of Superior Court held in IREDELL County.

This action is brought to recover damages for the burning of plaintiff's goods and part of its warehouse, alleged to have been caused by the negligence of defendant in negligently permitting fire to escape from its smokestack.

At the conclusion of plaintiff's evidence, a motion for judgment as of nonsuit was sustained. Plaintiff assigned error and appealed to the Court of Appeals.

Woodson, Hudson & Busby by Donald D. Sayers for plaintiff appellant.

Raymer, Lewis & Eisele by Douglas G. Eisele, and Adams, Dearman & Pope by William P. Pope for defendant appellee.

MALLARD, C.J.

Plaintiff asserts that the court erred in allowing defendant's motion for judgment as of nonsuit.

[1] On motion for nonsuit the evidence must be taken in the light most favorable to the plaintiff. 7 Strong, N.C. Index 2d, Trial, § 21. When the evidence is so taken, the following facts appear: That the property owned by plaintiff was adjacent to that owned by defendant; that defendant's building was located approximately north of plaintiff's building; that defendant's smokestack was fifty-three feet from the northeast corner of plaintiff's building; that there was a fence between the smokestack and the plaintiff's building and a fence east of plaintiff's building extending north and south; that there was a railroad track east of this east fence; that there was high grass from the railroad track to plaintiff's east fence; that it was twenty-eight feet from the northeast corner of plaintiff's building to the fence east of the building; that "it is approximately 10 to 12 feet from the fence to the shoulder of the railroad"; that on 1 April 1966 the wind was blowing "to the south"; that during the months of March and February the defendant's smokestack emitted smoke and sparks about 1:00 p.m. every day; that a fire started at about 1:00 p.m. on 1 April 1966 and went down the railroad tracks "coming from the north and going in a southeast direction"; that the fire "had come in at a point about 28 feet from the north corner" of plaintiff's fence and after burning the dead grass between plaintiff's warehouse and the fence spread to plaintiff's warehouse; and that plaintiff's goods and warehouse were damaged by the fire. There was some evidence that defendant fired its "equipment" that day. However, the plaintiff offered no evidence that the "equipment" was fired before the fire occurred, and, more importantly, there was no evidence that any smoke or sparks emitted from defendant's smokestack on 1 April 1966.

[2, 3] Proof of the origin of fire may be established by circumstantial evidence. *Phelps v. Winston-Salem,* 272 N.C. 24, 157 S.E. 2d 719 (1967). However, it is not enough to show only that (1) the fire occurred and (2) defendant had a smokestack which emitted sparks in the past. The plaintiff must show that the fire in question originated due to a spark or sparks from defendant's smokestack. *Phelps v. Winston-Salem, supra; Moore v. R. R.,* 173 N.C. 311, 92 S.E. 1 (1917); *Mfg. Co. v. R. R.,* 122 N.C. 881, 29 S.E. 575 (1898).

[4] The plaintiff in this case takes the position that we should infer (1) that sparks emitted from defendant's smokestack and (2) that those sparks started the grass fire that subsequently injured

plaintiff's warehouse. It is settled law in North Carolina that an inference of fact may not be based upon an inference. *Petree v. Power Company,* 268 N.C. 419, 150 S.E. 2d 749 (1966); *Powell v. Cross,* 263 N.C. 764, 140 S.E. 2d 393 (1965); *Johnson v. Fox,* 254 N.C. 454, 119 S.E. 2d 185 (1961); *Lane v. Bryan,* 246 N.C. 108, 97 S.E. 2d 411 (1957).

[5] The question at issue is whether defendant's negligence can be inferred where there is no showing as to the cause of the fire or a showing of smoke or sparks emitting from the defendant's smokestack. In *Mfg. C. v. R. R., supra,* the Court said:

> "(W)here plaintiff alleges that he has been injured by *fire* originating from sparks issued from defendant's locomotive, 'he must not only prove that the fire *might* have proceeded from defendant's locomotive, but must show by reasonable affirmative evidence that it did so originate.'"

In *Phelps v. Winston-Salem, supra,* the Court said:

> "In order to go to the jury on the question of defendant's negligence causing the fire, plaintiffs must not only show that the fire *might* have been started due to the defendant's negligence, but must show by reasonable affirmative evidence that it *did* so originate. *Moore v. R. R., supra.* In *Lumber Co. v. Elizabeth City,* 227 N.C. 270, 41 S.E. 2d 761, the Court held that nonsuit was proper where the origin of the fire was left in speculation and conjecture.
>
> This is an 'unexplained fire'. *Proof of the burning alone is not sufficient to establish liability, for if nothing more appears, the presumption is that the fire was the result of accident or some providential cause.* There can be no liability without satisfactory proof, by either direct or circumstantial evidence, not only of the burning of the property in question but that it was the proximate result of negligence and did not result from natural or accidental causes. 5 Am. Jur. 2d, 836." (Emphasis Added.)

The evidence in this case revealed that there were several smokestacks in the general area of plaintiff's warehouse; that children and others often walked along the railroad track; that workmen smoked outside the building; that there had been previous "unexplained" fires in the same grass; and that a railroad track was located next to the high grass.

In *Maguire v. R. R.,* 154 N.C. 384, 70 S.E. 737 (1911), fire occurred along the right-of-way next to the railroad track, but there

was no evidence that the locomotive using the track emitted sparks. The Supreme Court held that defendant's motion for nonsuit should be granted and said:

> "There was every opportunity for this fire to have originated from some other source as well as from defendant's engine. All that can be reasonably said is that the fire *may* possibly have been set out by the engine, and it is equally true that it may not."

In the case at bar the fire may possibly have been set by sparks emitted from defendant's smokestack, and it is equally true that it may not; the evidence presents a mere choice of possibilities and leaves the source of the fire in doubt.

The plaintiff has failed to show that the fire originated due to defendant's negligence. Consequently, the judgment of the superior court in granting the nonsuit is affirmed.

Affirmed.

MORRIS and GRAHAM, JJ., concur.

ELLEN JANE CONNOR BOONE v. JUNIOR (NMN) BOONE

No. 7019SC273

(Filed 24 June 1970)

1. Divorce and Alimony § 24; Infants § 9— custody — finding that both parents are fit

If a court finds that both parents are fit and proper persons to have custody of the children and then awards custody to the father after finding it is in the best interest of the children that he have custody, such holding will be upheld when supported by competent evidence.

2. Divorce and Alimony § 24; Infants § 9— award of custody to persons over whom court has no control

In this child custody proceeding instituted by the mother against the father wherein the court found that both parents were fit and proper persons to have custody of the children, the trial court erred in providing that the father should have custody of the children *and* that they should remain at the home of third persons who had been caring for them, the evidence being insufficient to support a finding that the best interests of the children will be served if they remain in the home of such third persons, and the court having no control over the third persons since they are not parties to the proceeding, are not a public institution and have not consented to be bound by the court's order.

BOONE *v.* BOONE

APPEAL from *Godwin, J.*, 6 January 1970 Session, RANDOLPH Superior Court.

This is a civil action brought by Ellen Jane Connor Boone against her husband, Junior Boone, in which Mrs. Boone sought to gain custody of the two minor children of the marriage, support for the children, alimony pendente lite, counsel fees and alimony without divorce. The matter was heard before the Honorable A. Pilston Godwin upon affidavits and testimony from both parties. At the conclusion of the hearing, Judge Godwin entered an order awarding custody of the two minor children to the defendant and attorney's fees on behalf of the plaintiff. From the signing and entry of this order, the plaintiff appealed.

Ottway Burton for plaintiff appellant.

Walker, Bell and Ogburn, by John N. Ogburn, Jr., for defendant appellee.

HEDRICK, J.

The order of Judge Godwin awarding custody of the two minor children was as follows:

"*ORDER OF GODWIN, J.*

"THIS CAUSE COMING ON TO BE HEARD and being heard before the undersigned Judge Presiding at the January 5, 1970, two-week Session of the Civil Division of the Randolph County Superior Court, upon motion of the plaintiff for subsistence for herself, support and custody of the two minor children born of the marriage between the plaintiff and the defendant, and counsel for the plaintiff [sic], and it appearing to the Court that Notice was served on the defendant to be present on January 5, 1970, in Randolph County Superior Court, and the plaintiff being present in Court and represented by her attorney of record, Ottway Burton, and the defendant being present in Court and represented by his attorneys of record, Walker, Bell & Ogburn, of Asheboro, and the plaintiff having introduced evidence and the defendant having introduced evidence, the Court finds the following facts:

"1. That the plaintiff and the defendant have been separated since December 15, 1969, and that since that time the defendant has had custody of the two minor children, Daniel Richard Boone, born May 9, 1969, and Billy Ray Boone, born January 1, 1967, and that the defendant has been keeping the two said

children at the home of Mr. and Mrs. Wilburn Frye in Seagrove, North Carolina;

"2. That the mother, Ellen Jane Connor Boone, is a fit and proper person to have the care and custody of the two minor children born of the marriage of the plaintiff and defendant.

"3. The Court further finds from the evidence that the home of Mr. and Mrs. Wilburn Frye is a suitable place for the two minor children and that the children are being well taken care of, the Court finding that the plaintiff and the defendant both work at public work. The Court finds as a fact that the father, Junior Boone, is a fit and proper person to have custody of the two minor children born of the marriage, and finds from the evidence that the best interest, health and welfare of the two children would best be served by allowing them to remain in the custody of the father, and to remain at the home of Mr. and Mrs. Wilburn Frye, subject to visitation of the mother.

"NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the father, Junior Boone, shall have the custody of the two minor children, Daniel Richard Boone and Billy Ray Boone, and that they shall remain in the home of Mr. and Mrs. Wilburn Frye under the same arrangements as they are now being kept; the Court further ORDERS that the mother, Ellen Jane Connor Boone, shall have the right to visit with the children at any time convenient to Mr. and Mrs. Wilburn Frye in Seagrove, and also the mother, Ellen Jane Connor Boone, shall have the right to have the children visit with her at any place of her choice except her father, John Connor, two weekends each month, commencing Friday, at 5:00 P.M. until Sunday at 9:00 P.M. at which time she shall return the children to Mr. and Mrs. Wilburn Frye's home.

"The Court further ORDERS the defendant to pay into the office of the Clerk of the Superior Court of Randolph County, the sum of $200 on or before the 2nd day of February, 1970, as attorneys' fees for the plaintiff for the use and benefit of Ottway Burton, Attorney.

"This cause is retained for the further orders of the Court.

"This the 6th day of January, 1970.

"/s/ A. Pilston Godwin
"Judge Presiding"

[1] Under the provisions of G.S. 50-132(a), the judge may order

the custody of a minor child ". . . to such person, agency, organization, or institution . . ." as will, in his opinion, best promote the interest and welfare of the child. If a court finds that both parents are fit and proper persons to have custody of the children and then awards custody to the father after finding it is in the best interest of the children that he have custody, his holding will be upheld when supported by competent evidence. *Hinkle v. Hinkle,* 266 N.C. 189, 146 S.E. 2d 73 (1966). "However, a finding by the court, . . . which finding is not supported by the evidence, is not binding on appeal, and the judgment based thereon will be reversed . . ." 1 Strong, N.C. Index 2d, Appeal and Error, § 57; *Burrell v. Burrell,* 243 N.C. 24, 89 S.E. 2d 732 (1955); *Coble v. Coble,* 229 N.C. 81, 47 S.E. 2d 798 (1948).

[2] Judge Godwin found as a fact that the best interest, health and welfare of Daniel Richard Boone, age seven months, and Billy Ray Boone, age two years, would best be served if they were allowed to remain in the custody of the father *and* to remain at the home of Mr. and Mrs. Wilburn Frye. This finding of fact indicates that the judge felt that the best interest of the children would be served only if the father left the children in the home of Mr. and Mrs. Frye. The order provided that the father would have the custody *and* that they should be kept in the home of Mr. and Mrs. Frye under the arrangements then existing. The evidence does not support a finding that the best interest, health and welfare of the children will be served if they remain in the home of the Fryes. The evidence does not show that any "arrangements" have been made with the Fryes that they should provide a home for these two small children. The Fryes are identified by the evidence only as a nice, substantial couple who keep "kids" in their home in Seagrove, North Carolina. The record does not show that the Fryes are willing to assume the awesome responsibility of providing a home for these two small children. The father testified that he lived in Troy, North Carolina, and that he saw the boys only on the weekend, and that he provided them with milk, baby food and clothing, and that Mrs. Frye did their washing.

The order appealed from, in effect, awards custody of these two children to Mr. and Mrs. Frye with visitation rights granted to the father and the mother. Mr. and Mrs. Frye are not parties to this proceeding, nor are they a public institution, nor have they consented to be bound by this order; therefore the order is unenforceable. If the mother and the father are both fit and proper persons to have custody of these children, as the judge found them to be, under ordinary circumstances the court would then proceed to determine

whether the best interest, health and welfare of the children would be served by awarding custody to the mother or father. If not, then the court must deal with someone or an agency over whom the court has control. The order awarding custody must be reversed and this cause remanded for further hearing and finding.

Additionally, the order recites that the matter came on for hearing "upon motion of the plaintiff for subsistence for herself . . ."; however, the court failed to make any findings of fact or order with reference to the plaintiff's motion for subsistence. The plaintiff is entitled to a ruling upon this motion. G.S. 50-16.8(f).

For the reasons stated, the order appealed from is reversed and the case remanded to the superior court of Randolph County for further proceedings not inconsistent with this opinion.

Reversed and remanded.

BROCK and BRITT, JJ., concur.

CAROLINA OVERALL CORPORATION v. EAST CAROLINA LINEN SUPPLY, INC.

No. 707SC99

(Filed 24 June 1970)

1. Contracts § 31— interference with contractual rights — cause of action

An action lies against one who, without legal justification, knowingly and intentionally causes or induces one party to a contract to breach that contract and cause damage to the other contracting party.

2. Contracts § 32— interference with contracts — elements of proof

To establish a cause of action for tortious interference with a contract, the plaintiff must show (1) that a contract existed between him and a third person which conferred upon plaintiff some contractual right against the third person; (2) that defendant had knowledge of plaintiff's contract with such third person; (3) that defendant intentionally induced the third person not to perform his contract with plaintiff; (4) that in so doing the defendant acted without justification; and (5) that defendant's acts caused plaintiff actual damages.

3. Contracts § 31— interference with contract — theory of recovery

The theory of the doctrine which permits recovery for the tortious interference with a contract is that the right to the performance of a contract and to reap the profits therefrom are property rights which entitle

each party to protection and to seek compensation by action in court for an injury to such contract.

4. Contracts § 31— interference with contract — competition as legal justification

Competition is not legal justification for interference by a party with a contract between his competitor and a third person.

5. Contracts § 32— interference with contract between industrial laundry and its customers — sufficiency of complaint

Complaint by plaintiff industrial laundry stated a cause of action against its competitor for tortious interference with the laundry's contracts, where there were allegations that the competitor induced plaintiff's employee to breach an employment contract as a route salesman with plaintiff and to enter the employment of the competitor, and that the competitor, acting through the former employee and other agents, solicited the business of fourteen of plaintiff's customers and induced them to breach their contracts with plaintiff for laundry service.

6. Contracts § 32— interference with contract — damages

Damages for tortious interference with a plaintiff's contracts are limited to the actual value of the contracts interferred with and will not extend to such speculative matters as loss of patronage and good will.

APPEAL by plaintiff from *Bundy, J.*, September 1969 Session of NASH County Superior Court.

Plaintiff alleges in its complaint in substance as follows: Plaintiff and defendant are corporate competitors in the industrial laundry business. Defendant induced one Bill Lowe to breach an employment contract as a route salesman with plaintiff and to enter the employment of defendant; and defendant, acting through Bill Lowe and other agents, solicited the business of fourteen of plaintiff's customers and induced them to breach their contracts with plaintiff for laundry service. Further, the actions of defendant were without justification and constituted tortious interference with plaintiff's contracts.

On 15 September 1969 an order was entered by the presiding judge of the Nash County Superior Court sustaining a demurrer filed by defendant to plaintiff's complaint and dismissing the action. Plaintiff excepted to the order and appealed.

Spruill, Trotter & Lane by John R. Jolly, Jr., for plaintiff appellant.

Battle, Winslow, Scott & Wiley by Robert M. Wiley for defendant appellee.

GRAHAM, J.

[1] It is well established in this jurisdiction that an action lies against one who, without legal justification, knowingly and intentionally causes or induces one party to a contract to breach that contract and cause damage to the other contracting party. *Bryant v. Barber,* 237 N.C. 480, 75 S.E. 2d 410; *Eller v. Arnold,* 230 N.C. 418, 53 S.E. 2d 266; *Winston v. Lumber Co.,* 227 N.C. 339, 42 S.E. 2d 218; *Coleman v. Whisnant,* 225 N.C. 494, 35 S.E. 2d 647; *Bruton v. Smith,* 225 N.C. 584, 36 S.E. 2d 9, concurring opinion by Barnhill, J. (later C.J.); *Elvington v. Shingle Co.,* 191 N.C. 515, 132 S.E. 274; *Jones v. Stanly,* 76 N.C. 355; *Haskins v. Royster,* 70 N.C. 601.

[2] The elements necessary to establish a cause of action for tortious interference with a contract are summarized in *Childress v. Abeles,* 240 N.C. 667, 84 S.E. 2d 176. The plaintiff must show: (1) that a contract existed between him and a third person which conferred upon plaintiff some contractual right against the third person; (2) that defendant had knowledge of plaintiff's contract with such third person; (3) that defendant intentionally induced the third person not to perform his contract with plaintiff; (4) that in so doing the defendant acted without justification; and (5) that defendant's acts caused plaintiff actual damages.

Defendant concedes the general principles but argues that competition is legal justification for interference by a party with a contract between his competitor and a third person. Defendant relies upon certain dicta in the case of *Childress v. Abeles, supra,* from which inference may indeed be drawn that such a rule prevails in North Carolina. However, more nearly in point is the case of *Bryant v. Barber, supra.* There the complaint alleged, for a second cause of action, that plaintiff had contracts with numerous persons living along his bus route which obligated such persons to ride to and from their employment at Camp Lejeune on plaintiff's buses exclusively; that defendant wrongfully induced various of the passengers to breach their contract with plaintiff and to ride on defendant's buses, and that plaintiff suffered substantial damage as the result. The Supreme Court affirmed an order overruling a demurrer to the complaint, although the parties were clearly business competitors. Compare cases where the interference is with unregistered contracts for the sale of real estate. *Bruton v. Smith, supra; Holder v. Bank,* 208 N.C. 38, 178 S.E. 861; *Elvington v. Shingle Co., supra.*

The following general rule is set forth in the Restatement of the Law of Torts, § 768:

"(1) One is privileged purposely to cause a third person not to enter into or continue a business relation with a competitor of the actor if

(a) the relation concerns a matter involved in the competition between the actor and the competitor, and

(b) the actor does not employ improper means, and

(c) the actor does not intend thereby to create or continue an illegal restraint of competition, and

(d) the actor's purpose is at least in part to advance his interest in his competition with the other.

(2) *The fact that one is a competitor of another for the business of a third person does not create a privilege to cause the third person to commit a breach of contract with the other even under the conditions stated in Subsection (1).*" (Emphasis added).

[3, 4] The theory of the doctrine which permits recovery for the tortious interference with a contract is that the right to the performance of a contract and to reap the profits therefrom are property rights which entitle each party to protection and to seek compensation by action in court for an injury to such contract. *Bruton v. Smith, supra,* concurring opinion of Barnhill, J. (later C.J.); Annot., 84 A.L.R. 43, *et seq.* (1933); Annot., 26 A.L.R. 2d 1227, *et seq.* (1952). We see no valid reason for holding that a competitor is privileged to interfere wrongfully with contractual rights. If contracts otherwise binding are not secure from wrongful interference by competitors, they offer little certainty in business relations, and it is security from competition that often gives them value. It is true that a party to a contract which is breached by another has a cause of action for breach of contract. This, however, affords little remedy where the party breaching the contract is insolvent; or where, as alleged here, numerous contracts involving nominal amounts of money are breached as a result of wrongful inducement by a competitor.

[5, 6] In our opinion the complaint states a cause of action for compensatory damages for tortious interference with plaintiff's contracts and the demurrer should have been overruled. If plaintiff is entitled to recover at all, its recovery will be for the actual value of the contracts interferred with, and will not extend to such speculative matters alleged in the complaint as loss of patronage and good

will. See 45 Am. Jur. 2d, Interference, § 57; Restatement of the Law of Torts, § 768.

Reversed.

MALLARD, C.J., and MORRIS, J., concur.

STATE OF NORTH CAROLINA v. JAMES R. JENKINS

No. 706SC131

(Filed 24 June 1970)

1. Robbery § 4— armed robbery — nonsuit — failure to make verbal demand on victim

That neither defendant nor his companion made any verbal demand on the prosecuting witness to surrender the money does not entitle defendant to a nonsuit in an armed robbery prosecution, where there is evidence that the witness immediately pitched the money onto the floor when a gun was pointed in his face.

2. Robbery § 1— armed robbery — proof that money was taken

It is not incumbent upon the State to prove that the defendants in an armed robbery prosecution actually took the money; the offense is complete if there is an *attempt* to take personal property by use of firearms or other dangerous weapons. G.S. 14-87.

3. Criminal Law § 89— cross-examination — impeachment by prior inconsistent statements

The solicitor in an armed robbery prosecution had a legitimate basis for cross-examining defendant's alibi witnesses with respect to their inconsistent statements to the officers investigating the offense, where the witnesses made several admissions which indicated that the prior statements to law enforcement officers differed materially from the alibi evidence they were giving in court.

4. Robbery § 5— armed robbery — guilt of lesser offense — instructions

Evidence in armed robbery prosecution did not warrant submission of an issue of defendant's guilt of common law robbery.

5. Criminal Law § 115— instructions on lesser included offense

Where there is no evidence that would permit a jury to find defendant guilty of a lesser included offense, it is not incumbent on the court to charge with respect thereto.

6. Constitutional Law § 36— cruel and unusual punishment

Sentence which was within the limits provided by law does not constitute cruel and unusual punishment.

APPEAL by defendant from *May, S.J.,* August 1969 Session of HALIFAX County Superior Court.

Defendant was tried under a bill of indictment charging him with the armed robbery of one Roy Inscoe, a violation of G.S. 14-87.

The State offered evidence tending to show that shortly after midnight, on 23 June 1969, Roy Inscoe, an employee of Peoples Theater in Roanoke Rapids, entered the upstairs of the theater to deposit in a safe located there a money bag containing the sum of $739.75. When he entered the upstairs area he met a man with a gun who said, "Hold it!". Inscoe testified: "I looked around and there was another man in another room. As I stepped back, I pitched the money into [sic] the floor and he said, 'Come on in with your hands up.' " Inscoe advised the men that he could not open the safe because they had "messed" with the dial which had been set for him to open. Inscoe was ordered into a closet. "They said, 'It will take us an hour to get in that safe. If you make any noise or come out I am going to blow your brains out.' " When Inscoe got out of the closet about an hour and forty-five minutes later the bag containing the money was gone. Inscoe stated that defendant was one of the two men who accosted him and was the man who pointed a pistol at him and told him to "hold it." Inscoe also stated: "I threw the money onto the floor because the gun was in my face."

Defendant and various members of his family testified that at the time of the alleged robbery defendant was enroute from the home of his father near Norlina to Roanoke Rapids.

The jury returned a verdict finding defendant guilty as charged in the bill of indictment and from judgment entered upon the verdict defendant appealed.

Robert Morgan, Attorney General, by Carlos W. Murray, Jr., Staff Attorney, for the State.

Hux and Livermon by James S. Livermon, Jr., for defendant appellant.

GRAHAM, J.

[1] Defendant contends that the case should have been nonsuited because the evidence shows that neither the defendant nor his companion made any verbal demand that the prosecuting witness surrender the money. This contention is without merit. No verbal demand was necessary as the witness responded immediately when the gun was pointed in his face by pitching the money onto the floor.

It may be that the original purpose of defendant and his companion in going to the upstairs of the theater in the dead of night was to commit larceny or some crime other than armed robbery. However, when Inscoe appeared on the scene and was threatened with a pistol and ordered into a closet in an effort by defendant and his companion to further their unlawful purpose, the offense became one of armed robbery.

[2] Defendant also argues that the State's case should fail because it was not positively established by the evidence that defendant or his companion took the bag of money which was thrown onto the floor. This argument is likewise completely without merit. No one was present in the upstairs of the theater during the period when the money disappeared other than the prosecuting witness and the two defendants, who had made their unlawful purposes well known. Furthermore, it was not incumbent upon the State to prove that defendants actually took the money. In a prosecution for the offense of armed robbery under G.S. 14-87 the offense is complete if there is an *attempt* to take personal property by use of firearms or other dangerous weapons. *State v. Rogers,* 273 N.C. 208, 159 S.E. 2d 525; *State v. Parker,* 262 N.C. 679, 138 S.E. 2d 496. "So great is the offense when life is endangered and threatened by the use of firearms or other dangerous weapons, that it is not of controlling consequence whether the assailants profit much or little, or nothing, from their felonious undertaking. The attempt to take property by the forbidden means, all other elements being present, completes the offense." *State v. Parker, supra,* at p. 682.

[3] Defendant next contends that the court erroneously permitted the solicitor to propound certain questions on cross-examination which assumed the existence of facts which were not established in evidence or admitted. The questions concerned prior inconsistent statements that had been given by the witnesses to law enforcement officers investigating the offense. We find nothing improper about the questions. "A witness may be impeached by proof that on other occasions he has made statements inconsistent with his testimony on the present trial." Stansbury, N.C. Evidence 2d, § 46. The questions asked by the solicitor compare in no way with those condemned in *State v. Phillips,* 240 N.C. 516, 82 S.E. 2d 762, as suggested by defendant. Here the record clearly indicates that the solicitor had a legitimate basis for propounding the questions. The witnesses made several admissions regarding statements which they had previously made which indicate that their prior statements differed in material respects from the alibi evidence they gave in court. Also, Detective Harry House, Jr. testified for impeachment

purposes concerning prior inconsistent statements made to him by the witnesses. The court properly instructed the jury regarding the impeachment purposes of the detective's testimony, and his testimony, in our opinion, was clearly admissible.

[4, 5] Defendant assigns as error the failure of the court to submit to the jury the issue of defendant's guilt of the lesser included offense of common law robbery. We find no evidence in the record tending to establish the lesser crime. Where there is no evidence that would permit a jury to find defendant guilty of a lesser included offense, it is not incumbent on the court to charge with respect thereto. *State v. Parker, supra.*

[6] Defendant's two remaining assignments of error are also without merit. The court's charge to the jury was in no way prejudicial to defendant, and the sentence imposed was within the limits provided by law and does not constitute cruel and unusual punishment.

No error.

MALLARD, C.J., and MORRIS, J., concur.

STATE OF NORTH CAROLINA v. JOE LOCKLEAR (ALIAS HOSS LOCKLEAR)

No. 7016SC290

(Filed 24 June 1970)

1. Conspiracy § 6— proof of conspiracy — acts occurring after conspiracy

While the beginning of a conspiracy to commit a crime must precede the commission of the crime itself, the presence of a conspiracy need not be proved by direct evidence of acts which precede the commission of the actual crime.

2. Conspiracy § 6— sufficiency of evidence

State's evidence of events which occurred after alleged conspiracy had been consummated was sufficient to support a finding by the jury that defendant and another had combined or agreed to commit larceny by unlawfully removing tobacco from the possession of its owners and appropriating it to their own use.

3. Conspiracy § 7; Larceny § 8— failure to instruct on elements of larceny

In this prosecution for conspiracy to commit felonious larceny and

felonious larceny, failure of the court to instruct the jury as to the essential elements of larceny entitles defendant to a new trial on both charges.

APPEAL by defendant from *Burgwyn, E.J.*, 20 October 1969 Criminal Session of ROBESON County Superior Court.

Defendant was brought to trial upon a bill of indictment, proper in form, containing three counts. The first count charged defendant and various other individuals, including Huel Locklear, with conspiracy to commit felonious larceny. The second count charged felonious larceny and the third count charged the offense of receiving property knowing it to have been stolen. The third count was *nol prossed.*

The State's evidence tended to show the following: On the morning of Tuesday, 9 September 1969, Mr. Wilton Shooter discovered that fourteen sheets of tobacco owned by him and two of his tenants and valued in excess of $1,250.00 had been removed from a packhouse near Rowland. The latch on the side door of the packhouse had been pulled off. Shooter had observed the tobacco in the packhouse the previous afternoon. On Wednesday, 10 September 1969, thirteen of the fourteen sheets of tobacco were found at the house of June Vanderhall. A single sheet of tobacco was seen in front of defendant's house. The tobacco found at Vanderhall's house was identified by means of certain pieces of cloth that had been tied to the sheets in order to identify the tobacco in which each tenant owned an individual interest.

Tire tracks at the packhouse matched tracks found in defendant's yard on the morning of 9 September 1969. On the night of Tuesday, 9 September 1969, after a deputy sheriff had been at defendant's home taking plaster casts of tire tracks, defendant and Huel Locklear went to June Vanderhall's house in a pickup truck and asked his permission to store some tobacco there. Four hours later, Huel Locklear delivered the thirteen sheets of tobacco to Vanderhall's house in the same pickup truck. Before light on the morning of Thursday, 11 September 1969, Huel Locklear went to Vanderhall's house to talk to him about the stored tobacco but stated that he had to see defendant about the tobacco before he could take it out. Defendant owned a pickup truck. There was no evidence that the treads on the truck tires matched those which had made the tracks at the scene of the alleged theft; however, there was evidence that the tires on defendant's truck had been recently changed.

Defendant offered evidence tending to establish an alibi.

The jury returned a verdict finding defendant guilty as charged in both of the remaining counts of the indictment. A single judgment was entered imposing a prison sentence for a term of not less than five nor more than seven years. The sentence was suspended upon the condition that the defendant pay a fine of $500.00 and comply with certain other conditions recited in the judgment. Defendant appealed.

Robert Morgan, Attorney General, by Sidney S. Eagles, Jr., Assistant Attorney General, for the State.

Henry B. Shore for defendant appellant.

GRAHAM, J.

Defendant does not challenge the sufficiency of the evidence to support the charge of larceny, but he does contend that the court erred in failing to nonsuit the conspiracy charge, since the only evidence tending to support that charge related to events which happened after the offense of conspiracy, if it occurred at all, had been consummated.

[1] The cases cited by defendant establish that the beginning of a conspiracy to commit a crime must precede the commission of the crime itself. This principle is elementary. It does not follow, however, that the presence of a conspiracy can be proved only by direct evidence of acts which precede the commission of the actual crime. In *State v. Andrews,* 216 N.C. 574, 577, 6 S.E. 2d 35, Devin, J. (later C.J.), stated as follows:

> "The existence of the unlawful agreement need not be proven by direct testimony. It may be inferred from other facts, and the conditions and circumstances surrounding. 11 Am. Jur., 548, 570. 'The results accomplished, the divergence of those results from the course which would ordinarily be expected, the situation of the parties and their antecedent relations to each other, together with the surrounding circumstances, and the inferences legitimately deducible therefrom, furnish, in the absence of direct proof, and often in the teeth of positive testimony to the contrary, ample ground for concluding that a conspiracy exists.' *S. v. Whiteside, supra; S. v. Anderson,* 208 N.C., 771 (787); *S. v. Shipman,* 202 N.C., 518, 163 S.E., 657; *S. v. Ritter,* 199 N.C., 116, 154 S.E., 62."

[2] The evidence in this case, when taken in the light most favorable to the State, is ample to support a finding by the jury that

defendant and Huel Locklear combined or agreed to commit larceny by unlawfully removing the tobacco in question from the possession of its owners and appropriating it to their own use. "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. It is our opinion, and we so hold, that the court properly overruled defendant's motion for nonsuit.

[3] Defendant also assigns as error the failure of the court to instruct the jury as to the essential elements of larceny. This assignment of error must be sustained. A careful review of the complete charge of the court as it appears in the record discloses that at no point in the charge was the jury instructed as to any of the essential elements of the crime of larceny. Whether this resulted from an inadvertence on the part of the trial judge or an omission by the reporter in transcribing the charge we do not know. In any event, the record, including the charge, has been certified by the clerk and contains a stipulation that the transcript and the judge's charge are correct. Suffice to say, the failure of the charge to contain essential instructions regarding the offenses of which defendant has been convicted constitutes a violation of G.S. 1-180 and requires a new trial on both counts.

New trial.

MALLARD, C.J., and MORRIS, J., concur.

VICTORIA L. GREGOR v. EDISON LONZO WILLIS, SR., EDISON LONZO WILLIS, JR., AND ALBERT JOSEPH GREGOR

No. 7022SC242

(Filed 24 June 1970)

1. **Automobiles § 57— intersection accident — negligence by driver on servient street — sufficiency of evidence**

In this action by a passenger against the driver of the car in which she was riding for injuries received in an intersection accident, plaintiff's evidence was sufficient to be submitted to the jury on the issue of the driver's negligence in (1) failing to keep a proper lookout, (2) failing to yield the right-of-way to traffic on the dominant street, and (3) entering the intersection from a subservient street without first ascertaining that the movement could be made in safety.

2. Automobiles §§ 8, 19— motorist on servient street — duties at intersection

The driver of an automobile on a servient street had a positive duty to determine by proper lookout that she could enter an intersection with a dominant highway with reasonable assurance of safety to herself and others, and was charged with having seen what she could have seen if she had looked, and if she did look, with having seen what she should have seen.

APPEAL by defendant Gregor from *Seay, J.,* November 1969 Civil Session of IREDELL County Superior Court.

Plaintiff instituted this action on 11 December 1966 alleging that she sustained personal injuries on 30 January 1965 when the car in which she was riding was struck at a Statesville intersection by a car owned by defendant Edison Lonzo Willis, Sr. and being operated by defendant Edison Lonzo Willis, Jr. The car in which plaintiff was a passenger was owned by her husband, defendant Albert Joseph Gregor, and was being operated by their daughter, Nancy Ellen Gregor. The complaint alleges and the answer admits that the Gregor car was being operated by the daughter as an agent of the defendant father within the meaning of the family purpose doctrine.

Admissions in the pleadings and plaintiff's evidence established the following: The collision occurred on 30 January 1965 at or about 12:10 p.m. at the intersection of South Meeting Street and West Sharpe Street. The Gregor car was being operated east on West Sharpe Street. Upon reaching the intersection with South Meeting Street the driver of the Gregor car brought the car to a complete stop in obedience to a stop sign lawfully erected at the intersection. South Meeting Street is a two-lane street and is the dominant street with no stop signs or traffic control devices controlling the flow of traffic into and through the intersection in question. The driver of the Gregor car and plaintiff were talking and discussing a shopping trip as their car stopped at the intersection. The driver of the Gregor car pulled into the intersection and was immediately struck on the right front door by the front of the Willis car as the Willis car entered the intersection in a northerly direction, coming from plaintiff's right. The collision occurred in the southeast quadrant of the intersection.

A motion for nonsuit made by defendants Willis at the close of plaintiff's evidence was allowed and plaintiff did not except to that judgment. Defendant Gregor offered no evidence. The issues of his negligence were answered in plaintiff's favor and damages were awarded in the sum of $6,500.00. Defendant Gregor appealed.

Chamblee, Nash and Frank by Fred G. Chamblee for plaintiff appellee.

Collier, Harris & Homesley by Jack R. Harris for defendant appellant.

GRAHAM, J.

The sole question raised by this appeal is whether the evidence taken in the light most favorable to plaintiff was sufficient to withstand defendant's motion of nonsuit. We hold that it was.

[1] It is true, as argued by the appellant, that there was no evidence concerning the speed of the Willis car, the actual distance it was from the intersection when the Gregor car entered, or whether appellant's driver looked in either direction before entering the intersection. However, appellant's further answer and defense and cross action alleges that at the same time appellant's driver entered the intersection, the Willis car was approaching the intersection. Also, there was evidence from which it could be legitimately inferred that the collision occurred immediately upon the Gregor car's pulling out into the intersection and at a time when it had completely negotiated only half of the twenty-six foot street. This evidence, when taken in the light most favorable to the plaintiff, was sufficient to support a finding by the jury that appellant was guilty of negligence in any one or more of the following particulars alledged by plaintiff: (1) She failed to keep a proper lookout. (2) She failed to yield the right-of-way to traffic on the dominant street. (3) She entered the intersection from a subservient street without first ascertaining that the movement could be made in safety.

[2] Appellant's driver had the positive duty to determine by proper lookout that she could enter the intersection with reasonable assurance of safety to herself and others. *Primm v. King,* 249 N.C. 228, 106 S.E. 2d 223. She is charged with having seen what she could have seen if she had looked. *Raper v. Byrum,* 265 N.C. 269, 106 S.E. 2d 223. If she did look, she is charged with having seen what she should have seen. *Bowen v. Gardner,* 275 N.C. 363, 168 S.E. 2d 47; *Wall v. Bain,* 222 N.C. 375, 23 S.E. 2d 330. The Willis vehicle unquestionably had the right-of-way as it approached the intersection and it was the duty of appellant's driver to yield the right-of-way. See G.S. 20-158.

Our holding here is not inconsistent with the case of *Farmer v. Reynolds,* 4 N.C. App. 554, 167 S.E. 2d 480, which is strongly relied upon by appellant. There, plaintiff's evidence showed that as the driver on the servient street approached a yield right-of-way sign,

his vision was obstructed by a big holly tree and some hedges near the intersection. No car was seen approaching until his car was at the curb line and proceeding into the intersection. At that time the car approaching on the dominant street was between 200 and 250 feet away. In affirming a judgment of nonsuit in favor of the driver of the car entering the intersection from the servient street, this court held that plaintiff's evidence showed that the motorist on the dominant highway was a sufficient distance from the intersection to warrant the assumption by the driver on the servient street that he could cross in safety before the other vehicle, if operated at a reasonable speed, reached the intersection. In this case plaintiff's evidence does not affirmatively show that when the Gregor car entered the intersection the Willis car was a sufficient distance away to permit appellant's driver to reasonably assume that she could cross the intersection in safety. A reasonable inference from the evidence here is that appellant's driver entered the intersection without making any determination that her movement could be made in safety and that this negligence was a proximate cause of the collision and plaintiff's injuries.

Affirmed.

MALLARD, C.J., and MORRIS, J., concur.

STATE OF NORTH CAROLINA v. HERMAN EUGENE TURNER

No. 7028SC280

(Filed 24 June 1970)

1. Criminal Law § 140— concurrent sentences of unequal duration — validity

A sentence of five years' imprisonment to run concurrently with a sentence of 18 to 24 months' imprisonment which defendant was already serving is permissible, although the two sentences are not of equal duration; there is no merit to defendant's contention that he should not serve the five-year sentence beyond the expiration of the 18-24 months' sentence.

2. Indictment and Warrant § 8— duplicity — waiver by defendant

A defendant who fails to make a motion to quash the indictment waives his opportunity to contest the duplicity of the indictment.

3. Larceny § 10; Receiving Stolen Goods § 7; Criminal Law § 137— indictment alleging larceny and receiving — single judgment — validity

In a prosecution upon indictment charging defendant with larceny and with receiving stolen goods, a single judgment imposed upon a verdict of "guilty as charged" will be upheld when the prosecution is free from error.

4. Larceny § 4— sufficiency of indictment to bar subsequent prosecution

Indictment in automobile larceny prosecution is sufficient to bar prosecution for the same offense where the indictment specifies the year, make, tag number and value of the automobile, and also specifies the name and address of the owner and the date of the larceny.

APPEAL by defendant from *Snepp, J.*, 1 December 1969 Schedule B Session of BUNCOMBE County Superior Court.

Defendant was charged in an indictment with felonious larceny of an automobile and operating a motor vehicle without an operator's license. The State took a nol pros on the latter count. The pertinent portion of the indictment reads as follows: "EUGENE EDWARD TURNER alias HERMAN EUGENE TURNER, late of said County, unlawfully and wilfully and feloniously did steal, take and carry away a 1962 model Ford automobile, of the value $500.00, of the goods and chattels of one Hugh Hyder, Rt. 2, Weaverville, N. C., before then feloniously stolen, taken, and there well knowing said automobile to have been feloniously stolen, taken and carried away said automobile, license no. DV-1634, . . ." Defendant pleaded guilty to the foregoing charge, waived presentment of evidence and the court found such plea to be freely, understandingly and voluntarily made, without undue influence, compulsion or duress, and without promise of leniency. Defendant acknowledged that he was presently serving two concurrent 18 to 24 month sentences and requested, through court-appointed counsel, that whatever sentence the court imposed would run concurrently with the sentences he was then serving. The court then sentenced defendant to serve five years, "to run concurrently with the sentences he is presently serving in the Department of Correction."

By letter defendant gave notice of appeal and a different counsel was appointed to perfect said appeal.

Attorney General Robert Morgan by Staff Attorney L. Phillip Covington for the State.

Scott N. Brown, Jr., for defendant appellant.

MORRIS, J.

[1] Defendant contends in his first assignment of error that "con-

current" means "contemporaneous with and equal in duration", that a five-year sentence cannot be concurrent with a sentence of 18 to 24 months, that such a sentence is ambiguous and therefore he should not serve any longer than the sentences he was serving at the time the five-year sentence was imposed. He also contends that under *In re Parker,* 225 N.C. 369, 35 S.E. 2d 169 (1945), the judgment is insufficient for vagueness because it referred to sentences then being served by defendant which were incapable of accurate computation without reference to matters dehors the record. These contentions are without merit and are overruled. Though similar to defendant's first contention, *In re Parker, supra,* is not in point as the question there was whether the sentence imposed was to run concurrently or consecutively, it not being clear from the judgment. The Court held that if the judgment did not make it perfectly clear that the sentence being imposed was to run at the expiration of any sentences presently being served, then the defendant would be given the benefit of the doubt and the sentence would begin immediately. As a result of that holding the defendant in *Parker* was discharged because he had served the period of the sentence imposed by the judgment in question while serving an earlier sentence. In the case at bar the court specifically stated that the sentence was to run concurrently with those acknowledged by defendant. Indeed, the court was granting defendant's own request that the sentence, if any, run concurrently. It must be pointed out that the two sentences in *Parker* were not of equal duration. To sustain defendant's contention that concurrent sentences must be construed to end with a prior but shorter sentence would obviously result in the abandonment of the use of concurrent sentencing procedures and consequently work to the detriment of all persons who may be sentenced for commission of a crime while serving other sentences. Defendant's second contention fails to consider the fact that the five-year sentence is longer than those acknowledged by defendant and will consequently exceed the prior sentences. The specificity requirements of *Parker* do not apply because the five-year sentence is to begin immediately and is capable of being accurately determined. In *Parker* the question was when would the new sentence begin, and based on the judgment, the answer could not be determined with specificity.

[2-4] Defendant contends in his second assignment of error that the indictment was defective because it attempted to include two separate offenses in one count and because it failed to state the offense in sufficient detail to bar a subsequent prosecution for the same offense. These contentions are without merit and are overruled. By his failure to move to quash the indictment defendant has waived

his opportunity to contest the duplicity of the indictment. *Blakeney v. State,* 2 N.C. App. 312, 163 S.E. 2d 69 (1968), and cases there cited. Defendant argues that the indictment charged him with the larceny of and receiving the same property and that since one person cannot be guilty of both, the indictment is fatally defective. We agree that larceny and receiving are separate crimes and that a plea of guilty of stealing property and of receiving the same property knowing it to have been stolen will not support separate, cumulative sentences. *In re Powell,* 241 N.C. 288, 84 S.E. 2d 906 (1954). However, defendant's position is untenable in view of *State v. Meshaw,* 246 N.C. 205, 98 S.E. 2d 13 (1957), where it is said:

> "Our decisions are to the effect that, if there is a verdict of 'guilty as charged' and the trial is free from error, or if there is a plea of guilty as charged, *a single judgment* pronounced thereon will be upheld. (citations omitted.) In such case, it is regarded immaterial whether the verdict be considered as relating to the larceny count or to the 'receiving' count. In short, since it has been established that the defendant is guilty of one *or* the other, in either case the judgment is sufficiently supported."

The year, make, tag number and value of the automobile were specified in the bill of indictment, in addition to the name and address of the owner and the date of the larceny. This is clearly sufficient to bar any subsequent prosecution for the same offense.

For the reasons contained herein, we find

No error.

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

STATE OF NORTH CAROLINA v. WAYNE TAYLOR

No. 705SC261

(Filed 24 June 1970)

1. Constitutional Law § 32— failure to appoint counsel for appeal — *case thereafter reviewed on certiorari*

Defendant was not prejudiced by finding of trial court that he was not indigent and not entitled to court-appointed counsel to perfect his appeal, where defendant testified that he had $820 in assets at that time and another judge thereafter found that defendant was then indigent, ap-

pointed counsel to file a petition for certiorari, which was allowed, and the merits of defendant's case have been reviewed by the appellate court.

2. Criminal Law § 18— misdemeanors — jurisdiction of superior court

Superior court had no jurisdiction to try defendant upon warrants charging misdemeanors where defendant had not first been tried upon the warrants in the district court and appealed to superior court.

3. Criminal Law §§ 13, 171— misdemeanors consolidated for judgment with felonies — lack of jurisdiction over misdemeanors — new trial

Lack of jurisdiction in superior court to enter judgment on two misdemeanor charges which were consolidated for judgment with felony charges does not entitle defendant to a new trial on the felony charges where the sentence imposed was less than the maximum which could have been given after the felony cases were consolidated for judgment.

ON certiorari to review judgment of *Copeland, S.J.*, 6 October 1969 Session, NEW HANOVER Superior Court.

Defendant was charged with 14 counts of breaking and entering and larceny and with two misdemeanor counts of larceny. Preliminary hearing for all the felony warrants, except two, was set for 5 August 1969 and for the other two on 7 August 1969 and 12 August 1969, respectively. Trial of the two misdemeanors under warrants Nos. 69CR10089 and 69CR10108 was also scheduled for 5 August 1969. Defendant, on 5 August 1969, through counsel waived his preliminary hearing, and all the cases set for hearing in the District Court on that date were bound over for trial in the Superior Court. On the date set for preliminary hearing on the remaining felony charges, hearing was waived. It appears that defendant was not tried in the District Court on the misdemeanor warrants (69CR10089 and 69CR10108).

During September-October Session true bills of indictment were returned as to all the felony warrants but no bill of indictment was ever submitted for either of the misdemeanor charges and no true bill was returned as to either. On 6 October 1970 all 14 felony charges and the two misdemeanor charges were called for trial, and defendant, through his counsel, entered a plea of nolo contendere.

The defendant did not desire to testify or offer any evidence in his behalf. The State took a nol pros in one of the felony charges (69CR9985).

The court consolidated seven of the felony cases for judgment and, on these, sentenced defendant to not less than seven nor more than 10 years.

The court then consolidated the remainder of the cases for judg-

ment and sentenced defendant to not less than seven nor more than 10 years to begin at the expiration of the sentence above referred to. In this latter group of cases were included the two misdemeanor cases (69CR10089 and 69CR10108).

Defendant gave notice of appeal. Thereupon the court conducted an inquiry as to defendant's indigency. Under oath, defendant testified that he had $20 in his pocket and owned household furniture worth about $800 which was paid for. The court found him not to be indigent and refused to appoint counsel. On 27 October 1969, the court received a letter from defendant stating that he would like to withdraw his appeal. He was brought before the court whereupon the court determined, after questioning, that defendant did not wish to withdraw his appeal. On 8 December 1969, defendant filed a "Motion" requesting appointment of counsel to prepare his appeal. Whereupon, Judge Cohoon again had the defendant brought into court and examined him as to his indigency. Judge Cohoon found as a fact that although defendant was not an indigent when examined by Judge Copeland, he was then an indigent, the property referred to in the hearing before Judge Copeland having been disposed of as the result of a mortgage thereon.

The court appointed counsel to petition this Court for the issuance of a writ of certiorari. The petition was allowed on 12 February 1970.

Attorney General Robert Morgan by Staff Attorney Lester V. Chalmers, Jr., for the State.

Smith and Spivey by Jerry L. Spivey for defendant appellant.

MORRIS, J.

Defendant brings forward two assignments of error.

[1] He contends that the court erred in finding that he was not indigent and not entitled to court-appointed counsel. He cites no authority but argues that he had appointed counsel for his preliminary hearing and Judge Cohoon found him to be an indigent, so he must have been an indigent at all times in between. The record clearly reveals that he had some $820 in assets upon his own sworn testimony at the time of Judge Copeland's determination. We fail to see how defendant has been prejudiced. He, by his own actions, failed to have his appeal docketed in time, but the court, nevertheless, ordered counsel appointed to file a petition for certiorari. His case has been reviewed on its merits.

[2] Defendant's other assignment of error is directed to the lack of jurisdiction of the Superior Court to enter judgment on the two misdemeanor charges (69CR10089 and 69CR10108). Defendant's position is well taken. G.S. 7A-272(a) gives to the district court, "Except as provided in this article," exclusive, original jurisdiction over "criminal actions . . . below the grade of felony, and the same are hereby declared to be petty misdemeanors."

By G.S. 7A-271(a) the superior court is given exclusive, original jurisdiction over all criminal actions not assigned to the district court division except (among others not pertinent here) that it may try a misdemeanor when the conviction is appealed to the superior court for trial de novo. G.S. 7A-271(a)(5).

Here defendant was not tried in the District Court upon the warrants and there was, therefore, no appeal from the District Court to the Superior Court.

[3] We do not agree that this inadvertence entitles defendant to a new trial on all the charges. The sentence imposed was less than the maximum sentence he could have received after the felony cases were consolidated for judgment.

However, defendant is entitled to a trial on the misdemeanor charges. Therefore, the judgments in cases Nos. 69CR10089 and 69CR10108 are vacated and these two numbers ordered deleted from the commitment. These two cases are remanded to the Superior Court for immediate transfer to the District Court for trial.

Error and remanded as to cases Nos. 69CR10089 and 69CR10108 only — judgment affirmed in all other cases.

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

S. J. TRIPP, D. E. TRIPP, JOHN D. TRIPP, CLEVIE TRIPP WALLACE, VERA TRIPP HAYNES, JOSEPHINE TRIPP GILLILAND, ELIZABETH TRIPP, G. A. TRIPP, JR., AND BETTIE JOE TRIPP v. NORTH CAROLINA PHOSPHATE CORPORATION AND WEYERHAEUSER COMPANY AND PETE ANDERSON

No. 702SC63

(Filed 24 June 1970)

Trespass to Try Title § 1; Pleadings § 38— wrongful cutting of timber — action for damages and quieting of title — effect of landowners' admission in pleadings

In landowners' action to recover double the value of timber allegedly cut on their land by corporate defendants and to remove cloud on title to 4.26 acres of landowners' property, an admission by the landowners that the description in defendants' deed referred to in the complaint encompassed the 4.26 acres of land in controversy *is held* not an admission that the defendants *owned* the disputed land or that their title is superior to plaintiffs' title; and plaintiffs are not precluded from establishing, if they could, title to the land.

APPEAL by plaintiffs from *Parker, J.*, October 1969 Session of BEAUFORT Superior Court.

Plaintiffs filed complaint on 2 June 1967 alleging in substance except where quoted as follows: Plaintiffs are the owners of a certain described tract or parcel of land located in Beaufort County, being the property also described in a deed, dated 27 December 1935 and recorded in Book 399, page 265, of the Beaufort County Registry.

> "3. That the defendant, North Carolina Phosphate Corporation owns a tract of land situate immediately to the South of plaintiff's [sic] land, said defendant having acquired said land by virtue and under a deed which is recorded in Book 534 at page 528 Beaufort County Registry, dated April 20, 1962."

In July and October, 1965 defendant, Weyerhæuser Company, with authority of its codefendant, entered the lands owned by the defendant, North Carolina Phosphate Corporation (Phosphate Corporation) referred to in section three of this complaint and cut certain standing timber thereon.

In cutting the timber from the lands of Phosphate Corporation, defendants crossed over the southern line of the plaintiffs' land and trespassed over a 4.26 acre area thereof, cutting and removing from plaintiffs' land and without plaintiffs' consent timber valued at $2,736.92. The plaintiffs further allege defendant Phosphate Corporation wrongfully claims to own the 4.26 acres of plaintiffs' property,

and that said claim is wrongful and constitutes a cloud on plaintiffs' property which should be removed.

Plaintiffs prayed for recovery of double the value of the timber allegedly cut by defendants and for the removal of the cloud on title to the 4.26 acres claimed by Phosphate Corporation.

Defendants answered denying all essential allegations in plaintiffs' complaint except for those of paragraph three, and in answer to those allegations defendants alleged:

> "3. It is admitted that North Carolina Phosphate Corporation is the owner of and in rightful possession of the lands described in a deed recorded in Book 534, page 528, Beaufort County Registry."

After the jury had been sworn and impaneled but before any evidence had been presented a pre-trial conference was held in the judge's chambers after which the following judgment was entered:

> "The above entitled matter coming on to be heard and being heard by the undersigned Judge Presiding and a Jury having been selected, chosen and sworn, and the pleadings having been read to the Jury and the Court by the respective attorneys for the parties and it further appearing to the Court that thereafter the attorney for the defendants moved the Court for Judgment on the pleadings. That thereafter in conference in the Judges Chambers between the presiding officers [sic] and the attorneys for plaintiffs and defendants it was admitted that the description as contained in the deed referred to in Section three of the plaintiffs' complaint encompasses the area in dispute which is the subject of this action. It further appearing to the Court that from a perusal and interpretation of Section three of the plaintiffs' complaint and the corresponding Section three of the defendants' answers admitting the allegations in plaintiffs' section number three and the admission of Counsel there is no legal controversy between the parties.
>
> WHEREUPON, it is ORDERED, CONSIDERED and ADJUDGED that said action be dismissed and that the costs be assessed against the plaintiffs."

Plaintiffs excepted to the judgment and in apt time appealed.

LeRoy Scott for plaintiff appellants.

Rodman & Rodman by Edward N. Rodman for defendant appellees.

GRAHAM, J.

Plaintiffs conceded before the trial court and on oral argument in this court that the description contained in the deed referred to in paragraph three of their complaint encompasses the 4.26 acres of land in controversy. However, this concession does not admit that defendants *own* the disputed tract. (Compare *Napoli v. Philbrick,* 8 N.C. App. 9, 173 S.E. 2d 574, where plaintiff stipulated that defendants *owned* the property described in their further answer and defense and that the description encompassed the disputed area). Paragraph three of the complaint alleges that defendant Phosphate Corporation owns a tract of land under a certain deed. The effect of plaintiffs' admission is that the 4.26 acres in controversy is included in the description of lands owned by Phosphate Corporation and described in the deed referred to in paragraph three. The fact that it is included in the description does not necessarily mean that Phosphate Corporation has title thereto superior to the title claimed by plaintiffs. Construing the pleadings, along with plaintiffs' admission, we interpret plaintiffs' position to be: The deed referred to in paragraph three describes certain property. Phosphate Corporation owns the property described therein except for a 4.26 acre tract which is owned by plaintiffs.

It is impossible to conclude from the pleadings and plaintiffs' admission that the disputed tract is not owned by plaintiffs. Plaintiffs should have been permitted to offer evidence to establish, if they could, title to the 4.26 acre tract. Judgment on the pleadings was therefore improvidently entered.

Reversed.

MALLARD, C.J., and MORRIS, J., concur.

STATE OF NORTH CAROLINA v. SARAH JANE BATTS

No. 704SC141

(Filed 24 June 1970)

1. Homicide § 30— second-degree murder — submission of issue of involuntary manslaughter

Failure of the trial court to apply the law on involuntary manslaughter to the evidence and to instruct the jury that they could return a verdict of guilty of involuntary manslaughter, *held* reversible error in this second-degree murder prosecution. G.S. 1-180.

2. Homicide § 30— failure to submit issue of involuntary manslaughter — error not cured by verdict

The error in failing to submit the question of defendant's guilt or innocence of involuntary manslaughter is not cured by a verdict convicting defendant of a higher offense.

3. Homicide § 30— failure to submit issue of involuntary manslaughter — new trial — effect of punishment

Where defendant's evidence in a second-degree murder prosecution would have warranted a verdict of involuntary manslaughter had that issue been submitted to the jury, defendant was entitled to a new trial on that ground notwithstanding the punishment imposed upon her conviction of voluntary manslaughter was within the maximum allowed for involuntary manslaughter.

ON *certiorari* upon petition of defendant to review an order of *Cowper, J.*, 14 July 1969 Session of Superior Court held in ONSLOW County.

Defendant was brought before the Onslow County District Court on a warrant charging her with the murder of her husband. That court found probable cause and bound her over to the superior court. An indictment, proper in form, was returned charging her with murder in the first degree. When the case was called, the solicitor announced that he would seek a verdict of murder in the second degree or manslaughter as the jury might find from the evidence. Defendant pleaded not guilty, was found guilty of manslaughter, and sentenced to five years in prison.

The evidence for the State and for the defendant tended to show that defendant and her husband on the day of the shooting had an argument about whether defendant would be permitted to go to Wilmington. Some of the evidence for the State and the defendant tended to show that the deceased picked up a board and started chasing defendant. The State's evidence tended to show that deceased had not been drinking and that defendant fired two shots at her husband, one over his head and the other at the ground by his

feet. The mother of the deceased testified for the State that defendant grabbed her son and shot him in the chest. Defendant's evidence tended to show that the deceased had been drinking. Defendant's testimony was in some respects contradictory, but she testified that:

> "Yes, I kept a pistol to protect myself and my children. I was afraid of him, he was always after me with a gun — I thought I could keep him off me. I fired down by his feet. I went to the porch cause he said he was going in and get his gun, so I went up on the porch to lock the door so he could not get in the house and get his gun. I looked back at his mother and that's when he grabbed me around the neck and started choking me and the gun went off accidentally. Yes, he had both hands around my throat. I am 37 years old. I have never been arrested or convicted of any criminal offense."

Attorney General Morgan by Deputy Attorney General Lewis and Staff Attorney Hart for the State.

Reginald L. Frazier for defendant appellant.

MALLARD, C.J.

Defendant contends that the court erred in failing to allow defendant's motion for judgment of nonsuit. This contention is without merit. There was ample evidence of defendant's guilt to require submission of the case to the jury.

[1] Defendant contends, *inter alia,* that the court erred in failing to charge the jury on the law relating to involuntary manslaughter. This contention is well taken. "Involuntary manslaughter is the unlawful killing of a human being, unintentionally and without malice, proximately resulting from the commission of an unlawful act not amounting to a felony, or resulting from some act done in an unlawful or culpably negligent manner, when fatal consequences were not improbable under all the facts existent at the time * * *." 4 Strong, N.C. Index 2d, Homicide, § 6. Although the court in the charge gave a definition substantially similar to the one above, it failed in the final mandate to apply the law on involuntary manslaughter to the evidence at the trial as required by G.S. 1-180. This constitutes reversible error. The judge in the charge to the jury limited the verdict of the jury to murder in the second degree, manslaughter, or not guilty. Under the evidence in this case, the judge should have submitted to the jury the question of the guilt or in-

nocence of the defendant of murder in the second degree, voluntary manslaughter, or involuntary manslaughter.

[2, 3] The error in failing to submit the question of defendant's guilt or innocence of involuntary manslaughter is not cured by a verdict convicting defendant of a higher offense. *State v. Moore,* 275 N.C. 198, 166 S.E. 2d 652 (1969). As stated in *Moore:*

> "The reason for the rule was stated by Stacy, C.J., in *State v. DeGraffenreid,* 223 N.C. 461, 463-64, 27 S.E. 2d 130, 132: '(T)he defendant is entitled to have the different views presented to the jury, under a proper charge, and an error in respect of the lesser offense is not cured by a verdict convicting the defendant of a higher offense charged in the bill of indictment, for in such case it cannot be known whether the jury would have convicted of a lesser degree of the same crime if the different views, arising on the evidence, had been correctly presented by the trial court.' "

In the case at bar, the jury, if they believed defendant's evidence, could have found her guilty of involuntary manslaughter. Even though the punishment imposed was within the limits allowed upon a conviction of involuntary manslaughter [G.S. 14-2; *State v. Adams,* 266 N.C. 406, 146 S.E. 2d 505 (1966)], the defendant had the right to have the jury consider involuntary manslaughter in determining her guilt or innocence. *State v. Lilley,* 3 N.C. App. 276, 164 S.E. 2d 498 (1968).

Since there must be a new trial, we do not consider defendant's other assignments of error because they are unlikely to occur at the new trial.

New trial.

MORRIS and GRAHAM, JJ., concur.

PAUL JAMES TURPIN v. PAUL JAMES GALLIMORE AND PAULA TYSINGER GALLIMORE

No. 7019SC310

(Filed 24 June 1970)

1. Negligence § 35— nonsuit for contributory negligence

Dismissal of an action because of contributory negligence is proper when plaintiff's evidence reasonably permits no other inference.

2. Automobiles § 79— intersection accident — contributory negligence of turning motorist

In this action for damages resulting from a collision at an intersection controlled by an electric traffic signal, plaintiff's evidence disclosed contributory negligence as a matter of law on the part of the driver of his automobile where it showed that defendant was proceeding in her proper lane on a green light in the opposite direction from which plaintiff's driver was originally proceeding, and that as plaintiff's driver attempted to make a left turn at the intersection, plaintiff's automobile was struck in the rear by defendant's oncoming vehicle.

APPEAL by plaintiff from *Godwin, S.J.*, 5 January 1970 Session, RANDOLPH Superior Court.

Plaintiff instituted this action to recover $400 for damage to his 1963 Ford resulting from a collision with a 1964 Ford belonging to the male defendant and operated at the time of the collision by the feme defendant. Plaintiff alleged that the feme defendant was negligent in that she drove at excessive speed, failed to keep a proper lookout and her vehicle under proper control, and failed to yield the right-of-way.

In their answer defendants pleaded contributory negligence on the part of plaintiff's driver, specifically that said driver turned from a direct line of traffic without first determining that said movement could be made safely, made a left turn without giving a proper signal, drove carelessly and recklessly, failed to keep a proper lookout, and failed to yield the right-of-way. Defendants also pleaded a counterclaim against plaintiff for $400 damage to their car.

At trial plaintiff's evidence tended to show: Sunset Avenue in Asheboro runs east and west, has two lanes for westbound traffic, each lane being approximately 15 feet wide, and two lanes of similar width for eastbound traffic, with a three-foot median between the eastbound lanes and the westbound lanes. Sunset Avenue is bisected by a similar four-lane avenue running north and south connecting Salisbury Street with U.S. 220 bypass, there being a three-foot median between the northbound and southbound lanes of this avenue. Traffic at the intersection is controlled by a single-unit electric traffic light signal with the usual green, yellow and red lights, suspended over the center of the intersection. The driver of plaintiff's car approached the intersection in the left southbound lane of the connector avenue and stopped for a red light. When the light turned green, he gave a left turn signal, proceeded diagonally across the intersection with the intention of going east on Sunset Avenue. Before proceeding through the intersection, he looked south on the connector avenue toward U.S. 220 bypass (he could see approxi-

mately 170 feet) but saw no traffic approaching. He proceeded to enter the right eastbound lane of Sunset Avenue and had almost cleared the intersection when the right rear corner of plaintiff's car was struck by the front of defendants' car which was traveling north in the right or easternmost lane of the connector avenue. Plaintiff's driver did not see defendants' car before the collision. The feme defendant was proceeding on a green light and the collision occurred in her lane in the intersection.

At the conclusion of plaintiff's evidence, defendants' motion for directed verdict was allowed. At the conclusion of defendants' evidence on the counterclaim, plaintiff's motion for directed verdict was allowed. From judgment dismissing his action and taxing him with the costs, plaintiff appealed. Defendants did not appeal.

Ottway Burton for plaintiff appellant.

Coltrane & Gavin by T. Worth Coltrane for defendant appellees.

BRITT, J.

Plaintiff's first assignment of error relates to the allowance of defendants' motion for directed verdict and judgment dismissing his action. We hold that the motion was properly allowed and judgment appropriately entered for that plaintiff's own evidence disclosed contributory negligence as a matter of law on the part of the driver of plaintiff's automobile, which contributory negligence was imputed to plaintiff.

[1] No inflexible rule can be laid down as to whether the evidence discloses contributory negligence as a matter of law, but each case must be determined upon its own particular facts. 6 Strong, N.C. Index 2d, § 35, p. 72. Dismissal of the action because of contributory negligence is proper when plaintiff's own evidence reasonably permits no other inference. *Lowe v. Futrell,* 271 N.C. 550, 157 S.E. 2d 92.

[2] Plaintiff's own evidence disclosed that the driver of his automobile attempted to make a left turn at an intersection of two four-lane streets; that traffic at the intersection was controlled by an electric traffic control signal; that the feme defendant was proceeding in her proper lane on a green light in the opposite direction from which plaintiff's driver was originally proceeding and struck the rear of plaintiff's automobile as it crossed her lane. Although plaintiff alleged excessive speed on the part of the feme defendant, there was no evidence to support this allegation; plaintiff's driver testified he did not see defendants' automobile prior to the collision. We

think plaintiff's evidence reasonably permits no inference except that his driver attempted to make a left turn in the face of oncoming traffic without determining that said movement could be made safely, that he failed to keep a proper lookout, and that said driver failed to yield the right-of-way to the feme defendant.

For the reasons stated, the judgment of the superior court is

Affirmed.

BROCK and HEDRICK, JJ., concur.

RICHARD A. TILLEY v. JOE W. GARRETT, NORTH CAROLINA COMMISSIONER OF MOTOR VEHICLES

No. 7018SC322

(Filed 24 June 1970)

1. Automobiles § 2— hearing on suspension of license — degree of formality — review

Although a hearing conducted pursuant to G.S. 20-25 may be as informal as the particular judge permits, nevertheless there should be sufficient formality in compiling a record of the proceeding so as to permit an appellate review.

2. Automobiles § 2— suspension of license — sufficiency of proof of convictions

In a hearing to determine the validity of a Department of Motor Vehicles order suspending petitioner's driver's license upon the basis of two convictions in one year of speeding over 55 mph, the trial court erred in reversing the Department's order on the ground that the Department did not have as a part of its evidence a "valid warrant" or a "valid judgment of conviction," since the statutes require only (1) that the courts forward to the Department a *record* of convictions and (2) that the Department may base its suspensions upon a showing by *its record*. G.S. 20-16, G.S. 20-24.

APPEAL by Commissioner of Motor Vehicles from *Crissman, J.*, 19 January 1970 Session, GUILFORD Superior Court.

The Commissioner of Motor Vehicles issued an order, effective 2 January 1970, suspending plaintiff's driving privilege upon the basis of two convictions of speeding over 55 miles per hour occurring in a period of one year.

On 31 December 1969 plaintiff instituted this action pursuant to

G.S. 20-25 alleging that plaintiff had not been twice convicted of speeding over 55 miles per hour within the period of twelve months, and asking that defendant be permanently restrained from suspending plaintiff's driving privilege.

An *ex parte* temporary restraining order was issued on 31 December 1969, returnable at the 19 January 1970 Session. Defendant filed answer on 16 January 1970, and the parties agreed that Judge Crissman might hear the cause upon its merits on 19 January 1970.

At the hearing before Judge Crissman the only evidence offered were two exhibits which were extracts from plaintiff's driver's license record on file with the defendant. The judgment of the trial court refers to these as having been offered by the defendant as defendant's exhibit 1 and defendant's exhibit 2.

The judgment appealed from contains the following language:

> "And the court finding and concluding as a matter of law that Defendant's Exhibit No. 2, which had to do with an alleged conviction in the Rowan County Court, does not show a valid warrant nor any valid judgment of conviction and that therefore the restraining order hereinbefore entered should be continued permanently."

The judgment followed with a permanent restraint upon defendant from suspending plaintiff's driving privileges for the offenses recited in the Order of Suspension. Defendant appealed.

Cahoon & Swisher, by Robert S. Cahoon, for plaintiff.

Attorney General Morgan, by Staff Attorney Costen, for defendant.

BROCK, J.

[1] Although it appears that a hearing conducted pursuant to G.S. 20-25 may be as informal as the particular judge permits, nevertheless there should be sufficient formality in compiling a record of the proceeding so as to permit an appellate review.

The Order of Suspension issued by defendant was not a part of the evidence in this case; there was no stipulation that the two exhibits in evidence are the records upon which the suspension was ordered; and there is no finding by the judge to relate the exhibits to the Order of Suspension. Although we may be reasonably safe in assuming that counsel and the judge were not deliberately engaging in an exercise in futility by considering records which had

no relation to the Order of Suspension, nevertheless we do not engage in the practice of assuming the existence of evidence. The Record on Appeal in this case was stipulated by counsel and we take it to be complete.

However, for another reason the Order appealed from must be reversed.

[2] G.S. 20-24 requires that the trial courts ". . . shall forward to the Department *a record* of the conviction of any person . . . ." (Emphasis added.) It does not require that the warrant and judgment, or certified copies thereof, shall be forwarded. G.S. 20-16 authorizes the Department ". . . to suspend the license of any operator or chauffeur with or without preliminary hearing upon a showing *by its records* . . ." (emphasis added) that the licensee has committed an enumerated offense. It does not require the Department to have in its files a "valid warrant" nor a "valid judgment" before it is authorized to take action.

Therefore, absent a showing by competent evidence, or a stipulation, that defendant's exhibit 2 was an exact copy of the warrant and judgment on record in Rowan County Court, the finding in the order appealed from that defendant's exhibit 2 ". . . does not show a valid warrant nor any valid judgment of conviction . . ." is completely immaterial.

If the plaintiff has been improperly deprived of his license by the Department due to a mistake of law or fact, he is entitled to show that the suspension was erroneous; however, he has no ground to complain that the Department does not have as a part of its records a "valid warrant" and a "valid judgment". Plaintiff has available to him the records of the Court in which he is alleged to have been convicted by which he may show whether the conviction was valid.

The judgment appealed from is

Reversed.

BRITT and HEDRICK, JJ., concur.

JOHN WADE GANTT, SR., EMPLOYEE v. HICKORY MOTOR SALES, INC., EMPLOYER AND THE FIDELITY & CASUALTY COMPANY OF NEW YORK, CARRIER

No. 7025IC19

(Filed 24 June 1970)

Master and Servant § 77— review of agreement to pay compensation — bar of review

Injured employee was not entitled to a review of an agreement to pay compensation where his application for the review was made more than twelve months after the last payment of compensation under the agreement. G.S. 97-47.

APPEAL by defendants from opinion and award of the Industrial Commission entered 19 July 1969.

On 29 October 1960 plaintiff employee sustained an injury to his back by accident arising out of and in the course of his employment. He was initially given a permanent disability rating of 40% loss of use of his back, which in June 1964 was changed to a permanent disability rating of 75% loss of use of his back. The parties entered into an agreement for the payment of compensation for disability pursuant to which plaintiff was paid a total of $10,000.00, which was the maximum compensation payable at that time under the North Carolina Workmen's Compensation Act. In addition, $11,450.33 was paid to provide plaintiff with medical, surgical, hospital, and nursing services and treatment. Plaintiff received his last payment of compensation on 7 July 1967, at which time he was also furnished with Industrial Commission Form 28B. This form, entitled "Report of Compensation and Medical Paid," contained certain information, including the following:

"8. Total Amount of Compensation Paid (Maximum under statute) $10,000.00

* * * * *

"10. Date Last Compensation Check Forwarded July 7, 1967

"11. *Total Medical Paid - Does this include final medical? Yes $11450.37 (including nursing, hospital, drugs, etc.)

* * * * *

"14. Does This Report Close the Case — including final compensation payment? Yes

* * * * *

"NOTICE TO EMPLOYEE: If the answer to Item No. 14 above is 'Yes', this is to notify you that upon receipt of this

form your compensation stops. If you claim further benefits, you must notify the Commission in writing within one (1) year from the date of receipt of your last compensation check."

On 19 July 1968 plaintiff signed and on 23 July 1968 filed with the Industrial Commission a request for hearing to determine the responsibility of defendants to pay for medical treatment which had been furnished to plaintiff during the months of January through April 1967. After hearings, Deputy Commissioner Delbridge entered an award directing defendants to pay all medical and hospital expenses incurred by plaintiff as a result of his injury up to 7 July 1967, the date he received his final payment of compensation. On appeal, the full Commission adopted as its own the findings of fact, conclusions of law, and award of the hearing Commissioner, and affirmed the award. Defendants appealed to the Court of Appeals, assigning errors.

Fairley, Hamrick, Montieth & Cobb, by S. Dean Hamrick, for defendant appellants.

No counsel contra.

PARKER, J.

An agreement to pay compensation, such as existed in this case, when approved by the Industrial Commission, is equivalent to an award. *Smith v. Red Cross,* 245 N.C. 116, 95 S.E. 2d 559. Under G.S. 97-47 an injured employee may, on the grounds of change in condition, apply to the Commission to review any award. The statute expressly provides, however, that "no such review shall be made after twelve months from the date of the last payment of compensation pursuant to an award." In the present case the date of last payment of compensation was 7 July 1967. Application for review was not made until more than twelve months thereafter. Nothing in the record indicates, and the Commission did not find, that anything occurred to estop defendant employer or its carrier from pleading the lapse of time. The language of the statute is clear and the claim is barred. *White v. Boat Corporation,* 261 N.C. 495, 135 S.E. 2d 216; *Smith v. Red Cross, supra.*

This disposition makes it unnecessary for us to pass upon appellants' additional contention that the award was in any event erroneous since there is no evidence in the record tending to show that the medical treatment received by plaintiff during the year 1967,

which is the only subject of controversy in this matter, would tend to lessen plaintiff's disability as required by G.S. 97-25.

The award of the Industrial Commission is

Reversed.

BRITT and HEDRICK, JJ., concur.

STATE OF NORTH CAROLINA v. JOHN LEWIS SIMMONS

No. 7019SC239

(Filed 24 June 1970)

1. Criminal Law § 58— handwriting testimony — bigamy trial — necessity of expert testimony

In an attempt to demonstrate to the jury the genuineness of his signature and the falsity of the signature on the marriage license introduced by the State, the defendant in a bigamy prosecution was not entitled to offer into evidence, without the aid of expert testimony, his driver's license, his social security card, and a paper upon which he had written his name five times. G.S. 8-40.

2. Indictment and Warrant § 17; Bigamy § 2— variance between indictment and proof — name of spouse

Variance between allegation in indictment charging defendant with bigamy in marrying "Mary Katherine Goodman" and proof that the defendant was presently married to "Margaret Catherine Simmons" *held* not prejudicial to defendant, where defendant admitted his marriage to Margaret Catherine Simmons and did not question or object to her identity at the trial.

APPEAL from *Martin (Robert M.), J.*, 6 October 1969 Session, CABARRUS Superior Court.

Defendant was charged in a bill of indictment with the bigamous marriage to one Mary Katherine Goodman he having previously married one Helen I. Blackwell Simmons, who was then living and from whom he had not obtained a divorce. Defendant entered a plea of not guilty.

The State offered the evidence of Helen B. Simmons which tended to show defendant was married to Helen B. Simmons on 17 May 1952 in York, South Carolina, and that defendant had never been divorced from Helen B. Simmons, although they separated in July

1967. The State's evidence further tended to show defendant married one Margaret Catherine Simmons on 5 July 1967 and that he was living with her at the time of the trial.

Defendant denied ever being married to Helen B. Simmons although he admitted living with her for some 10-15 years. Defendant admitted he was married to Margaret Catherine Simmons.

From a verdict of guilty defendant appealed.

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

Thomas K. Spence for defendant.

BROCK, J.

[1] Helen B. Simmons testified that she and defendant were married in York, South Carolina, on 17 May 1952. Thereafter the State was allowed to introduce into evidence the marriage license for the restricted purpose of corroborating the testimony of Helen B. Simmons. Defendant testified that the signature on the marriage license was not his signature and offered into evidence his driver's license, his social security card, and a paper upon which he had written his name five times for the purpose of demonstrating to the jury his genuine signature. Upon objection, these items were excluded from evidence, and defendant assigns this as error. Defendant contends the jury should have been allowed to examine and compare the signatures offered by him with the signature on the exhibit offered by the State. Thus, defendant raised the issue of the genuineness of the signature on the marriage license.

"[I]n North Carolina, where the early view was that the jury could not, under any circumstances, make their own independent examination of handwriting, the courts, while finally relaxing this rule somewhat, still would only allow the jury to examine a disputed writing and an admitted or proved genuine specimen to the extent of having an expert witness, or witness acquainted with the person's handwriting, compare the papers in the presence of the jury and point out the similarity or difference, as the case might be; that is, the jury could only pass upon the genuineness of the disputed writing upon the testimony of witnesses." Annot., 80 A.L.R. 2d 272, 279 (1961).

In 1913 G.S. 8-40 was enacted permitting witnesses to compare a disputed writing with a proved genuine writing and providing that the writings and the evidence of witnesses might be submitted to the

court and jury as evidence of the genuineness or otherwise of the disputed writing. This changed the rule existing theretofore, and comparison by the jury has been approved. If the genuineness of a signature or writing is established to the satisfaction of the judge, a witness may compare the established writing with the disputed writing; and then the testimony of the witness and the writings themselves may be submitted to the jury. *Newton v. Newton,* 182 N.C. 54, 108 S.E. 336; *In re Will of Gatling,* 234 N.C. 561, 68 S.E. 2d 301.

However, neither G.S. 8-40, nor our rules of evidence, permits the jury, unaided by competent opinion testimony, to compare writings to determine genuineness.

[2] Defendant next contends there was a fatal variance between the State's allegata and its probata in that the indictment charged defendant with bigamy in the marrying of one Mary Katherine Goodman yet the evidence introduced by the State was that defendant was presently married to one Margaret Catherine Simmons; and that this constituted prejudicial error.

There is no merit to this contention. Defendant admitted his marriage to Margaret Catherine Simmons. He did not question or object to her identity at the trial. This assignment of error is overruled.

Defendant further assigns as error several portions of the judge's charge to the jury. We have carefully examined these assignments of error in the light of the evidence and the charge as a whole, and, if it can be said there was some technical error, we find no prejudicial error. In our opinion the case was submitted to the jury in such a manner that there can be no doubt the jury understood the applicable legal principles.

In the entire trial we find no prejudicial error.

No error.

BRITT and HEDRICK, JJ., concur.

IN RE INCORPORATION OF INDIAN HILLS, JACKSON COUNTY, NORTH CAROLINA

No. 7030SC25

(Filed 24 June 1970)

Municipal Corporations § 1— creation — failure to make necessary findings of fact

The Municipal Board of Control erred in incorporating an area into the town of "Indian Hills" without making findings of fact that the area proposed to be incorporated does not lie within three miles of the limits of any city, town or incorporated village as required by [former] G.S. 160-196, those opposing the incorporation having contended that the area was in fact less than three miles from the community of "Cherokee."

APPEAL by the Eastern Band of Cherokee Indians from *Bryson, J.*, 25 August 1969 Session, JACKSON Superior Court.

This is a proceeding under Article 17, Chapter 160 of the General Statutes (which article has been repealed effective 2 June 1969) to incorporate a new municipal corporation.

On 30 January 1969 a petition, signed by a majority of the resident qualified electors and a majority of the resident freeholders of the territory proposed to be incorporated, was filed with the Secretary of State of North Carolina requesting that the territory be incorporated into a town to be known as "Cherokee Town". The petition described a tract of land adjacent to and contiguous with the southwestern boundary line of the Cherokee Indian Reservation (also known as Qualla Boundary) in Jackson County, and located near the village of Cherokee which is situated within the boundaries of the Cherokee Indian Reservation.

On 30 January 1969 the Secretary of State entered an order setting a hearing on the petition before the Municipal Board of Control at ten o'clock a.m. on 11 March 1969. Due notice of the hearing was published in accordance with the statute.

The hearing was conducted before the Attorney General, as chairman, and the Secretary of State, as secretary. The third member, the chairman of the Utilities Commission, was absent. Present at the meeting were a number of persons who resided on the tract sought to be incorporated as a municipal corporation. Also present, opposing the incorporation, were persons who resided in adjoining areas, notably officials and representatives of the Eastern Band of Cherokee Indians. When the hearing was convened the petition seeking the incorporation was amended to ask that the new municipal corporation be known as "Indian Hills" instead of "Cherokee Town".

Thereafter the Municipal Board of Control heard testimony and argument both for and against the incorporation. On 19 March 1969 the Municipal Board of Control entered its order incorporating the tract into a town under the name of "Indian Hills".

On or about 28 March 1969 a petition for a writ of certiorari to the Municipal Board of Control was filed in the Superior Court of Jackson County. Pursuant to the petition a writ of certiorari was issued, and the proceedings were duly certified to the Superior Court. After a hearing in the Superior Court Judge Bryson, on 25 August 1969, entered an order finding that the order of the Municipal Board of Control was fully supported by competent evidence and was in accordance with the law, and thereupon affirmed the order. The Eastern Band of Cherokee Indians appealed to this Court.

McGuire, Baley & Wood, by J. M. Baley, Jr., for appellants.

Stedman Hines for appellees.

BROCK, J.

G.S. 160-196 (in effect at the time this proceeding was heard) provides that the area proposed to be incorporated "shall not be a part of nor within three miles of the area included in the limits of any city, town, or incorporated village. . . ."

Although there was pertinent evidence before the Municipal Board of Control, it failed absolutely to make any finding of fact with respect to whether the above quoted portion of the statute was or was not being complied with. One of the crucial contentions and arguments advanced by the Eastern Band of Cherokee Indians before the Board and before the Superior Court was that the area proposed to be incorporated was in fact less than three miles from the community known as "Cherokee".

Whether "Cherokee" is a city, town, or incorporated village is not sufficiently presented to us upon this record because the Municipal Board of Control failed to make appropriate findings of fact. Also, whether the area proposed to be incorporated lies within three miles of the limits of any city, town, or incorporated village is likewise not sufficiently presented to us upon this record because the Municipal Board of Control failed to make appropriate findings of fact.

The act repealing Article 17, Chapter 160 confers upon the Municipal Board of Control "the power and authority to hear and make

a determination of any petition or other matter filed or pending with the Municipal Board of Control prior to June 2, 1969."

The judgment of the Superior Court is reversed and this cause is remanded with directions that the Order of the Municipal Board of Control be vacated and that the cause be remanded to the Municipal Board of Control for further proceedings according to law.

Reversed and remanded.

BRITT and GRAHAM, JJ., concur.

HARRY DAWSON, ALIAS HARRY WALTON DALTON v. STATE OF NORTH CAROLINA

No. 7018SC353

(Filed 24 June 1970)

1. Constitutional Law § 32; Criminal Law § 21— right to counsel — preliminary hearing

A defendant, prior to the 1969 statute, G.S. 7A-451(b)(4), did not have a right to an attorney at a preliminary hearing.

2. Criminal Law § 134— reduction of sentence — absence of defendant

Defendant failed to show a violation of his constitutional rights by the reduction of his sentence without his knowledge or presence, where the trial court, upon motion by defendant's counsel, reduced a five to seven year sentence for felonious assault to a three to seven year sentence, and there was no suggestion that the reduced sentence was to run concurrently with another sentence.

3. Burglary and Unlawful Breakings § 2— lesser degrees of first-degree burglary

Felonious breaking and entering is a lesser included offense of first-degree burglary.

4. Criminal Law § 23— guilty plea — contention that plea was coerced

Defendant who was represented by counsel on trial failed to prove his contention that he was coerced into pleading guilty to felonious breaking and entering in order to avoid the possibility of the death penalty upon conviction of first-degree burglary.

ON certiorari to review order of *Crissman, J.*, 3 June 1968 Criminal Session, GUILFORD Superior Court (High Point Division).

Defendant was charged in valid bills of indictment with first-

degree burglary and felonious assault. The victim was Eldridge Streetman, and the location was a boarding house at 106 Oakwood Street, High Point, North Carolina, where Streetman and Dawson each had a room. Defendant, on 3 June 1968, entered a plea of guilty to felonious assault and to felonious breaking and entering. The defendant, in open court and with his attorney present, was questioned as to the voluntariness of his pleas, and they were found to have been freely, understandingly and voluntarily entered. Upon these pleas, judgment was entered imposing sentences of 5 to 7 years for the breaking and entering and 3 years for the felonious assault, the latter sentence to commence at the expiration of the other. Upon motion of counsel, Judge Crissman reduced the 5- to 7-year sentence to 3 to 7 years, the 3-year sentence to remain the same and to begin at the expiration of the 3- to 7-year sentence.

Defendant gave notice of appeal in each case to the Court of Appeals. On 23 September 1968 these appeals were dismissed by order of Judge Robert Martin for lack of prosecution and failure to perfect the appeal. Dawson filed a petition for a post-conviction hearing on 30 May 1969. The hearing was held on 1 July 1969 before Judge Eugene Shaw. The defendant contended his constitutional rights had been violated in that (1) he had not been given an attorney at his preliminary hearing; (2) his sentence was changed from 5 to 7 years to 3 to 7 years to run prior to the 3-year sentence, while he was on the way to prison and without his knowledge or consent; (3) he had been sentenced for felonious breaking and entering to which he entered a plea of guilty, but the grand jury had indicted him for first-degree burglary, and thus there was no valid bill of indictment for the crime to which he entered his plea of guilty; and (4) although he had requested an attorney to perfect his appeal, one had not been appointed and he had been deprived of a right to appeal.

Judge Shaw, on 23 September 1969, entered an order and judgment in which he found facts supported by the evidence before him and concluded that there was no merit in any of the contentions of the defendant with the exception of the contention that his appeal had not been perfected. Judge Shaw dismissed the petition subject to the defendant being granted the right to petition for a writ of certiorari to review the entire matter, since he had been deprived of an appeal. An attorney was assigned to file the petition and same was allowed by this Court.

The defendant presents for review the questions: (1) deprivation of his right to counsel at his preliminary hearing, (2) violation of

his constitutional rights by the reduction of his sentence without his knowledge or presence, (3) allowance of pleas of guilty to felonious breaking and entering when that allegedly is not a lesser included offense of first-degree burglary and (4) coercion of the defendant to plead guilty to felonious breaking and entering by virtue of the death penalty provision with respect to first-degree burglary.

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

James F. Morgan and D. P. Whitley, Jr., for plaintiff appellant.

CAMPBELL, J.

[1] A defendant, prior to the 1969 statute, G.S. 7A-451(b)(4), did not have a right to an attorney at a preliminary hearing. *State v. Gasque,* 271 N.C. 323, 156 S.E. 2d 740 (1967), *cert. denied,* 390 U.S. 1030. This assignment of error is without merit.

[2] It does not appear to this Court wherein the defendant has been prejudiced by the reduction of his sentence. The first sentence provided that the 3-year sentence for felonious assault was to begin at the end of a 5- to 7-year sentence for felonious breaking and entering. Thereafter, on motion of defendant's counsel, a reduction was made in the first sentence so as to make it a 3- to 7-year sentence, rather than 5 to 7 years. There is no suggestion in this record that the sentences were ever to run concurrently, as defendant contends. This assignment of error is without merit.

[3] Felonious breaking and entering is a lesser included offense to first-degree burglary. *State v. Gaston,* 4 N.C. App. 575, 167 S.E. 2d 510 (1969), *cert. denied,* 275 N.C. 500. This assignment of error is without merit.

[4] The fourth matter presented to us for review was not presented to Judge Shaw. Nevertheless, we have considered the contention of the defendant to the effect that he was coerced into pleading guilty to felonious breaking and entering in order to avoid the possibility of the death penalty upon conviction of first-degree burglary. There is no merit in this position. The record discloses that the defendant freely, understandingly and voluntarily entered the plea of guilty before Judge Crissman on 3 June 1968. The Supreme Court of the United States handed down three opinions during the week of 4 May 1970 which set forth criteria for attacking a guilty plea as being involuntary. *Brady v. United States,* 38 L.W. 4366; *Parker v. North Carolina,* 38 L.W. 4371; *McMann v. Richardson,*

38 L.W. 4379. These cases hold that when a defendant has voluntarily authorized his attorney to enter a plea of guilty, he may not later attack the plea as being involuntary.

We have carefully reviewed the record in this case and find that the defendant has received a fair trial and a careful review upon a post-conviction hearing, and we find no error.

Affirmed.

PARKER and VAUGHN, JJ., concur.

SCOTTIE SUE KELLY (NOW DICKERSON) v. RAYMOND DAVID KELLY

No. 7021DC328

(Filed 24 June 1970)

Appeal and Error § 14— dismissal of belated appeal from contempt order

Appeal from order holding defendant in contempt for failure to make child support payments is dismissed where (1) defendant did not attempt to appeal from the order until a month after it was entered, and (2) the record shows that defendant has purged himself of contempt by payment of the sum specified in the court's order and has entered into a compromise reducing the amount of the weekly support payment.

APPEAL by defendant from *Alexander, Chief District Judge,* January 1970 Session District Court, FORSYTH County.

In August 1963, plaintiff instituted an action in the Superior Court for divorce against the defendant and asked for custody of the children born of the marriage and support for them. Defendant answered, and the matter was heard at the 7 October 1963 Session. Judgment was entered on 7 October 1963 awarding custody of the children to the plaintiff, subject to visitation privileges in the defendant, and providing for the payment by defendant of the sum of $25 per week for the support and maintenance of the three children.

On 26 November 1969 plaintiff moved for an order directing defendant to show cause why he should not be adjudged in contempt of court for his willful refusal to obey the order entered 7 October 1963, alleging that no payment had been made since 7 February 1967 and that defendant was in arrears in the sum of $3675. An

order was entered on 26 November 1969, served on defendant with a copy of the motion on 28 November 1969, and the matter was heard on 9 December 1969. At that hearing, defendant was not represented by counsel, but he and his mother testified. The record reveals that "[a]t the conclusion of this proceeding, Judge Rhoda B. Billings adjudged that the defendant, Raymond David Kelly, was in contempt of court judgment of October 7, 1963, for failure to provide weekly support payments as required by said judgment of October 7, 1963. The Judge told the defendant in open court to appear at 2:00 p.m., January 8, 1970, and demonstrate to the court that he had paid $200.00 to the plaintiff for the support of the minor children of the parties and that he was gainfully employed in order to purge himself of contempt of the judgment of October 7, 1963."

An order finding facts and making conclusions of law was entered on 2 January 1970 by which defendant was found in contempt and continuing the cause until 8 January 1970 at 2:00 p.m. to permit defendant to purge himself of contempt by demonstrating that he had paid $200 to the plaintiff for the children and that he was gainfully employed. Defendant did not appeal from this order.

On 2 January 1970, defendant filed a motion to vacate the judgment of 7 October 1963, based upon a change of circumstances, and asked that the motion be heard on 15 January 1970.

On 15 January 1970, the cause came on to be heard before Judge Alexander who stated that the only purpose of the hearing was to determine whether defendant would purge himself of contempt. Plaintiff, in open court, tendered a motion to quash defendant's motion of 2 January 1970 (to vacate the 7 October 1963 order). Plaintiff's motion was allowed, the court holding that in view of the fact that an order had been entered on 2 January 1970 adjudging defendant in contempt from which no appeal had been taken, the court could not, as a matter of law, entertain defendant's motion.

During the course of the hearing counsel for plaintiff and defendant arranged a compromise whereby defendant would pay directly to the plaintiff $200, in order to purge himself of contempt and to begin to make support payments of $20 per week thereafter.

An order was entered on 16 January 1970 finding facts and making conclusions of law and directing that "any further deviation from the order of Judge Billings will be subject to instanter process, subject only to the reduction of $5.00 per week which the court in its discretion and of its own motion changed but which did not change the previous adjudication in any respect." The order further

provided as follows: "WHEREFORE (sic), the reasons hereinabove stated, the adjudication of Judge Billings is the prevailing order of this court."

From the entry of this order defendant, in open court gave notice of appeal, and on 2 February 1970, defendant filed exceptions to the order of 2 January 1970.

Hayes, Hayes and Sparrow, by James M. Hayes, Jr., and W. Warren Sparrow, for plaintiff appellee.

Harris, Poe, Cheshire and Leager, by W. Brian Howell, for defendant appellant.

MORRIS, J.

Defendant seeks by this appeal to have set aside the order of 2 January 1970 contending, among other things, that the court failed to find that the defendant had the means to comply with the previous order of the court. While it may be that if properly presented, the contentions might have merit, the questions raised by defendant are not before us. The order was entered 2 January 1970, and defendant attempted to appeal therefrom on 2 February 1970. His attempted appeal thus comes much too late. We note also that the record is clear that the defendant agreed to and did pay the $200 required to extinguish the arrearage of $3675 and further entered into a compromise reducing the weekly payments from $25 to $20.

For the reasons stated herein defendant's appeal is dismissed.

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

DOROTHY LITTLE CONGLETON v. CITY OF ASHEBORO AND CAROLINA POWER AND LIGHT COMPANY

No. 7019SC268

(Filed 24 June 1970)

1. Pleadings § 1— filing of complaint — extension of time

Clerk of court had no authority to grant an extension of time for filing complaint beyond 20 days, and his order for an extension of 21 days was of no effect. G.S. 1-121.

2. Limitation of Actions § 1— discretion of court

The court has no discretion when considering whether a claim is barred by the statute of limitations; consequently, trial court did not err in refusing to enter a *nunc pro tunc* order which would have allowed plaintiff to bring his claim within the period of limitations.

3. Limitation of Actions § 12— computation of period of limitation — extension of time to file complaint

Where plaintiff fails to comply with the statutory provisions relating to extension of time to file complaint, the date the complaint was filed and not the date of issuance of summons must be used in determining whether the statute of limitations is applicable.

APPEAL by plaintiff from *Kivett, J.*, 11 February 1970 Session of RANDOLPH County Superior Court.

Plaintiff was allegedly injured on 30 November 1966 as the result of defendants' negligence. Plaintiff filed summons on 28 November 1969, with a request for an extension of time, to 19 December 1969, within which to file her complaint, which request was granted by the Clerk of the Randolph County Superior Court. Plaintiff verified and filed her complaint on 19 December 1969. Both defendants moved to dismiss the action and for summary judgment on the grounds that the extension order was for a period of 21 days and of no effect, since the maximum period permitted under G.S. 1-121 was 20 days and that the plaintiff's claim was barred by the three-year statute of limitations of G.S. 1-15, 1-46 and 1-52. Plaintiff in turn moved the court to enter an order *nunc pro tunc* to change the date of the extension order and the complaint verification from 19 December 1969 to 18 December 1969. The plaintiff submitted affidavits from her attorney, her attorney's secretary and the Clerk of the Superior Court of Randolph County, all acknowledging that the insertion of the date 19 December 1969 was a clerical error and a mistake and that the date should have been 18 December 1969. The court denied plaintiff's motion and granted the defendants' motions to dismiss and for summary judgment, finding that the extension order was of no effect because contrary to the provisions of G.S. 1-121 and that the plaintiff's claim was barred by the statute of limitations.

Ottway Burton for plaintiff appellant.

Sherwood H. Smith, Jr., and Archie L. Smith for defendant appellee, Carolina Power and Light Company.

G. E. Miller for defendant appellee, City of Asheboro.

MORRIS, J.

[1, 2] The only question before us is whether plaintiff's claim has been barred by the statute of limitations, as defendants contend it is. From the record it appears that the summons was issued and the request for extension of time within which to file a complaint was requested within the time limited by the three-year statute of limitations. However, whatever the reason, the extension granted was for a period of 21 days and was in violation of G.S. 1-121, which was in effect until repealed effective 1 January 1970 and which provided for a maximum extension of 20 days. The clerk was without authority to grant an extension for more than 20 days and his order for an extension of 21 days was of no effect. See *Deanes v. Clark,* 261 N.C. 467, 135 S.E. 2d 6 (1964). Plaintiff argues that the matter is still within the discretion of the trial court and that he abused that discretion in failing to enter a *nunc pro tunc* order which would have brought plaintiff's claim within the period of the statute of limitations. We are of the opinion that the court has no discretion when considering whether a claim is barred by the statute of limitations. It is clear that a judge may not, in his discretion, interfere with the vested rights of a party where pleadings are concerned. *Highway Commission v. Hemphill,* 269 N.C. 535, 153 S.E. 2d 22 (1967). It is equally clear that the statute of limitations operates to vest a defendant with the right to rely on the statute of limitations as a defense. *Wilkes County v. Forester,* 204 N.C. 163, 167 S.E. 691 (1933).

[3] Therefore, the crucial question is what date should be used to determine whether plaintiff's claim is barred, the date summons was issued or the date the complaint was filed. The complaint was verified and filed on 19 December 1969, more than 20 days from the issuance of summons and one day more than the statutory maximum permitted. Where plaintiff fails to comply with the statutory provisions relating to such extensions, the date the complaint was filed must be used in determining whether the statute of limitations is applicable. See *Roberts v. Bottling Co.,* 257 N.C. 656, 127 S.E. 2d 236 (1962). The complaint was filed after the statute of limitations had run and plaintiff's claim is barred thereby.

In *Shearin v. Lloyd,* 246 N.C. 363, 98 S.E. 2d 508 (1957), Bobbitt, J. (now C.J.), said in speaking for the Court:

> "Statutes of limitations are inflexible and unyielding. They operate inexorably without reference to the merits of plaintiff's cause of action. They are statutes of repose, intended to require

that litigation be initiated within the prescribed time or not at all."

"The purpose of a statute of limitations is to afford security against stale demands, not to deprive anyone of his just rights by lapse of time. *Butler v. Bell,* 181 N.C. 85, 106 S.E. 217. In some instances, it may operate to bar the maintenance of meritorious causes of action. When confronted with such a cause, the urge is strong to write into the statute exceptions that do not appear therein. In such case, we must bear in mind Lord Campbell's caution: 'Hard cases must not make bad laws.' "

Affirmed.

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

ED LUTHER BEAVER v. FRANKLIN P. LEFLER AND WIFE, ANNABELL R. LEFLER

No. 7019SC285

(Filed 24 June 1970)

1. Negligence § 59— licensee — guest performing minor service for host

Plaintiff who was helping defendants carry meat into their house had the status of a licensee and not an invitee where plaintiff and male defendant customarily helped each other perform such minor and incidental services around their respective homes.

2. Negligence § 59— action by licensee — fall on wet floor — insufficiency of evidence

In this action for injuries received when plaintiff licensee slipped and fell on some wet leaves on defendants' kitchen floor after plaintiff had placed a box of meat on the kitchen table and started back toward the door which he had just entered, plaintiff's evidence was insufficient to be submitted to the jury on the issue of defendants' negligence where it disclosed that he had reason to believe the floor was wet and that if he had been keeping a proper lookout he would have seen the wet leaves on the floor.

APPEAL by plaintiff from *Ragsdale, J.,* 3 November 1969 Session, CABARRUS Superior Court.

This is a civil action in which plaintiff seeks to recover damages and losses resulting from a personal injury sustained while on the premises of defendants.

Plaintiff's evidence tends to establish the following:

At the time of the accident, 19 November 1965, plaintiff had lived in defendants' neighborhood for seven or eight years and they had become good friends. Plaintiff had retired a year or two prior to 1965 due to his arthritic condition and had done odd jobs around his house and for neighbors. He had helped Franklin Lefler on several occasions prior to 1965 and although he did not charge him anything he had always been given something for his work.

On the day of the accident, Franklin Lefler and plaintiff rode to Kannapolis to get a load of meat. Franklin Lefler carried the biggest part of the load of meat from the freezer locker in Kannapolis to the truck; plaintiff did not carry any of it. They returned to defendants' house about ten o'clock in the morning and parked the truck about thirty feet from the back kitchen door. There was a light rain or heavy mist falling and the ground was wet. There were about five cement steps leading to the back door and there was no hand railing. Franklin Lefler began making trips from the truck to the house carrying in the meat to his wife who was putting the meat in their freezer in the kitchen. Plaintiff saw Franklin Lefler make the trips and noticed that he did not wipe his feet as he went into the house.

After Franklin Lefler had made eight or ten trips from the truck to the house, plaintiff carried a box of meat into the house. The box of meat weighed about thirty or forty pounds and plaintiff carried it in his arms in such a way that he could not see the kitchen floor. Plaintiff laid the meat on the table, turned around, and walked a little way toward the kitchen door at which time he slipped on some wet leaves on the floor and fell landing on the concrete steps.

The evidence further tends to show plaintiff was injured as a result of the fall.

At the close of plaintiff's evidence, defendants moved for judgment as of nonsuit. The motion was allowed and judgment entered accordingly. Plaintiff appeals, assigning error.

Thomas K. Spence for plaintiff appellant.

Wardlow, Knox, Caudle & Wade, by Lloyd C. Caudle, for defendant appellees.

BROCK, J.

[1] Plaintiff contends that because he was helping defendants carry meat into their house his status was that of an invitee and not a licensee at the time of the accident in defendants' home. The au-

thorities, however, support the view that he was a bare licensee. *Murrell v. Handley,* 245 N.C. 559, 96 S.E. 2d 717, and cases therein cited; *Jenkins v. Brothers,* 3 N.C. App. 303, 164 S.E. 2d 504.

"Minor services performed by a guest for the host during the course of a visit will not change the status of the guest from a licensee to an invitee." *Murrell v. Handley, supra.*

Plaintiff and male defendant were friends and were accustomed to helping each other do odd jobs around their houses. At the time of the accident, plaintiff was helping carry into defendants' house a portion of a load of meat. This constituted a minor or incidental service performed by the plaintiff for male defendant and one the nature of which each customarily performed for the other. In going upon the premises of defendants, plaintiff was neither a customer nor a servant nor a trespasser.

[2] The only evidence as to the condition of the floor prior to plaintiff's fall was plaintiff's testimony that he did not see any leaves or water on the kitchen floor as he walked into the kitchen. Plaintiff did not slip and fall on his way into the house although he was carrying a large box of meat and was unable to see; he slipped and fell after he had placed the meat on the table and had started back toward the door he had just entered. Plaintiff's own evidence discloses that he had reason to believe the floor was wet and that if he had been keeping a proper lookout he would have seen the wet leaves on the floor.

In our opinion the evidence bearing on the question of negligence was insufficient to justify submission of this case to the jury.

The ruling of the court below is

Affirmed.

BRITT and HEDRICK, JJ., concur.

FRED COLE T/A COLE'S RADIO & TV SERVICE v. ROBERT JAMES VOGEL
— AND —
ELSIE F. COLE v. ROBERT JAMES VOGEL

No. 708DC48

(Filed 24 June 1970)

Automobiles § 56— striking rear of stopped automobile — failure to keep proper lookout

Plaintiffs' evidence was sufficient to go to the jury on the issue of defendant's negligence in failing to keep a proper lookout, where it tends to show that defendant's automobile ran into the back of an automobile which had stopped in the road with its left turn signal on and then continued down the road and struck plaintiffs' oncoming vehicle.

APPEAL by plaintiffs from *Wooten, District Judge,* 27 July 1969 Session of the District Court held in LENOIR County.

This appeal arises from two actions which were consolidated for trial. The Fred Cole action is for property damage and the Elsie F. Cole action is for damages for personal injuries. The damages sought in each action allegedly resulted from the negligence of defendant Vogel in the operation of an automobile which was in collision with the Cole vehicle on 16 March 1966. At the close of plaintiffs' evidence, the motion of defendant in each case for judgment as of nonsuit was sustained. Plaintiffs appealed.

Turner and Harrison by Fred W. Harrison for plaintiff appellants.

Lucas, Rand, Rose, Meyer and Jones by David S. Orcutt for defendant appellee.

MALLARD, C.J.

Plaintiffs' evidence, in substance, except where quoted, was: Fred Cole was on 16 March 1966 the owner and driver of a 1966 Mercury station wagon. At the time of the collision, Elsie F. Cole, his wife, was a passenger in the vehicle. The collision occurred about 10 miles south of Jacksonville, North Carolina, on Highway 17 at a "T" intersection. The male plaintiff testified:

> "As I approached this intersection I saw an automobile that was stopped and he had his left-hand turn signal on which led me to believe that he wanted to turn left. I later found out that this car was being operated by a man named Pierce. He had come to a complete stop. I was meeting the Pierce vehicle. Down the road about a city block I saw another car coming. It was

following Mr. Pierce. HE WAS COMING AT A PRETTY GOOD CLIP OF SPEED.

OBJECTION BY DEFENDANT OBJECTION SUSTAINED EXCEPTION NO. 1".

Plaintiff later learned that the operator of the following vehicle was defendant Vogel. Defendant's automobile hit the back of the Pierce car and then continued down the road and hit the Cole car knocking it into a sign on the right side of the road.

The only assigned errors requiring discussion are the granting of the motion for nonsuit in each case. We think this was error.

In *Dunlap v. Lee,* 257 N.C. 447, 450, 126 S.E. 2d 62, 65 (1962), Moore, J., speaking for a unanimous Court, said:

> " 'Ordinarily the mere fact of a collision with a vehicle ahead furnishes some evidence that the following motorist was negligent as to speed, was following too closely, or failed to keep a proper lookout.' *Clark v. Scheld,* 253 N.C. 732, 737, 117 S.E. 2d 838; *Clontz v. Krimminger,* 253 N.C. 252, 116 S.E. 2d 804; *Smith v. Rawlins,* 253 N.C. 67, 116 S.E. 2d 184. But the nature of the negligence, if any, depends upon the circumstances in each particular case. *Beaman v. Duncan,* 228 N.C. 600, 46 S.E. 2d 707."

In that case, plaintiff was proceeding southwardly following another car. The driver of that car gave a hand signal for a right turn for some 75 to 100 feet prior to turning. Plaintiff gave a mechanical right turn signal for about 75 feet, although she did not intend to turn, and came to a complete stop in her lane of traffic. She was not aware that defendant was following her. About the time the car in front of her cleared the highway, defendant's car ran into the rear of her car, causing only slight damage. Defendant's testimony on adverse examination, offered by plaintiff, was to the effect that he was following about four car lengths behind plaintiff; that both cars were traveling about 35 to 40 miles per hour; that when a passenger in defendant's vehicle cautioned him to "Watch that car in front of you", he stepped on his brakes and skidded into plaintiff's bumper; that plaintiff told him the car in front did not give a signal and she had no time to give a signal. There, as here, there was no direct evidence that defendant was following too closely. Indeed the direct evidence is to the contrary. There, as here, there was no direct evidence of excessive speed. The Court there concluded that defendant's testimony permitted the inference that he was not keeping a proper lookout. We are of the opinion that the evidence here per-

mits the same inference and the question of defendant's negligence should be for the jury.

New trial.

PARKER and GRAHAM, JJ., concur.

STATE OF NORTH CAROLINA v. MARVIN JOHNSON

No. 7021SC362

(Filed 24 June 1970)

Homicide § 30— submission of issue of involuntary manslaughter

Trial court in first-degree murder prosecution properly refused to submit issue of involuntary manslaughter to the jury when there was no suggestion in the evidence that the two shots fired by defendant into deceased's stomach were fired involuntarily or by reason of culpable negligence.

ON *certiorari* to review the order of *Seay, J.*, 9 December 1969 Criminal Session of FORSYTH County Superior Court.

Defendant was tried for the capital offense of first degree murder. The jury was instructed that if they failed to find defendant guilty of murder in the first degree they could return a verdict of guilty of murder in the second degree, manslaughter, or not guilty. The verdict of the jury was guilty of murder in the second degree. An active prison sentence of from eighteen to twenty years was imposed thereon.

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

J. Clifton Harper, for defendant appellant.

GRAHAM, J.

Defendant, through his court appointed counsel, has brought forth two assignments of error. In his first assignment of error he questions the failure of the trial judge to instruct the jury that they could return a verdict of guilty of involuntary manslaughter.

Only the State offered evidence, and it tended to show that on the night of 28 September 1969 defendant and deceased, while drink-

ing at the home where deceased resided, got into an argument and fight over the deceased's girlfriend. Defendant sustained a cut on the arm during the fight. He then left saying: "I will be back." When he got outside the house he told Danny Rogers, who owns the house where the party was going on, to send the deceased out of the house and stated: "If you don't I'm going to burn it down." A short time thereafter defendant returned to the house. One witness testified: "He kicked the door open, and he had a pistol in his left hand. When he walked in Jack [deceased] jumped up and grabbed him. Marvin Johnson didn't say anything because Jack grabbed him at the time he saw the gun, and they began to fight over the gun. Jack was trying to take the gun from Marvin. They wrestled for a while on the couch, and then they fell over into [sic] the floor and wrestled all the way over to the vent of the living room there, and that's when Marvin shot him on the floor. When Jack Langford got shot he was flat on his back, and Marvin was on top of him. He wasn't standing over him he was down on top of him. Two shots were fired." Four eyewitnesses offered by the State testified to substantially the same series of events. It was stipulated that deceased died as the result of two gunshot wounds in the stomach.

It is our opinion that the issue of involuntary manslaughter does not arise on the evidence and that the court properly refused to submit it to the jury. Involuntary manslaughter is defined in 4 Strong, N.C. Index 2d, Homicide, § 6, as follows:

> "Involuntary manslaughter is the unlawful killing of a human being, unintentionally and without malice, proximately resulting from the commission of an unlawful act not amounting to a felony, or resulting from some act done in an unlawful or culpably negligent manner, when fatal consequences were improbable under all the facts existent at the time, or resulting from the culpably negligent omission to perform a legal duty."

At no point in the evidence is there any suggestion that the two shots fired by defendant into the deceased's stomach were fired involuntarily or by reason of culpable negligence. Involuntary manslaughter was therefore not involved. *State v. Bright,* 237 N.C. 475, 75 S.E. 2d 407; *State v. Rawley,* 237 N.C. 233, 74 S.E. 2d 620.

Defendant's second assignment of error is that the court erred in refusing to set aside the verdict *ex mero motu* because the weight of the evidence was contrary to the verdict of second degree murder. We view the evidence as ample to support the conviction.

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

No error.

MALLARD, C.J., and MORRIS, J., concur.

M. E. CHURCH AND WIFE, ELLA CHURCH v. ADOLPH CHEEK AND WIFE, MRS. ADOLPH CHEEK

No. 7023SC255

(Filed 24 June 1970)

Appeal and Error § 39— failure to docket record in apt time

Appeal is dismissed for failure of appellant to docket the record on appeal within the time allowed by Rule 5 of the Court of Appeals.

APPEAL by plaintiffs from *McConnell, J.*, November 1969 Session of Superior Court held in YADKIN County.

This proceeding was instituted on 10 May 1954 to establish a boundary line between the lands of the parties. On 18 November 1954 an order of survey was entered herein by Judge Pless. On 15 November 1955, by consent of the parties, the cause was referred by Judge Rousseau. The referee heard evidence and made his report on 14 November 1956. A judgment confirming the referee's report and ordering a surveyor to establish the dividing lines was entered 11 February 1957 by Judge Craven. The order of Judge Craven directing a survey was not complied with, and on 20 November 1961 Judge Armstrong ordered another survey. The surveyor established the lines and made his report dated 14 May 1963. On 16 August 1963 plaintiffs excepted to the report of the surveyor. On 21 May 1964, by consent of the parties, Judge May entered an order directing that Earl L. Caudill establish the dividing line. On 17 August 1967 Judge Gambill entered an order in which he found that in an order dated 21 November 1964, Judge May had directed L. B. Grier to establish the dividing lines and that L. B. Grier was experiencing "some difficulty in complying with the orders of the court due to outside interference." Judge Gambill thereupon enjoined all of the parties hereto from interfering with L. B. Grier in performance of his duties under the order of the court.

On 20 November 1968, upon motion of defendants, Judge Collier

entered an order directing L. B. Grier to show cause, if any, on 27 November 1968 why he failed to comply with the order of the court.

On 27 November 1968 Judge Collier found that there was a controversy as to the location of the beginning point of the dividing line between the parties as found by the referee, R. Lewis Alexander. Without objection or exception, Judge Collier ordered that the matter be "re-submitted and referred back to said Referee for a finding and determination of a beginning point of the division line heretofore established between the lands of plaintiffs and of defendants and that said Referee shall report his finding and determination to this Court in the manner provided by law within thirty days from the date hereof."

On 20 November 1969 the referee, R. Lewis Alexander, made another report with a map attached showing the beginning point and also the dividing line between the parties by metes and bounds.

On 2 December 1969 Judge McConnell entered an order overruling the exceptions of plaintiffs and confirmed the report of the referee dated 20 November 1969.

F. D. B. Harding, and Allen, Henderson & Allen by Hoke F. Henderson for plaintiff appellants.

Randleman, Randleman & Randleman by Richard N. Randleman for defendant appellees.

MALLARD, C.J.

The judgment appealed from is dated 2 December 1969. This case was docketed by appellants in the Court of Appeals on 9 March 1970. Rule 5 of the Rules of Practice in the Court of Appeals requires that in the absence of an extension of time granted to do so, the record on appeal must be docketed within ninety days after the date of the judgment appealed from. No order appears in this record extending the time for docketing the record on appeal as provided in Rule 5.

This case has been pending many years, and many judges, surveyors, and lawyers have been involved in it. It is time that there should be an end to this litigation. Despite the failure of appellants to comply with the rules relating to docketing, we have considered all of their assignments of error, and no prejudicial error is made to appear.

However, for failure to comply with the Rules of Practice in this court, this appeal is dismissed.

Dismissed.

MORRIS and GRAHAM, JJ., concur.

STATE OF NORTH CAROLINA v. BOBBY GRAY HICKMAN

No. 7021SC342

(Filed 24 June 1970)

1. Parent and Child § 1— presumption that child is legitimate child of the marriage

It is presumed that a child born in wedlock is the legitimate child of that marriage unless it is shown that the husband could not have had access to the spouse at a time when the child could have been conceived or that the husband was impotent or that other circumstances would prevent the husband from being the father of the child.

2. Bastards § 5— nonsupport — prosecution — competency of evidence of gestation period

Defendant in nonsupport prosecution may not complain that trial court excluded medical evidence and other testimony tending to show a different gestation period of the mother, where defendant himself admitted that he had dated the mother at a time of possible conception and that he knew the mother was pregnant when he married her.

APPEAL by defendant from *Exum, J.*, 2 February 1970 Schedule "B" Three-Week Session, FORSYTH Criminal Superior Court.

Defendant was charged with the willful nonsupport of a child, Heather Robin Hickman, born 4 November 1968. The State's evidence tends to show that the prosecutrix, Joan Hickman (Joan), first dated the defendant in June 1967. In August of 1967, Joan moved to Alaska with her mother, sister and brother. While in Alaska, Joan dated an airman, Clayton Burton. She returned to Winston-Salem on 14 March 1968. She stated that she saw the defendant, Bobby Hickman (Hickman), the next day. She testified that she had sexual relations with him at that time and that she had not had sexual relations with anyone prior to that time.

Joan, when she thought she might be pregnant, went to see a Dr. Petty, using the name Mrs. Joan Burton. She told Hickman

that she was pregnant, and they were married on 25 April 1968. The child was born 4 November 1968 and weighed 7 lbs. 12 oz. The defendant has never supported the child. His defense is lack of paternity.

Hickman testified that he had not engaged in sexual intercourse with Joan on 15 March 1968 and that she had said that the child was Clayton Burton's. This testimony was stricken upon motion of the solicitor. Medical testimony offered by the defendant that the baby was a "term" baby and a purported statement of Joan that her last menstrual period had been 1 February 1968 were also stricken.

The defendant was found guilty of nonsupport and was sentenced to a prison term of 6 months, suspended upon condition that Hickman (1) pay costs of court and (2) pay $13.00 a week support for the child. Hickman appeals, assigning as error the exclusion of testimony offered in his defense and errors in the charge of the trial judge.

Attorney General Robert Morgan by Assistant Attorney General R. S. Weathers for the State.

Wilson, Morrow and Boyles by John F. Morrow for defendant appellant.

CAMPBELL, J.

[1, 2] It is presumed that a child born in wedlock is the legitimate child of that marriage unless it is shown that the husband could not have had access to the spouse at a time when the child could have been conceived or that the husband was impotent or that other circumstances would prevent the husband from being the father of the child. See *State v. Key,* 248 N.C. 246, 102 S.E. 2d 844 (1958). Hickman admitted that he dated Joan on 15 March 1968 and that he knew she was pregnant when he married her. It would be anomalous for him to try to prove after that admission that he, in effect, did not have access. As has been succinctly said under those circumstances, he "takes whatever is in the gum." He may not complain that medical evidence and other testimony tending to show a different gestation period was excluded. His assignments of error in this regard are without merit.

The defendant also challenges the charge of the trial judge as follows:

"'. . . under the law, when a child is born in wedlock, that

is, when a child is born during the marriage of the mother, the law presumes that this child is the child of the husband of the mother at the time the child was born. Now, this presumption of legitimacy of the child cannot be rebutted except by evidence tending to show that the husband could not have access to the mother during the period of time which the law recognizes as the period of time that the child could have been conceived. This period of time which the law recognizes as the period of time during which the child could have been conceived is a period of time sometimes referred to in the law as the normal period of gestation, and this period may be anywhere from seven, eight, or nine or nine and a half, or ten months from the date of the birth of the child, and the only way the presumption of legitimacy of the child born during the marriage of the man and wife may be rebutted is by evidence tending to show that the husband could not have had access to the wife during the period of time that I have referred to.' "

This assignment of error is without merit. *State v. Snyder,* 3 N.C. App. 114, 164 S.E. 2d 42 (1968).

We find in law

No error.

PARKER and VAUGHN, JJ., concur.

JOHN H. PHIPPS, HOWARD PHIPPS AND BESSEMER TRUST COMPANY, A NEW JERSEY CORPORATION, TRUSTEES UNDER THE WILL OF JOHN S. PHIPPS, DECEASED; JOHN H. PHIPPS, MICHAEL G. PHIPPS AND GRACE NATIONAL BANK OF NEW YORK, TRUSTEES UNDER A TRUST AGREEMENT, DATED MAY 4, 1956, CREATING A TRUST KNOWN AS "JOHN S. PHIPPS FOUNDATION"; HOWARD PHIPPS, TRUSTEE UNDER THE WILL OF AMY GUEST, DECEASED; AND HENRY B. MARTIN, TOWNSEND B. MARTIN, ALASTAIR B. MARTIN, AND ESMOND B. MARTIN v. CORTEZ GASKINS, A. S. AUSTIN, LEE ROBINSON, M. L. BURRUS, MRS. URSA STOWE, MILLARD BALLANCE, CARLOS ODEN, PERRY AUSTIN, BERNICE BALLANCE, ROY GASKINS, FRED PETERS, GEORGE H. HINE, MRS. JULIA R. TANDY, EDGAR STYRON, E. R. MIDGETT, AND LEE PEELE

No. 701SC264

(Filed 24 June 1970)

Ejectment § 10— failure to locate exception in deed — nonsuit

In this action in ejectment wherein plaintiffs claim title to the dis-

puted lands under a 1910 grant from the State which contains an exception to the described premises, the trial court properly entered judgment of nonsuit where it does not appear from plaintiffs' evidence or any admission of defendants that defendants are claiming within the exception, and plaintiffs failed to locate the exception in order to show that defendants' possessions are not within the exception.

APPEAL by plaintiffs from *Parker (Joseph W.), J.*, 13 January 1969 Session, DARE Superior Court. By consent of all parties final judgment was entered 24 October 1969.

This action was instituted to remove numerous alleged clouds upon the title to plaintiffs' property. The property which plaintiffs claim they own extends for several miles along Hatteras Island. Plaintiffs claim under a grant from the State in the year 1910. They allege that defendants claim to be owners of various tracts of land within the outer boundaries of the grant. The parties agree that the case was treated as an action in ejectment.

The cause was heard by referee who concluded that each defendant's motion for judgment of nonsuit should be allowed; and these rulings by the referee were upheld upon the exceptions heard by Judge Parker. Plaintiffs appealed.

Wallace R. Gray and John H. Hall, Jr., for plaintiffs.

Leroy, Wells, Shaw, Hornthal & Riley; Twiford & Abbott; and McCown & McCown, for defendants.

BROCK, J.

This lawsuit has meandered at a leisurely pace. Complaint was filed 25 August 1962; the last answer was filed on 22 October 1965; on some date prior to 3 September 1963 Judge Bundy ordered a survey; between 3 September 1963 and 25 September 1963 the survey was made and map prepared; on 11 June 1964 Judge Cowper entered an order of reference; the Referee conducted hearings on 19 April 1965 and on 22 August 1966, and filed his report on 21 August 1967; upon appeal by plaintiffs from the Referee's report the matter was heard by Judge Parker at the January 1969 Session, but by consent the judgment was not entered until 24 October 1969. The appeal from Judge Parker's judgment was docketed in this Court on 16 March 1970.

Plaintiffs claim title to the tract of land described in a grant from the State, dated 26 January 1910, to Mrs. Georgia A. Gaskins. The description of the outer boundaries of the grant will not close

and plaintiffs have undertaken to show the location of the lines on the ground by surveying according to the monuments referred to in the grant. However, aside from the problems encountered in their attempt to establish the location of the outer boundaries of the grant on the ground, plaintiffs completely failed to locate the exception contained in the grant. The exception reads as follows: "The lands mentioned in Judgment of Superior Court, Spring Term (Dare County) 1909, in case of C. E. Rollinson, Plaintiff vs Georgia A. Gaskins, are excepted from this grant, ..."

"Where it appears from the showing of a *prima facie* title by the plaintiff or the judicial admission of the defendant that the land in dispute in an action of ejectment or other action involving the establishment of a land title is within the external boundaries of the plaintiff's deed and that the defendant claims it under an exception in such deed, the burden is on the defendant to bring himself within such exception by proper proof." *Paper Co. v. Cedar Works,* 239 N.C. 627, 80 S.E. 2d 665. However, this rule is not applicable in the present case because it does not appear from plaintiffs' evidence, or any admission by defendants, that the defendants are claiming within the exception in the grant; therefore the burden of proof was upon plaintiffs to locate the exception within the outer boundaries of the grant in order to show that defendants' possessions were not within the exception. As was said in *Peacock v. R. R.,* 203 N.C. 216, 165 S.E. 357, "[t]he principle that the burden of proof is on one claiming under an exception in a deed or grant to show that his claim comes within the exception (citation omitted), is not applicable in the instant case, for the reason that it does not appear that the defendants are claiming under the exception. The burden was upon the plaintiff and not upon the defendants to offer evidence tending to show that the possession of the defendants was not within their rights. In the absence of such evidence, there was no error in the judgment dismissing the action as of nonsuit."

The judgment appealed from is

Affirmed.

BRITT and HEDRICK, JJ., concur.

STATE OF NORTH CAROLINA v. DWIGHT R. BAKER, ALIAS ROBERT RAY WILLIAMS, ALIAS BOBBY RAY WILLIAMS

No. 7025SC284

(Filed 24 June 1970)

Criminal Law § 155.5— extension of time to serve case on appeal

Judge who was not the trial judge had no authority to grant an extension of time in which to serve the case on appeal. Rule 50 of the Court of Appeals. Appeal is subject to dismissal by the Court of Appeals *ex mero motu* for failure to comply with Rule 50. Rule 48.

APPEAL by defendant from *Clarkson, E.J.*, 1 December 1969 Special Criminal Session of Superior Court held in CATAWBA County.

Defendant was charged in a bill of indictment, proper in form, with armed robbery. The case was consolidated for trial with a kidnapping charge. Only the indictment charging armed robbery is included in the record, presumably because defendant was acquitted by the jury of the charge of kidnapping. The evidence for the State tended to show that on the afternoon of 26 December 1968 the prosecuting witness, Zeno H. Clement (Clement), was the manager of a supermarket located near Hickory, North Carolina. On that date defendant robbed the supermarket of approximately $6,800 by threatening Clement with a sawed-off shotgun. The shotgun was concealed under defendant's coat until he pulled his coat back and revealed the end of the shotgun. Clement was forced by the defendant to put the money into a bag. Defendant then forced Clement to accompany him some three to four hundred yards from the supermarket. The defendant was not wearing a hat and had nothing covering his face. Clement testified that he observed the defendant while in the store and also when the defendant forced him to go outside the supermarket. Clement testified that he had consciously tried to obtain a good description of the robber and positively identified the defendant from observation at the time of the crime. Defendant's fingerprints were found on a bag at the scene of the crime.

The jury returned a verdict of guilty of armed robbery, and defendant was sentenced to thirty years in prison. The defendant appealed to the Court of Appeals.

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

Thomas W. Warlick for defendant appellant.

MALLARD, C.J.

Defendant was tried and sentenced by Judge Clarkson on 4 December 1969 and was permitted sixty days to prepare and serve his case on appeal. The sixty days allowed by Judge Clarkson to serve the case on appeal expired on 2 February 1970. The case on appeal was not served during that time, but service thereof was accepted by the assistant solicitor on 24 February 1970. On 2 February 1970 an order was obtained from Judge Harry C. Martin and filed 4 February 1970, purporting to allow defendant an additional period of time in which to *serve his case on appeal.* On 3 March 1970 an order was obtained and filed permitting defendant an additional period of time in which to docket the record on appeal with this court. Judge Harry C. Martin was not the trial judge. Rule 50 of the Rules of Practice in the Court of Appeals of North Carolina requires that if an extension of time is required in which to serve the case on appeal, *only* the *trial judge* may enter such an order, for good cause and after reasonable notice to the opposing party or counsel, providing such order may not alter the provisions of Rule 5 relating to the docketing of the record on appeal. Judge Martin was without authority to grant an extension of time in which to serve the case on appeal, and the appeal is subject to dismissal *ex mero motu* under Rule 48 for a failure to comply with Rule 50.

We have, nevertheless, examined the record and the assignments of error presented in defendant's brief and are of the opinion that the proceedings in the superior court were free from prejudicial error.

Appeal dismissed.

MORRIS and GRAHAM, JJ., concur.

STATE OF NORTH CAROLINA v. WILLIE ERVIN DAVIS

No. 7018SC341

(Filed 24 June 1970)

1. Criminal Law § 169— admission of evidence over objection — similar evidence admitted without objection

Defendant was not prejudiced by admission of evidence over objection where evidence of a like import had already come in without objection.

2. Criminal Law § 162— necessity for objection to evidence at trial

Objection to introduction of evidence comes too late when first made on appeal.

3. Criminal Law § 87— leading questions — discretion of court

The allowance of leading questions is within the discretion of the court, and its rulings thereon are not reviewable absent a showing of abuse of discretion.

4. Criminal Law § 43— admission of motion pictures — failure to object or request preview

In this drunken driving prosecution, the trial court did not err in the admission of motion pictures taken of defendant at the police station where defendant failed to object at the trial and made no request to preview the film.

5. Criminal Law § 166— abandonment of assignments of error

Assignments of error not brought forward and argued in the brief are deemed abandoned. Court of Appeals Rule No. 28.

ON *certiorari* to review judgment of *Gwyn, J.*, 30 October 1969 Session of GUILFORD Superior Court.

Defendant was convicted in the Greensboro Municipal County Court of driving under the influence and appealed to the Superior Court. Through his court-appointed counsel, he entered a plea of not guilty, was tried, and found guilty by the jury. He appealed and counsel was appointed to prosecute his appeal and he was allowed to appeal as a pauper. The appeal was not perfected within the time allowed, and the solicitor moved for dismissal of the appeal. The court, however, entered an order appointing new counsel to petition this Court for a writ of certiorari. Certiorari was granted by this Court on 26 November 1969.

Attorney General Robert Morgan by Staff Attorney T. Buie Costen for the State.

William A. Vaden for defendant appellant.

MORRIS, J.

The record contains 120 exceptions which form the bases for the defendant's five assignments of error.

[1, 2] The first assignment of error is directed to the admission of testimony which defendant says was incompetent and inadmissible. This assignment is based on 28 exceptions. Only two of these are supported by an objection made at the trial. As to these, evidence of a similar import had already come in without objection, and the overruling of the objection in these two instances could not have prejudiced defendant. As to the other 26 exceptions embraced in this assignment of error, the objection to the introduction of the evidence, even if it were inadmissible, which is not conceded, was

not made in apt time and comes too late when first made on appeal. *Abbitt v. Bartlett,* 252 N.C. 40, 112 S.E. 2d 751 (1960); *Lambros v. Zrakas,* 234 N.C. 287, 66 S.E. 2d 895 (1951).

[3] The second assignment of error embraces 99 exceptions appearing in the record. By this assignment of error defendant contends that the court abused its discretion in allowing the solicitor to ask leading questions. Only one exception is based on an objection, the court's ruling on which appears in the record. This objection was sustained. An objection appears in the record to two others but the ruling of the court does not appear. In any event, the allowance of leading questions is within the discretion of the court, and his rulings thereon are not reviewable absent a showing of abuse of discretion. *State v. Staten,* 271 N.C. 600, 157 S.E. 2d 225 (1967). From our examination of the record here we find no abuse of discretion, and defendant has not shown any.

[4] Assignment of error No. 5 is directed to the allowing into evidence of motion pictures taken of defendant at the police station. Again, no objection was made at the trial, nor was there a request for previewing. See *State v. Strickland,* 276 N.C. 253, 173 S.E. 2d 129 (1970). This assignment of error is overruled.

[5] Defendant's remaining assignments of error are directed to the charge of the court. They are not brought forward and argued in defendant's brief and are, therefore, deemed abandoned. Rule 28, Rules of Practice in the Court of Appeals of North Carolina.

It appears abundantly clear from the record that the evidence was plenary to support the verdict of the jury. It also appears that defendant's counsel ably represented him at trial. Defendant was given a suspended sentence, fined $100 and costs which he was allowed to pay at the rate of $10 per week, and ordered not to operate a motor vehicle in North Carolina for 12 months. Perhaps the failure of counsel repeatedly to interpose objections — often needlessly — was a most effective trial strategy.

No error.

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

STATE OF NORTH CAROLINA v. THOMAS SYKES

No. 706SC115

(Filed 24 June 1970)

Criminal Law §§ 114, 168— instructions — expression of opinion

Trial court's instruction, apparently in reference to defendant's plea of "not guilty by reason of insanity," that both defendant and his attorney admitted that defendant had committed the crime of molesting or assault with intent to commit rape, *held* prejudicial error, where the record discloses that defendant did not testify and that neither defendant nor his attorney had made such admission.

APPEAL by defendant from *Parker, J.*, August 1969 Session, NORTHAMPTON Superior Court.

Defendant was charged with the rape of a 6-year-old child. The solicitor announced that the State would not seek a verdict of guilty of rape but would ask for a verdict of guilty under the charge of assault with intent to commit rape. Defendant, an indigent, was represented by court-appointed counsel. With respect to the plea entered by defendant, the record shows the following as a part of the judgment and commitment signed and entered by the court: "In open court, the defendant appeared for trial upon the charge or charges of rape and thereupon entered a plea of not guilty of assault with intent to commit rape by reason of insanity." The jury returned as its verdict: "He is guilty as charged with the recommendation of mercy." Defendant appealed and the court appointed counsel to perfect his appeal.

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

Thomas W. Henson for defendant appellant.

MORRIS, J.

Defendant brings forward ten assignments of error based on twelve exceptions, all but one of which are directed to the instructions of the court to the jury. The other is a formal exception to the entry of the judgment.

The following excerpts from the charge form the bases of two of defendant's exceptive assignments of error:

> "The court further instructs you that you will recall upon the call of the case, the attorney for the defendant admitted that the crime of molesting or assaulting with intent to commit rape

had been performed by the defendant, but the plea was not guilty by reason of insanity, so therefore, the only question before you ladies and gentlemen would be 'has the State through this admission by the defendant satisfied you from the evidence and this admission beyond a reasonable doubt that the defendant is guilty?' You would still have to determine whether or not as to his guilt or innocence.

Then you would have to determine whether or not at the time alleged in the bill of indictment the defendant was insane."

and again

"The defendant at the beginning of the trial having admitted the commission of the act alleged in the bill of indictment and having plead not guilty by reason of lack of mental capacity or insanity,".

The defendant did not testify and there was no evidentiary admission of guilt. Nor does the record disclose any admission by defendant's counsel. It is apparent that the court was referring to the defendant's plea of "not guilty by reason of insanity." However, as was succinctly pointed out by Higgins, J., in *State v. Moore,* 268 N.C. 124, 150 S.E. 2d 47 (1966), "The plea of not guilty by reason of temporary insanity is not a judicial admission that the defendant committed any unlawful act. Under a plea of not guilty the State must prove all elements of the offense charged. (citations omitted.)"

We think the portions of the charge quoted constitute prejudicial error. They could have misled the jury to the extent that the jury decided the defendant's guilt solely upon the question of whether he had satisfied them as to his insanity. That this could have resulted is further bolstered by the surplusage in the verdict "with the recommendation of mercy."

The case on appeal herein was not docketed within the time allowed by Rule 5, Rules of Practice in the Court of Appeals of North Carolina. After the case on appeal was docketed, the State filed a motion to dismiss. Defendant filed an answer thereto which we treated as a petition for certiorari, and the case has, therefore, been heard on its merits.

Because of this and other errors in the charge prejudicial to defendant there must be a

New trial.

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

ATLANTIC DISCOUNT OF AHOSKIE, INC. v. CYNTHIA GRAY SMITH

No. 706DC44

(Filed 24 June 1970)

Payment § 4— proof of payment — payment as affirmative defense

In an action to recover on a note, defendant who failed to plead payment as an affirmative defense could not introduce evidence of payment.

APPEAL by plaintiff from *Gay, J.*, 29 August 1969 Session of HERTFORD County, the General Court of Justice, District Court Division.

Plaintiff brought suit against defendant to recover on a note and conditional sales contract allegedly executed by the defendant in the purchase of a 1963 automobile. Plaintiff alleged that the total amount of the note was $2,456.40 and that $409.40 had been paid, leaving $2,047.00 remaining due. Defendant entered a general denial to the allegations. At the trial defendant, over objection, introduced evidence of payment in full of the indebtedness. The jury held for the defendant. Plaintiff assigned error and appealed to the Court of Appeals.

Leroy, Wells, Shaw, Hornthal & Riley by Dewey W. Wells, and Cherry & Cherry by Thomas L. Cherry for plaintiff appellant.

Jones, Jones & Jones by L. Bennett Gram, Jr., for defendant appellee.

MALLARD, C.J.

Plaintiff assigns as error the court's allowing the defendant to present evidence of payment of the indebtedness when payment was not affirmatively pleaded in defendant's answer.

It is well settled in North Carolina that payment is an affirmative defense and must be specially pleaded.

> "Any defense which is intended to operate as a discharge of the obligation set forth in the complaint should be specially pleaded and cannot be proved under a general denial. In a complaint to recover a debt, the usual allegations are the execution of the contract and that it is due and unpaid, but a general denial of these allegations puts in issue only the execution of the instrument or contract, and not the fact of payment." McIntosh, N.C. Practice 2d, § 1236(10)(a).

In *Ellison v. Rix*, 85 N.C. 77 (1881), the Supreme Court said:

"It is true the complaint in the case contains the allegation that the bond sued on has not been paid, but that is an averment that the plaintiff is not required to prove. The *onus* in that case is in the defendant who maintains the affirmative of the issue, and the defense of payment is in *confession and avoidance,* and is *new matter.* That is new matter which shows that a cause of action which once existed has been defeated by something which has subsequently occurred. *Evans v. Williams, supra.* Payment, then, is new matter, and our conclusion is that there was no error in overruling this exception."

In support of her contentions, the defendant cites the case of *Whitley v. Redden,* 5 N.C. App. 705, 169 S.E. 2d 260 (1969). The *Whitley* case, as modified and affirmed by the Supreme Court in an opinion reported in 276 N.C. 263, 171 S.E. 2d 894 (1970), is distinguishable from the instant case.

The defendant, having failed to plead payment, could not introduce evidence of payment. 70 C.J.S., Payment, § 91. See also *Joyce v. Sell,* 233 N.C. 585, 64 S.E. 2d 837 (1951); *Bank v. Barrow,* 189 N.C. 303, 127 S.E. 3 (1925); *Bank v. Knox,* 187 N.C. 565, 122 S.E. 304 (1924); *Averitt v. Elliott,* 109 N.C. 560, 13 S.E. 785 (1891); *Montague v. Brown,* 104 N.C. 161, 10 S.E. 186 (1889).

For the foregoing reasons, the plaintiff is entitled to a new trial.

New trial.

MORRIS and GRAHAM, JJ., concur.

S. S. KRESGE COMPANY, SKY CITY STORES, INC., AND ZAYRE OF HIGH POINT, INC. v. ROBERT D. DAVIS, MAYOR OF THE CITY OF HIGH POINT; PAUL CLAPP, WILLIAM BENCINI, FRED M. YODER, FRED SWARTZBERG, J. COY PUTNAM, JAMES R. SHELTON, O. ARTHUR KIRKMAN, AND JOHN W. THOMAS, JR., MEMBERS OF THE CITY COUNCIL FOR THE CITY OF HIGH POINT, NORTH CAROLINA; LAURIE PRITCHETT, CHIEF OF POLICE OF THE CITY OF HIGH POINT; DOUGLAS ALBRIGHT, SOLICITOR OF THE SUPERIOR COURT; AND ROSS STRANGE, DISTRICT COURT PROSECUTOR

No. 7018SC241

(Filed 24 June 1970)

Sundays and Holidays— High Point Sunday observance ordinance

Trial court properly sustained a demurrer to a complaint attacking the constitutionality of the High Point Sunday observance ordinance.

APPEAL by plaintiffs from *Exum, J.*, 19 December 1969, in Chambers, GUILFORD Superior Court, High Point Division.

This action was instituted on 5 December 1969 to enjoin the enforcement of Section 15-35 of the Code of Ordinances of the City of High Point, revised 1957, for the alleged reasons that the ordinance was either unconstitutional on its face or was unconstitutional because of the discriminatory manner in which it had been enforced since its adoption. A temporary restraining order was entered on 5 December 1969 enjoining the enforcement of the questioned ordinance. By judgment entered as of 19 December 1969, James G. Exum, Jr., resident superior court judge, sustained defendants' *demurrer ore tenus* on the grounds that plaintiffs' complaint failed to state facts sufficient to constitute a cause of action. Upon notice of appeal being given by plaintiffs, the court, in its discretion, continued the temporary restraining order in effect until plaintiffs' appeal could be disposed of.

Gardner & Wilson by Rossie P. Gardner for plaintiff appellants.

Knox Walker for defendant appellee City of High Point.

Morgan, Byerly, Post & Keziah by J. V. Morgan, and Smith & Patterson by Norman B. Smith for defendant appellees.

MALLARD, C.J.

The ordinance of the City of High Point involved in this proceeding is substantially similar to the ordinance of the City of Raleigh which was upheld in the case of *Kresge Co. v. Tomlinson and Arlan's Dept. Store v. Tomlinson*, 275 N.C. 1, 165 S.E. 2d 236 (1969).

In *Kresge v. Tomlinson, supra*, Justice Bobbitt (now Chief Justice) noted that the Charlotte ordinance considered and upheld in *Clark's Charlotte, Inc. v. Hunter*, 261 N.C. 222, 134 S.E. 2d 364 (1964), and the Winston-Salem ordinance considered and upheld in *Charles Stores v. Tucker*, 263 N.C. 710, 140 S.E. 2d 370 (1965), were similar to the Raleigh ordinance. The Court also noted that the Greenville ordinance considered and upheld in *Clark's v. West*, 268 N.C. 527, 151 S.E. 2d 5 (1966), is identical in all material aspects to the one considered in *Charles Stores v. Tucker, supra.*

We have carefully considered the assignment of error brought forward by the plaintiff appellants and are of the opinion and so

hold that the judgment of the superior court sustaining the demurrer interposed by the defendants ought to be affirmed.

Affirmed.

MORRIS and GRAHAM, JJ., concur.

STATE OF NORTH CAROLINA v. JAMES E. SATTERFIELD

No. 7019SC331

(Filed 24 June 1970)

Criminal Law § 127; Bastards § 2; Indictment and Warrant § 10— arrest of judgment — failure of affidavit for warrant to name defendant

In this prosecution for nonsupport of an illegitimate child, judgment must be arrested for failure of the warrant on which defendant was tried to charge defendant with a crime where the name of defendant does not appear in the affidavit upon which the warrant is based.

APPEAL by defendant from *Kivett, J.*, 26 January 1970 Criminal Session of Superior Court held in RANDOLPH County.

Attorney General Morgan and Staff Attorney Mitchell for the State.

Ottway Burton for defendant appellant.

MALLARD, C.J.

This was a criminal proceeding instituted for the nonsupport of an illegitimate child under the provisions of Article 1 of Chapter 49 of the General Statutes.

The defendant was tried upon an affidavit and warrant reading as follows:

"NORTH CAROLINA, RANDOLPH COUNTY
STATE
VS.
JAMES E. SATTERFIELD
Rt. #2, Asheboro, N. C.

Detta Farlow being duly sworn, complains and says that at and in said county on or about the 1 day of January, 1969, Detta

Farlow did unlawfully and wilfully did neglect and refuse to support and maintain his illegitimate child, Debbie Farlow 17 months of age, and begotten upon the body of Detta Farlow, to-wit: both plaintiff and defendant being over 18 years of age, and not married to each other. (in violation of GS 49-2) contrary to the form of statute, made and provided and contrary to law and against the peace and dignity of the State.

Sworn and subscribed to before me this 18 day of April, 1969.

C. O. BULLA
Justice of the Peace

Detta Farlow
Complainant

WARRANT

North Carolina, Randolph County
To the Sheriff or any other lawful officer of Randolph County; GREETINGS:

For the causes stated in affidavit hereto attached, you are hereby commanded forthwith to arrest James E. Satterfield and him safely keep so that you have him before Randolph County Recorder's Court in Asheboro, N. C., forthwith to answer the above complaint and be dealt with as the law directs.

This the 18 day of April, 1969.

C. O. BULLA
Justice of the Peace"

It seems clear that the warrant was intended to contain a charge that the defendant, James E. Satterfield, unlawfully failed to support his illegitimate child. However, in the affidavit upon which the warrant is based, the name of the defendant does not appear.

The warrant does not charge the defendant with a crime, and the judgment must be arrested under the principles of law enunciated in *State v. Benton*, 275 N.C. 378, 167 S.E. 2d 775 (1969).

Judgment arrested.

MORRIS and GRAHAM, JJ., concur.

STATE OF NORTH CAROLINA v. SPURGEON DUNCAN ISLEY

No. 7018SC319

(Filed 24 June 1970)

Criminal Law § 155.5— docketing of appeal beyond time allowed by order and rules

Where case on appeal was not docketed in the Court of Appeals until after the time allowed by an order of extension, and where the time of docketing was beyond the maximum 150 days allowed by Rule 5, the appeal is subject to dismissal.

APPEAL by defendant from *Collier, J.*, 27 October 1969 Criminal Session, GUILFORD Superior Court.

Defendant was charged with first-degree murder by indictment returned at the May 1969 Session of court. Upon an indigency determination counsel was appointed to defend him. He was tried at the October 1969 Session. Upon the call of the case the solicitor announced that the State would not try the defendant for first-degree murder but would seek a conviction for murder in the second degree or a lesser included offense as the evidence might justify. Defendant was convicted of murder in the second degree and appealed. His trial counsel was appointed to prosecute his appeal to this Court.

Attorney General Robert Morgan by Assistant Attorney General Millard R. Rich, Jr., for the State.

Adam Younce for defendant appellant.

MORRIS, J.

The judgment in this case was dated and entered on 31 October 1969. An order extending time for docketing the case on appeal was entered on 16 December 1969 extending the time to and including 28 March 1970. The case on appeal was not docketed in this Court until 13 April 1970. This was not within the time allowed by the order and was beyond the maximum 150 days allowed by Rule 5, Rules of Practice in the Court of Appeals of North Carolina. Defendant has not applied for a writ of certiorari. The appeal is subject to dismissal for failure to comply with the Rules.

We have, nevertheless, carefully examined each of defendant's assignments of error, and we find no prejudicial error. It clearly appears from the record that defendant was well and ably represented at his trial and his counsel has filed a carefully prepared brief and appeared and argued in his behalf.

Defendant has had a fair trial which was free from prejudicial error and his appeal has been considered on its merits.

No error.

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

STATE OF NORTH CAROLINA v. RAY LEWIS LONG

No. 7021SC352

(Filed 24 June 1970)

1. Criminal Law § 89— corroborating testimony — variance

Where variance between corroborating testimony and testimony sought to be corroborated was so slight as to be inconsequential, failure of trial judge to strike portion of corroborating testimony excepted to was not prejudicial.

2. Criminal Law § 113— consolidated prosecution of two defendants — instructions on guilt of each defendant — inadvertent use of "they"

In a consolidated prosecution of two defendants, the fact that the trial judge, while instructing the jury as to one defendant, twice used the pronoun "they" instead of "he" does not constitute reversible error, since the entire charge made it clear that the jury was to consider the guilt or innocence of each defendant separately.

ON certiorari to review the judgment of *Gambill, J.*, at the 13 October 1969 Criminal Session of FORSYTH Superior Court.

The defendant Ray Lewis Long, along with one James L. Long, was tried upon a proper bill of indictment charging armed robbery. In the case against James L. Long the jury returned a verdict of guilty as charged. The verdict as to Ray Lewis Long was guilty of common law robbery. From a judgment imposing an active prison sentence the defendant Ray Lewis Long appeals.

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

Edward R. Green by Charles R. Redden for defendant appellant.

VAUGHN, J.

[1] The defendant brings forward only two assignments of error. Merry Carol Miles, an alleged accomplice in the robbery, testified

as a witness for the State. A deputy sheriff later testified as to what Miles had told him about the occurrence. The trial judge carefully instructed the jury that such evidence was admitted only for the purpose of corroborating the testimony of Miles if they found it did. The defendant assigns as error the failure of the trial judge to strike a portion of the deputy's testimony, contending that it did not corroborate the witness Miles. A study of the evidence discloses that any variance, if indeed there is a variance, is so slight as to be inconsequential. This assignment of error is overruled. *State v. Norris,* 264 N.C. 470, 141 S.E. 2d 869.

[2] Although the case against this defendant was consolidated for trial with that of James L. Long, the trial judge very carefully submitted the question of the guilt or innocence of each defendant separately. *State v. Parrish,* 275 N.C. 69, 165 S.E. 2d 230. The defendant Ray Lewis Long does not complain of any error in the instructions under which his case was submitted to the jury. In two instances, while instructing the jury as to James L. Long, the judge used the pronoun "they" instead of "he." This is the basis for the defendant's final assignment of error. A charge must be construed "as a whole in the same connected way in which it was given." When thus considered, if it "fairly and correctly presents the law, it will afford no grounds for reversing the judgment, even if an isolated expression should be found technically inaccurate." *State v. Tomblin,* 276 N.C. 273, 171 S.E. 2d 901. An examination of the entire charge makes it very clear that the jury could not have understood that if they found one defendant guilty, they should find both guilty, as contended by defendant. This assignment of error is overruled.

In the entire trial we find no error.

No error.

CAMPBELL and PARKER, JJ., concur.

STATE OF NORTH CAROLINA v. JAMES SUMNER LEE

No. 7011SC104

(Filed 24 June 1970)

Weapons and Firearms— machine gun, submachine gun or like weapon

Weapon described in a warrant as "a Universal Caliber 30 M1 Carbine, Serial No. 135258, capable of firing thirty-one (31) shots, by successive

pulling of the trigger" is not a "machine gun, submachine gun or other like weapon" within the meaning of G.S. 14-409.

GRAHAM, J., dissents.

APPEAL by the State from *McKinnon, J.*, 27 October 1969 Session, LEE Superior Court.

Defendant was charged in a warrant with the unlawful possession of a machine gun or sub-machine gun or other like weapon, to wit: a Universal Caliber 30 M1 Carbine, Serial No. 135258, capable of firing thirty-one (31) shots, by the successive pulling of the trigger. G.S. 14-409. The offense was alleged to have occurred on or about 2 September 1969. Defendant was tried in District Court on 9 September 1969, and from a verdict of guilty appealed to the Superior Court for trial *de novo*.

When the case was called for trial in Superior Court on 28 October 1969, defendant moved to quash the warrant because: (1) the weapon described in the warrant was not such a weapon as was covered by the statute; and (2) as applied to defendant the statute (G.S. 14-409) was void for vagueness. The trial judge ruled that the weapon as described in the warrant was not a "machine gun, submachine gun or other like weapon" within the meaning of G.S. 14-409. Based upon this ruling the trial judge quashed the warrant, and the State appealed.

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

No appearance for defendant.

BROCK, J.

We have examined G.S. 14-409 and the warrant under which defendant was charged in this case, and we agree with the ruling of the trial judge.

Affirmed.

BRITT, J., concurs.

GRAHAM, J., dissents.

STATE OF NORTH CAROLINA v. ELMER JAMES MOORE

No. 7018SC288

(Filed 24 June 1970)

APPEAL by defendant from *Crissman, J.*, 16 February 1970 Criminal Session, Superior Court of GUILFORD County.

Defendant was indicted for breaking and entering, larceny, and receiving. He was represented by court-appointed counsel and entered a plea of not guilty to all counts. The jury was selected and impaneled and the testimony of one witness for the State was taken. At that point, defendant entered a plea of guilty to receiving. The court examined the defendant with respect to the voluntariness of his plea. A transcript of his plea was taken and sworn to by defendant before the Deputy Clerk of Superior Court. The transcript and the court's adjudication appear in the record. His plea was accepted and, prior to sentencing, the court heard the testimony of five other witnesses for the State and one witness for defendant. From judgment entered, defendant appealed. The court appointed his trial counsel to perfect the case on appeal.

Attorney General Robert Morgan by Assistant Attorney General Sidney S. Eagles, Jr., and Staff Attorney Russell G. Walker, Jr., for the State.

Norman B. Smith for defendant appellant.

MORRIS, J.

The record contains no assignments of error. Defendant's counsel states in his brief that since he knows of no error committed by the court, no assignments of error were made. He further states in his brief that defendant has been asked if he wished to supplement the brief with arguments of his own, but the defendant has declined to do so. However, defendant has filed in this Court several documents, including a copy of the record on appeal filed by his counsel, which he refers to as "entirety of all records and contentions enclosed herein." By his letter to the Clerk, he asks that they be filed and directed for full review. This we have assumed is defendant's own supplemental brief. We have ordered that it be added to the record filed without printing.

We have carefully examined the record and the documents sub-

mitted by defendant and are in accord with counsel's conclusion that in the trial of this matter there was

No error.

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

LESLIE T. STARR, JR., EMPLOYEE v. CHARLOTTE PAPER COMPANY, INC., EMPLOYER AND CONTINENTAL CASUALTY COMPANY, CARRIER

No. 7026IC374

(Filed 15 July 1970)

1. Master and Servant § 94— findings by Industrial Commission — sufficiency

The Industrial Commission is not required to make a finding as to each fact presented by the evidence.

2. Master and Servant § 56— workmen's compensation — injury causing paralysis of legs — subsequent injuries from burns — proximate cause

The Industrial Commission did not err in its conclusion that plaintiff's compensable spinal injury which caused permanent paralysis of his legs was a proximate cause of burns received by plaintiff on the lower portions of his body when a cigarette he had been smoking set the clothing on his bed on fire, where there was ample evidence to support the Commission's findings that the original injury caused a spasm in the muscles of plaintiff's legs, causing him to put his cigarette in an ash tray on his wheelchair beside his bed while he straightened his legs so the muscle spasm would relax, and that plaintiff suffered the burns because of a loss of feeling and sensitivity in the lower portions of his body as a result of the original compensable accident, the act of leaving the cigarette where it could set fire to the bed clothing being insufficient to break the chain of causation between the original injury and the burns sustained.

3. Master and Servant §§ 56, 66— workmen's compensation — original compensable injury — subsequent injury at home — proximate cause

While plaintiff's original compensable injury must be one of the direct and natural causes of a subsequent injury suffered in plaintiff's home in order for plaintiff to recover under the Compensation Act for hospital and medical expenses incurred in the treatment of the subsequent injury, the original injury need not be the sole cause of the second injury.

4. Master and Servant § 58— workmen's compensation — negligence by injured employee

Acts of negligence of the employee do not bar compensation for an original injury arising out of and in the course of employment.

5. Master and Servant §§ 56, 58— workmen's compensation — injury subsequent to compensable injury — proximate cause

An injury subsequent to a compensable injury, whether an aggravation of the original injury or a new and distinct injury, is compensable if it is the direct and natural result of the compensable primary injury, unless it is the result of an independent intervening cause attributable to claimant's own intentional conduct.

6. Master and Servant §§ 56, 58— workmen's compensation — burns suffered subsequent to compensable injury — smoking in bed — proximate cause — intervening cause

Burns suffered by plaintiff when the clothing of his bed caught fire were the direct and natural results flowing from a compensable injury which had rendered plaintiff a paraplegic, and the conduct of plaintiff in smoking in bed was not such an independent intervening cause attributable to plaintiff's "intentional conduct" as to defeat recovery for medical and hospital expenses incurred in treatment of the burns.

APPEAL by defendants from an opinion and award of the North Carolina Industrial Commission (Commission) filed 18 February 1970.

On 7 July 1969 plaintiff filed a claim against the defendants for payment of all hospital and medical expenses incurred by him for the treatment of burns allegedly received by him on 17 March 1969. This claim was asserted under an order of the Commission filed 2 June 1965 approving a compromise settlement agreement (agreement) between the parties dated 27 May 1965.

The agreement set forth, among other things, that the plaintiff herein was an employee of the Charlotte Paper Company, Inc., who was subject to the provisions of the workmen's Compensation Act (Act) and whose insurance carrier was the Continental Casualty Company; that plaintiff employee suffered a compensable injury (original injury) on 8 October 1963 when he lost control of the automobile which he was driving in the course of his employment for the employer and suffered a spinal injury which resulted in the employee's being paralyzed in both legs and sustaining a loss of bladder and bowel control; that the sum of $35,000 was to be paid plaintiff, as a compromise, in full settlement of his right to weekly compensation benefits; with the exception, however, that such lump sum payment was not in satisfaction of reasonable and necessary nursing services, medicine, sick travel, medical, hospital and other treatment or care during the life of the plaintiff as required under the provisions of the Act and as required by the Act in cases in which

total and permanent disability results from paralysis resulting from an injury to the spinal cord. G.S. 97-29; G.S. 97-41.

By order filed 2 June 1965, the Commission approved the lump sum payment and in the award ordered:

> "Defendant shall pay all medical expenses incurred by plaintiff as a result of the injury by accident giving rise hereto, during the entire life of the said plaintiff, when bills for same have been submitted to and approved by the North Carolina Industrial Commission."

A hearing was held on the claim of plaintiff filed 7 July 1969 by Deputy Commissioner Leake of the Commission after the defendants denied that the medical expenses of plaintiff resulting from the fire on 17 March 1969 were covered by the order filed 2 June 1965.

On 5 December 1969 the hearing commissioner filed an opinion and award ordering defendants to "pay all hospital and medical expenses incurred by the plaintiff as a result of the burns suffered by him on March 17, 1969." Upon appeal to the Commission, the Full Commission adopted as its own the findings of fact, conclusions of law and award filed in this case on 5 December 1969 by the hearing commissioner.

The defendants appealed to the Court of Appeals.

Hubert E. Olive, Jr., for plaintiff appellee.

Kennedy, Covington, Lobdell & Hickman by Edgar Love, III, for defendants appellants.

MALLARD, C.J.

The evidence for the plaintiff tended to show, except where quoted, that after the accident of 8 October 1963, and continuously since that time, he was paralyzed from the tenth vertebra down. On 17 March 1969 he could not walk because of the original injury and used a wheelchair. He lived with his parents in Charlotte. Plaintiff testified:

> "* * * After the accident, I was paralyzed from the tenth vertebra down and had no sensation whatsoever.
>
> That condition was the result of the accident on October 8, 1963, and has not changed since that time. Since then I have had no feeling whatsoever in my legs and lower abdomen. Feeling or sensitivity stops right around the navel.
>
> * * * I have a room of my own there in the home. It has

twin beds in it and mine is against the wall. I put the wheelchair beside it and get in bed. There is a nightstand there. I had a sheet and blanket on my single bed and I had to put pillows between my legs because I have right many muscle spasms. I sleep on a sheepskin pelt which I lay on and which comes right about my navel on down.

I woke up about 3:30 that night. My father had been ill and he had been sick that night and I called mother to get me some water. I lit a cigarette and put it in the ash tray in the wheelchair. I had a muscle spasm and pulled my covers down, back, and straightened my legs and pillows back, and covers.

I don't remember anything after that except coming to when the smoke woke me up.

Muscle spasm is contracture, legs jump around, kick around. I have no control over this. When I had the muscle spasm, I pulled the sheet and blanket back.

My wheelchair was beside the bed at that time. The ash tray was in the wheelchair and the bed was a little over a foot from the wheelchair.

To help the muscle spasm in my legs, I moved it around and straightened the pillows and pulled the covers back up. The pillows are the ones I had between my legs.

The next thing I remember was smoke. After I smelled it, I realized there was fire and I reached down and tried to find it and called my mother.

* * *

I was semi-conscious.

I was burned on my left leg, on my abdomen, on the right ankle below my navel. Before I smelled the smoke I did not feel a thing. Even in the hospital I did not feel any pain.

I was in the hospital for 73 days, my attending physicians being Dr. Chaplain, Dr. Walker, Dr. Berkeley, and Dr. Jett. The treatment I had was skin grafts on my left leg and lower abdomen. I had five of them."

The plaintiff's mother testified that at about 3:30 a.m. on 17 March 1969 she took him some water; that a little before 6:00 the plaintiff called to her; she smelled smoke; she went into her son's room and saw smoke over the foot of his bed; there was no flame; "the covers was just smoldered and burned"; and he had received burns and his legs were black and crusty looking.

There is medical evidence that on 19 December 1963 a physical examination of the plaintiff revealed:

> "Absence of voluntary motion of legs. The lower extremities are flaccid, are flexic, and there is total anesthesia below the 10th dorsal dermatome."

There is additional medical evidence that on 9 September 1964 "(t)his man has permanent, very extensive physical disability as a result of a fracture-dislocation in the low dorsal spine region, leaving him extensive paralysis of the legs, bowel, and bladder."

There is also medical evidence tending to show that on 17 March 1969 the plaintiff suffered second and third degree burns to the lower portions of his body.

Defendants' first three assignments of error relate to the failure of the hearing commissioner to find that the plaintiff (1) did not turn the light on in his room while smoking a cigarette, (2) went to sleep in a darkened room leaving a half-smoked cigarette burning in an ash tray in a wheelchair less than a foot from his bed, and (3) that plaintiff went to sleep without putting out the cigarette he had been smoking or returning the ash tray to the night stand or checking to see if his bed clothes had come in contact with the burning cigarette.

[1] The Commission is not required to make a finding as to each fact presented by the evidence. *Guest v. Iron & Metal Co.*, 241 N.C. 448, 85 S.E. 2d 596 (1955); *Morgan v. Furniture Industries, Inc.*, 2 N.C. App. 126, 162 S.E. 2d 619 (1968). The facts mentioned in appellants' first three assignments of error are not material in this case. The failure to so find was not prejudicial error. *Thomason v. Cab Co.*, 235 N.C. 602, 70 S.E. 2d 706 (1952).

[2] In assignments of error four and five, appellants assert that the hearing commissioner and the Commission committed error in finding that (1) "(t)he plaintiff's physical condition which resulted from the injury received in the accident of October 8, 1963, constituted a proximate cause of the injury and burns which occurred on March 17, 1969," and (2) "the fact that plaintiff had no feeling in the lower extremities and had muscle spasms of the leg and had to have his wheelchair against the bed constituted proximate cause of the burns received."

Neither of these two assignments of error fully set forth the findings of the hearing commissioner. What the hearing commissioner found with respect to these two assignments of error was as follows:

"The plaintiff's physical condition which resulted from the injury received in the accident of October 8, 1963, constituted a proximate cause of the injury and burns which occurred on March 17, 1969. Due to the earlier injuries the plaintiff had no feeling in his lower extremities and had muscle spasms of the legs. The muscle spasms made it necessary for him to turn back the covers, massage his legs, and cover himself again. His condition also made it necessary for him to have his wheelchair against the bed. These factors constituted proximate causes of the burns received. Also, the paralysis resulting from the previous injury kept the plaintiff from realizing that he was being burned over the areas heretofore described."

In the case of *Petty v. Transport, Inc.*, 276 N.C. 417, 173 S.E. 2d 321 (1970), the Court said that the Act should not be given a "technical, narrow and strict construction."

In the case of *Lawrence v. Mill*, 265 N.C. 329, 144 S.E. 2d 3 (1965), the Supreme Court said:

"In compensation cases the Commission finds the facts. If the findings have evidentiary support in the record, they are conclusive. However, the question whether the evidence is sufficient to support the findings is one of law to be determined by the courts. The Legislature has provided that the Workmen's Compensation Act shall be liberally construed but it does not permit either the Commission or the courts to hurry evidence beyond the speed which its own force generates."

In the case before us there was ample evidence for the Commission to find that the plaintiff suffered second and third degree burns on portions of his body because of a loss of feeling and sensitivity therein as a result of the original accident. It is clear from the evidence in this case that if the plaintiff had had normal feeling and sensitivity in the lower portions of his body, he could not have slept, to be awakened later by smoke, while the fire smoldered in his bed, "charred" his legs until they were "black and crusty looking," and caused second and third degree burns of the right lower abdomen, scrotum, penis, left thigh and left knee. The evidence tended to show that this lack of feeling and sensitivity resulted from the original injury. The seriousness of the burns was caused by the inability of the plaintiff to feel the burning. Moreover, the evidence tended to show that the original injury caused the spasm in the muscles of his legs, and this caused him to put his cigarette in the ash tray on his wheelchair while he was "straightening his legs" so that the muscle spasm would relax. Leaving the cigarette there where it could, if it

did, set fire to the bed clothing was a simple act of forgetfulness on the part of the plaintiff which was insufficient to break the chain of causation between the original injury and the burns sustained.

In the case of *Vause v. Equipment Co.*, 233 N.C. 88, 63 S.E. 2d 173 (1951), the Supreme Court said:

> "* * * (I)t must be borne in mind that the Act was never intended to provide the equivalent of general accident or health insurance.
>
> Hence, the fundamental fairness and logic of the requirement that to be compensable an injury must arise 'out of' the employment, *i.e.*, must in some reasonable sense spring from and be traceable to the employment. Accordingly, 'where an injury cannot fairly be traced to the employment as a contributing proximate cause . . . it does not arise out of the employment.' *Bryan v. T. A. Loving Co.*, 222 N.C. 724, 24 S.E. 2d 751, and cases cited.
>
> The hazards of employment do not have to set in motion the sole causative force of an injury in order to make it compensable. By the weight of authority it is held that where a workman by reason of constitutional infirmities is predisposed to sustain injuries while engaged in labor, nevertheless the leniency and humanity of the law permit him to recover compensation if the physical aspects of the employment contribute in some reasonable degree to bring about or intensify the condition which renders him susceptible to such accident and consequent injury. But in such case 'the employment must have some definite, discernible relation to the accident.' *Cox v. Kansas City Refining Co., supra.* See also 58 Am. Jur., Workmen's Compensation, Section 247.
>
> * * *
>
> While there must be some causal connection between the employment and the injury, nevertheless it is sufficient if the injury is one which, after the event, may be seen to have had its origin in the employment, *and it need not be shown that it is one which should have been foreseen* or expected." (Emphasis Added.)

[3] There is a distinction between the proximate cause doctrine in workmen's compensation cases and that applied in cases of tort. The proximate cause doctrine in this case requires that the original injury be one of the direct and natural causes of the subsequent injury. It is not necessary, however, in order that this plaintiff recover

hospital and medical expenses, that the original injury be the sole cause of the second injury. *Vause v. Equipment Co., supra;* Larson's Workmen's Compensation Law, § 13.11.

Defendants, in their assignment of error nine, contend that the Commission committed error in failing to find that the burns received by plaintiff on 17 March 1969 were caused by his own negligent misconduct. We do not agree.

[4] Acts of negligence of the employee do not bar compensation for an original injury arising out of and in the course of employment. *Howell v. Fuel Co.,* 226 N.C. 730, 40 S.E. 2d 197 (1946).

In the case of *State Compensation Ins. Fund v. Industrial Acc. Com'n.,* 1 Cal. Rptr. 73 (1959), the District Court of Appeal, First District, Division 1, California, said:

> "Moreover, the employee's negligence actually is as irrelevant in the second injury as it admittedly is in the first. The fact that the workman suffers a secondary consequence of the first injury should not work a mystic change in the nature of the applicable test. * * *"

In this California case the court seems to hold that no intervening cause can break the chain of causation unless the original injury contributes nothing whatever to the final result.

In Larson's Workmen's Compensation Law, § 13.11, this holding of the California court is disapproved, and in doing so, it is there said:

> "On the other hand, most courts, in the search for a simple formula, have gone too far in the other direction when they have announced a general rule that the chain of causation between the original injury and the later consequences is broken by the claimant's negligence. * * *"

[5] Under the topic "RANGE OF COMPENSABLE CONSEQUENCES" in Larson's Workmen's Compensation Law, § 13.00, the general rule is stated:

> "When the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury likewise arises out of the employment, unless it is the result of an independent intervening cause attributable to claimant's own intentional conduct."

Also in Larson's Workmen's Compensation Law, § 13.11, it is said:

"The basic rule is that a subsequent injury, whether an aggravation of the original injury or a new and distinct injury, is compensable if it is the direct and natural result of a compensable primary injury."

[6] We think that the second and third degree burns suffered by plaintiff were the direct and natural results flowing from the original injury. The conduct of the plaintiff, a paraplegic, in smoking in bed was not such an independent intervening cause attributable to plaintiff's "intentional conduct" as to defeat recovery in this case.

Defendants, in their assignments of error six, seven and eight, contend that the Commission erred in concluding that the plaintiff is entitled to recover of the defendants all hospital and medical expenses incurred by the plaintiff as a result of the burns suffered by him on 17 March 1969. We do not agree.

The material facts found by the Commission are supported by the competent evidence. When the Act is liberally construed, as we are required to do, we are of the opinion and so hold that the Commission correctly held that the burns accidentally sustained by plaintiff on 17 March 1969 are a consequent of the original injury, and the opinion and award of the Commission ought to be and is affirmed.

Affirmed.

PARKER and HEDRICK, JJ., concur.

ROBERTS COMPANY v. ALADDIN KNIT MILLS, INC.

No. 7011SC80

(Filed 15 July 1970)

1. Trial § 3— motion for continuance — discretion of court

A motion for 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.

2. Trial § 51— motion to set aside verdict as contrary to evidence — discretion of court

Defendant's motion to set aside the verdict as being against the weight of the evidence is addressed to the sound discretion of the trial judge, and his ruling thereon is not reviewable on appeal in the absence of abuse of such discretion.

3. Trial § 49— newly discovered evidence — new trial — rebuttal evidence

Evidence which is merely contradictory of the evidence of the adverse party is insufficient to invoke the discretionary power of the court to order a new trial for newly discovered evidence.

4. Sales §§ 10, 15; Trial § 40— goods sold and delivered — counterclaim for breach of warranty — issues — burden of proof of compliance with warranty

In this action to recover the balance of the purchase price for machinery sold and delivered and for services rendered in installing the machinery wherein defendant counterclaimed for the down payment it had made on the machinery and for damages allegedly incurred because of plaintiff's breach of warranty, the issues submitted to the jury adequately presented the entire case, and any relevance in defendant's contention that the burden of proof was placed incorrectly on the question of whether the machines complied with the warranty was dispelled by the jury's determination that there was no warranty.

5. Trial §§ 10, 45; Contracts § 29; Damages § 16— issue of damages — necessity for dollar amount in verdict — expression of opinion by court

Where the jury originally answered the issue of damages as "amount specified in contract," the trial judge did not suggest an answer to the jury in violation of G.S. 1-180 when he informed the jury that the verdict should be in some dollar amount and inquired if they intended the amount set forth in the complaint, and all members of the jury confirmed that this was their intention and agreed to such amount which had been written on the issue sheet by the jury foreman.

6. Contracts § 29— action on contract — recovery of amounts due on installment — lack of acceleration clause

In this action to recover the balance of the purchase price for machinery sold and delivered, the trial court did not err in directing in its judgment that plaintiff is entitled to recover in this action only such portion of the indebtedness as was due at the time the action was filed, where the written contract sued on obligated defendant to pay the purchase price of the machinery in monthly installments and contained no acceleration clause making the entire contract price due if defendant defaulted in paying any monthly installment.

APPEALS by plaintiff and defendant from *McKinnon, J.*, August 1969 Civil Session of LEE Superior Court.

This civil action was instituted on 6 January 1969 in the Superior Court of Lee County to recover balance of purchase price for machinery sold and delivered and for services rendered in connection with installation of the machinery in defendant's mill at Lincolnton, N. C. On 6 February 1969 defendant filed motion to stay the action pending determination of a prior action brought by defendant against plaintiff in New York. On the same date defend-

ant filed answer, admitting purchase of the machinery for the agreed price, making of a down payment, but denying liability for the balance. In a first further answer defendant alleged that plaintiff had warranted the machinery in certain respects, that the machinery did not answer to the warranties and was not as represented, and that within a reasonable time after learning of the breach of the warranties defendant had elected to rescind. In a second further answer defendant alleged it had suffered certain damages by incurring costs of removing the equipment, loss of production, wasted material and labor, loss of profits, and in other respects. Defendant counterclaimed for the down payment it had made on purchase of the machinery and for damages it had suffered.

On 28 April 1969 defendant's motion to stay the action pending determination of the New York proceedings was denied by order of Judge George R. Ragsdale. In the same order the case was set peremptorily as the first jury case for trial at the 4 August 1969 Session of Lee Superior Court.

On the 1969-70 schedule of superior courts for Lee County, a criminal session was set for the first week in August and a civil session was set for the week commencing 28 July 1969. On 17 June 1969 plaintiff's counsel notified North Carolina counsel who had filed answer for defendant of this change in the court's schedule and on 24 June 1969 plaintiff's counsel received a reply stating that the North Carolina firm of attorneys who had filed answer for defendant had withdrawn from the case. On 3 July 1969 plaintiff's attorney issued a calendar notice on the form in use in the courts of Lee County requesting the case be calendared for trial at the session beginning 28 July 1969 and referred to Judge Ragsdale's order of 28 April 1969. A copy of this notice was sent to New York attorneys for defendant. On 11 July 1969 the clerk of Lee Superior Court received a letter from the New York attorneys requesting continuance of the trial until October 1969. One member of the New York firm of attorneys was chief executive officer and principal stockholder of defendant corporation at the time of institution of this action. This New York firm represented defendant in the action in the State of New York. On 16 July 1969 the New York attorneys, including the chief executive officer of defendant corporation, came to Sanford, N. C., and contacted attorney Robert L. Gavin with reference to appearing for defendant in the pending case. On that date the New York attorneys with Mr. Gavin also attempted settlement negotiations with plaintiff's attorney and the president of plaintiff corporation, but no settlement resulted.

Upon call of the calendar at the opening session of superior court on 28 July 1969, attorney Robert L. Gavin appeared for defendant and again moved for a continuance of the case, at the same time informing the court and plaintiff's counsel that the New York action had been dismissed by filing a stipulation of discontinuance in that action on 22 July 1969. Motion to continue was denied.

Upon the trial both parties introduced evidence. Defendant's evidence tended to show that the machines had not worked properly and that extensive reworking and repair by plaintiff had not made them work. Plaintiff's evidence in rebuttal tended to show that the type of raw material which defendant attempted to process through the machines, being solution dyed acrylic fiber, had not been properly pre-processed before defendant attempted to process it through the machinery. Defendant's motion for nonsuit at the close of all the evidence was denied.

Issues were submitted to the jury and answered as follows:

"1. Were the AcroFeed-DynaCards unfit for the ordinary purposes for which they were manufactured?

ANSWER: No

2. Did Roberts at the time of contracting have reason to know of the particular purpose for which the AcroFeed-DynaCards were required and that Aladdin was relying on Roberts' skill or judgment to furnish equipment for that purpose?

ANSWER: No

3. If so, were the AcroFeed-DynaCards unfit for that purpose?

ANSWER: .....

4a. Did the Roberts Company warrant to Aladdin Knit Mills, Inc. that the AcroFeed-DynaCards would effectively convert staple into first quality acrylic sliver in the manufacturing process in which they were to be used by Aladdin?

ANSWER: No

4b. Did Roberts warrant to Aladdin that the AcroFeed-DynaCards would produce such sliver at the rate of 90 to 120 pounds per hour in the manufacturing process in which they were to be used by Aladdin?

ANSWER: No

4c. Did Roberts warrant to Aladdin that the AcroFeed-DynaCard would produce sliver of a quality to meet US Gov-

ernment specifications for acrylic sandbag cloth in the manufacturing process in which they were to be used by Aladdin?

ANSWER: No

5. If so, did Roberts Company breach any of such warranties?

ANSWER: .....

6. If so, did Aladdin within a reasonable time give notice of its election to rescind the contract?

ANSWER: .....

7. If so, what amount is Aladdin entitled to recover of Roberts?

ANSWER: .....

8. If not, in what amount is Aladdin indebted to Roberts?

ANSWER: Amount specified in contract. $43,719.65."

The court entered judgment reciting the verdict and containing the following:

"[T]he Court upon the evidence and pleadings having found as a conclusion of law:

1. That the terms of payment of the subject machinery contract were '20% down, with balance payable in not less than 36 nor more than 60 monthly installments.'

2. That the unpaid balance on said machinery contract is $40,731.95 and the defendant was entitled to pay the same in 60 equal monthly installments commencing October 28, 1968, with interest on each installment after maturity at the rate of 6% per annum.

3. That plaintiff is entitled to recover from the defendant in this action only such portion of the said indebtedness as was due at the time the action was filed on January 6, 1969, to wit:

(a) Three (3) monthly installments on the machinery contract of $678.86 each with interest thereon from their respective due dates of October 28, November 28, and December 28, 1968; and

(b) The sum of $2,987.70 representing the purchase price of 132 sliver cans with interest thereon at the rate of 6% per annum from September 18, 1968.

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

1. That the defendant is indebted to the plaintiff in the amount of $43,719.65.

2. That of said indebtedness plaintiff is entitled to have and recover of the defendant in this action the sum of $5,024.28 with interest at the rate of 6% per annum, on the monthly installments of $678.86 from October 28, November 28, and December 28, 1968, respectively, and on the sum of $2,987.70 from September 18, 1968, until paid, together with the costs of this action.

3. That the defendant's counterclaim against the plaintiff be, and the same is hereby dismissed.

Entered this 23 day of August, 1969, at Lumberton, North Carolina, the parties having stipulated and agreed to the entry of said Judgment out of Term and out of District.

s/ Henry A. McKinnon, Jr.
Judge"

Both parties excepted and appealed to the Court of Appeals.

McDermott & Parks, by George M. McDermott and O. Tracy Parks, III, for plaintiff appellant-appellee.

James M. Kimzey for defendant appellant-appellee.

PARKER, J.

Both parties have filed briefs in their capacities both as appellant and as appellee. Rule 28 of the Rules of Practice in the Court of Appeals provides that the appellant's brief "shall contain, properly numbered, the several grounds of exception and assignment of error with reference to the pages of the record, and the authorities relied on classified under each assignment." Neither party as appellant has complied with this rule. This failure has added considerably to our difficulty in attempting to review their contentions, particularly in view of the large number of assignments of error noted in the record on appeal by the defendant as appellant. We have nevertheless undertaken to review both appeals upon the merits.

DEFENDANT'S APPEAL

[1, 2] Defendant-appellant contends there was error in the trial court's discretionary rulings on motion for continuance, motion to

set aside the verdict as being against the weight of the evidence, and motion for new trial because of newly discovered evidence. We find these contentions to be without merit. The record reveals that defendant's motion for a continuance was given most careful consideration by Judge McKinnon, who entered an order dated 28 July 1969 making full findings of fact from which the court concluded that "any lack of readiness for trial at this session results from a lack of due diligence on the part of defendant." (The court also found from the facts that no part of this lack of diligence is due to any action on the part of attorney Gavin.) A motion for 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. Defendant's motion to set aside the verdict as being against the weight of the evidence was also addressed to the sound discretion of the trial judge, and his ruling in this respect is not reviewable on appeal in the absence of abuse of such discretion. *Goldston v. Chambers,* 272 N.C. 53, 157 S.E. 2d 676. Review of the entire record in this case clearly reveals there was no abuse of discretion on the part of the trial court.

[3] The newly discovered evidence which defendant contends entitled it to a new trial amounted essentially only to evidence in rebuttal to plaintiff's evidence. Evidence "which is merely contradictory of the evidence of the adverse party, is insufficient to invoke the discretionary power of the court to order a new trial for newly discovered evidence." 7 Strong, N.C. Index 2d, Trial, § 49, p. 366.

[4] Defendant-appellant also argues there was error in submission of the issues to the jury, in that so defendant contends, plaintiff had the burden of proving that the machines failed to work properly because of some factor outside of its warranty, and that the issues did not properly reflect this burden. In our opinion the issues submitted to the jury did adequately present the entire case, and any relevance in defendant-appellant's contention that the burden of proof was placed incorrectly on the question as to whether the machines complied with the warranty, was dispelled by the jury's determination that there were no warranties.

[5] Defendant-appellant also contends that the trial judge violated G.S. 1-180 in taking the verdict of the jury. The jury originally answered issue 8, as to what amount Aladdin was indebted to Roberts, in the form "amount specified in contract." The trial court informed the jury that the verdict should be in some dollar amount,

and inquired if they intended the amount set forth in the complaint. All members of the jury confirmed that this was their intention and agreed to the figure of $43,719.65 as was written on the issue sheet by the jury foreman. Under the circumstances, we find there was no expression of opinion by the trial judge in violation of G.S. 1-180 as is contended by defendant-appellant. The judge did not, by his question, suggest an answer to the jury; he merely elicited from them confirmation of the clear implication of the answer which they had originally given to issue No. 8. There was no error in this respect.

We have carefully examined defendant-appellant's other assignments of error and find them to be without merit.

PLAINTIFF'S APPEAL

[6] Plaintiff-appellant's single contention made in its appeal is that there was error in the form of the judgment which directed that plaintiff is entitled to recover in this action only such portion of the indebtedness as was due at the time the action was filed. Plaintiff's argument in this respect is that the contract was in effect repudiated by defendant, and for that reason judgment should have been rendered for the entire contract price. However, the contract sued upon by the plaintiff was in writing and obligated defendant to pay the purchase price for the machinery only in monthly installments. There was no acceleration clause making the entire contract price due in event defendant should default in paying any monthly installment. "In the absence of such a provision for acceleration, a failure to pay some of the installments entitles the creditor to recover only the amount of the unpaid installments." 17A, C.J.S., Contracts, § 507, p. 811. The courts will enforce the contract of the parties, but they may not write a new agreement for them.

Upon careful examination of the entire record as it relates to the appeals of both parties, we have found no error.

No error.

CAMPBELL and HEDRICK, JJ., concur.

IRVIN A. BROADNAX, ADMINISTRATOR OF THE ESTATE OF FLOYD BOONE, DECEASED v. ROBERT LEE DELOATCH

No. 706SC307

(Filed 15 July 1970)

1. Automobiles § 44— res ipsa loquitur — sufficiency of evidence

Plaintiff administrator's evidence was sufficient to make out a *prima facie* case of defendant's negligence in the accident resulting in the intestate's death, the doctrine of *res ipsa loquitur* being applicable, where the evidence would support a finding that the defendant, while driving on a clear night upon a 21-foot wide highway which was dry and free from defects, and without interference from any other traffic, drove his car off of the pavement and into the rear of the car occupied by plaintiff's intestate while that car was parked on the dirt shoulder of the road entirely off the pavement and with its lights burning.

2. Negligence § 29— sufficiency of evidence of negligence

Where plaintiff's evidence was sufficient to support a finding that defendant was negligent in at least one of the respects alleged in the complaint and that such negligence was a proximate cause of the injuries and death of the deceased, the evidence was sufficient to withstand defendant's motion for nonsuit.

APPEAL by plaintiff from *Peel, J.*, November 1969 Session of NORTHAMPTON Superior Court.

This is a civil action in which plaintiff seeks to recover damages for the wrongful death of his intestate which plaintiff alleged was proximately caused by defendant's negligence. In his complaint plaintiff in substance alleged: Plaintiff is administrator of the estate of Floyd Boone, deceased. On the night of 9 July 1966, Boone drove his automobile in a westerly direction on N.C. Highway 195. At a point about one mile east of Seaboard, N. C., he drove his car to the right shoulder of the road and came to a stop with all wheels of his automobile off of the paved portion of the highway and with all lights on the car burning. While Boone's car was so parked, defendant Deloatch, driving his car also in a westerly direction along the same highway, drove off of the paved portion of the highway and onto the shoulder of the road, colliding with the rear of Boone's parked automobile. The collision threw Boone from his car and caused the injuries which resulted in his death a few hours later.

Plaintiff alleged the collision and Boone's death were proximately caused by defendant's negligence (1) in driving his car in a careless and reckless manner in violation of G.S. 20-140, (2) in driving while under the influence of alcohol, (3) in driving in excess of the posted speed limit, and (4) in carelessly and negligently driving his vehicle off of the travel lane of the highway and onto the dirt

shoulder and into the rear of Boone's parked automobile in violation of G.S. 20-146.

Defendant answered, denying the material allegations of the complaint and pleading as a further answer and defense that Boone had operated his vehicle upon the public highways while in an intoxicated condition and that this constituted contributory negligence.

Plaintiff offered evidence to establish the death of his intestate on 10 July 1966 as a result of severe cerebral concussion, the appointment of plaintiff as administrator of his estate, and the age, good health, and earning capacity of the deceased immediately prior to the collision. Relative to the circumstances of the collision, plaintiff presented witnesses who testified in substance (except where quoted) as follows:

The investigating highway patrolman testified: The highway where the collision occurred ran in a generally east-west direction, was straight and level, was paved with smooth asphalt for a width of 21 feet, was marked with a center line in the middle and a solid white line on each side. The highway was free from defects, and had a shoulder eight feet wide. The weather was clear, and the road dry. The patrolman was called to the scene about 11:15 p.m. on 9 July. He found defendant's 1961 Ford automobile in the center of the highway headed west. It was extensively damaged on the right front and the radiator was broken. A 1959 Chevrolet was sitting almost perpendicular to the highway in a road ditch off of the highway on the north side near a farm path. The entire rear of the Chevrolet was extensively damaged. Marks on the highway led back from the wheels of defendant's Ford toward the farm path. Broken glass and debris were on the north lane and on the north edge of the highway 116 feet distant from the front of defendant's Ford. Twelve feet of scuff marks led from the edge of the highway to the rear of the Chevrolet. Defendant was at the scene and told the patrolman that he was the driver of the Ford, that he was headed in a westerly direction and "started to pass a vehicle and was meeting oncoming traffic and had to pull abruptly back in his right lane and when he did he hit the rear of this vehicle here near the shoulder or on the shoulder."

Pearlean Jordan testified: She knew both the defendant and the deceased. On the night of 9 July 1966 she was driving in a westerly direction toward Seaboard. As she came to the Sante Fe Inn, she slowed to permit defendant's car to pull out ahead of her. "He was coming out so reckless like." She followed defendant's car and there were no other cars on the road, no car passed her, and she met no

other car. Defendant's car hit something, "and the lights went up." She drove up and stopped, and defendant came to her car and told her "he had hit Floyd Boone." She walked up and found Boone lying on the ground beside a path which led to his home, with his head to the edge of the highway. Blood was running out of his mouth. She knew Boone's car, which Boone had just gotten that afternoon. Boone's car was "in the farm path and headed or turned and knocked back to the way we were coming. I know that from the lights, the lights went up like that and I know."

Daniel Boone, a son of decedent, testified: The Santa Fe Inn is approximately a mile and a half from his home. He was with his father at the Sante Fe Inn about 10:30 or 11:00 p.m. on 9 July 1966. His father left the Inn, driving west from the Inn to go home. About five minutes later Daniel left the Inn and went to the scene of the accident about one mile and a quarter from the Sante Fe Inn. When he got there, his father's car was in the ditch with the lights on, "turned in the opposite direction headed back east in the field." Defendant's car was down the road approximately 60 feet and in the center of the highway. He observed this about six or seven minutes from the time he saw his father at the Sante Fe Inn. His father was lying on his back in the farm path with a bad cut on his throat and appeared to be unconscious.

Paul Boone, another son of decedent, testified: On the night of the accident he was at the Sante Fe Inn and saw his father and brother there. He also saw the defendant at the Inn. He saw defendant drink a beer but did not see his father drink any. He saw both his father and the defendant when they left. Defendant left about five minutes or more after his father left. Defendant left "with tires squalling when he pulled out of the driveway." The witness next saw defendant's car five or six minutes later. It was in the center of the highway and the right front fender was damaged. His father was lying in the path behind his car, which was turned around in an easterly direction headed back in the field. The left-hand rear fender on his father's car was bent. "The lights were still on and the doors jammed. There was not a glass cracked on it. None of the doors were open." His father was taken to the hospital that night and died the next morning.

Glenn Williams testified: He saw Floyd Boone on the afternoon of 9 July 1966 right after Boone got his new car. At that time Boone came by the shop where Williams and Boone's son were working and showed Williams his new car. Williams next met Boone about 9:30 that night when Boone came in the door at the Sante Fe Inn as

Williams was leaving. Later, about 10:00 or 10:30, Williams, with a passenger, Jesse Pierce, was driving on Highway 195 traveling east going toward the Sante Fe Inn when he saw the Boone car. "At that time I saw the Boone car pull off to the shoulder of the highway. I pulled up . . . The Boone car pulled off the shoulder of the road and stopped. The lights of the car were on." The Boone car was in the area where the path goes to the Boone home. Williams slowed down and went to another driveway and turned in. "[T]he Boone car was still parked on the shoulder of the road, the side of the road. It was off the pavement. . . . I drove in the path to turn around to go back to where Floyd's car was parked . . . but before I could turn around, my car got hung up in the gears and Jesse Pierce got out to work the gear lever to get it unstuck, and that time or about that time, the Deloatch car came along and ran into the back of the Floyd car and another car came along, and I had to sit there in the driveway and wait until those cars passed. While I was sitting in the driveway, the Deloatch car passed me at the pathway. It went on toward Seaboard. Mr. Floyd's car was sitting on the shoulder of the road. Deloatch hit him from behind and turned it around back toward the Sante Fe Inn. Deloatch's car stopped in the middle of the road after he hit him. I backed out the driveway and pulled off the road behind this car. Deloatch got out of the car. After the Deloatch car passed me, it hit Floyd's car. It was still on the road, it was on the right. I was sitting in the path and the Deloatch car passed me 'This way.' (pointing) And at the time the Floyd Boone car was sitting over here. I mean off of the road. . . . The Deloatch car came on down to the shoulder of the road. When I say shoulder of the road, I mean the dirt part. . . . At the time I turned into the path, I saw Mr. Floyd turn on the shoulder of the road. I saw him turn the car off the road and the next time I saw him he was lying in the path. Before the accident, he pulled off of the highway onto the shoulder and after the accident, he was in the driveway. . . . He was just lying in the driveway."

On cross-examination Williams admitted it was dark and he could not see who was driving the Boone car, but testified he knew the car which Boone had just bought that afternoon. "I didn't know if it was Mr. Floyd Boone or 'Dan' driving the car. I know that the car pulled over on the shoulder and I was going back up there to see what was wrong."

Jesse Pierce testified: He was a passenger in the Williams car. "When I first saw the Floyd Boone car it was going in the gate

where they go home. The car was moving, it was going off the road into his gate." The Williams car slowed down and went "to the other gate and pulled in there and the gear got hung. I got out to unhang them and two cars were coming up the road and I got the gears unhung and set the hood down and I saw the lights flash on. . . . When I said the lights flashed, that was Mr. Boone's car. I did not notice Mr. Boone's car before his lights flashed. It had lights on and I heard a BAM-A-LAM and I saw the lights flash around. At the time of the sound, the Boone car turned around. Just before the sound, it was sitting in the gate off the road in the path. The Boone car pulled off the road before the gears got hung. We were going back there. At the time I was putting the hood down, the Boone car was still there where it had stopped."

At the conclusion of plaintiff's evidence defendant's motion for nonsuit was allowed and plaintiff appealed.

James R. Walker, Jr., for plaintiff appellant.

Charlie D. Clark, Jr., for defendant appellee.

PARKER, J.

[1, 2] This case should have been submitted to the jury. From plaintiff's evidence the jury could legitimately have found that defendant, while driving on a clear night upon a 21-foot wide dry paved highway which was free from defects, and without any interference from other traffic, drove his car off of the pavement into the rear of the car occupied by plaintiff's intestate while that car was parked on the dirt shoulder of the road entirely off of the pavement and with its lights burning. "When a motor vehicle leaves the highway for no apparent cause, it is not for the court to imagine possible explanations. *Prima facie,* it may accept the normal and probable one of driver-negligence and leave it to the jury to determine the true cause after considering all the evidence — that of defendant as well as plaintiff." *Greene v. Nichols,* 274 N.C. 18, 161 S.E. 2d 521. Plaintiff's evidence was sufficient, therefore, to support a finding that defendant was negligent in at least one of the respects alleged in the complaint and that such negligence was a proximate cause of the injuries and death of the deceased. That was all plaintiff was required to show in order to withstand the motion for nonsuit. *Funeral Home v. Pride,* 261 N.C. 723, 136 S.E. 2d 120.

Appellee contends nonsuit was warranted because of a material variance between plaintiff's allegations and proof. In his brief appellee states that plaintiff's witness Williams testified he "had seen

Floyd Boone get out of his car and he was on the shoulder of the road just when Robert Deloatch passed and ran into the back of his car." Appellee contends this constituted a material variance from the allegation in plaintiff's complaint that Boone was thrown from the car. We question whether such a variance, had it existed, should be considered material. However, we do not find it necessary to decide that question, since in the record before us we find no such testimony as is recited in appellee's brief from the witness Williams or from any other witness. There was testimony that following the collision the doors on Boone's car were found jammed shut and his body was found lying on the ground outside the car. However, there was also testimony that the collision was of such force as to turn Boone's car completely around. In the process a door could have been sprung open, Boone ejected, and then the door slammed shut. In any event, on the record before us, whether Boone got out of his car before the collision or whether, as alleged in the complaint, he was thrown out as a result of the collision, were matters for the jury to determine.

The judgment of nonsuit is

Reversed.

CAMPBELL and VAUGHN, JJ., concur.

BETTY SANDERS WILLIAMSON, ADMINISTRATRIX OF LARRY EUGENE SANDERS, DECEASED v. REBECCA BRENDA MCNEILL, DANIEL LONNIE CHEEK AND LONNIE THOMAS CHEEK

No. 7019SC289

(Filed 15 July 1970)

1. Automobiles § 83— automobile accident — intestate who voluntarily lay on highway — contributory negligence

Evidence tending to show that the plaintiff's intestate voluntarily lay upon an unlighted rural road at night, where he was struck and fatally injured by defendant's automobile, *held* to disclose the intestate's contributory negligence as a matter of law.

2. Trial § 22— nonsuit — reasonable inference

A reasonable inference is valid on nonsuit but speculations are not.

3. Automobiles § 89— automobile accident — intestate who voluntarily lay on highway — last clear chance

Evidence that the plaintiff's intestate, and two other persons, had voluntarily lain on an unlighted rural road at night; and that the defendant motorist, who was driving at a speed of 50 mph, had perhaps 150 or 200 feet — that is, from less than two to as much as 2.6 seconds — within which to recognize that the dark shapes on the road ahead of her were the intestate and his companions, *held* insufficient to take the case to the jury on the doctrine of last clear chance.

HEDRICK, J., dissents.

ON certiorari to review trial before *Lupton, J.*, at the 13 May 1969 Session of RANDOLPH Superior Court.

This is an action for damages for wrongful death of plaintiff's intestate, her son, by virtue of the alleged negligence of the defendants in running over and killing said intestate, age 18, on the night of 30 August 1966. The complaint alleges that intestate was lying on the highway in a helpless condition at the time he was struck by defendants' automobiles. In their answers defendants alleged that intestate and two other young men, a short time prior to being struck, lay down in the southbound traffic lane of the highway and were lying there in a prone position when struck; defendants pleaded contributory negligence. By way of reply plaintiff pleaded last clear chance.

Plaintiff's evidence tended to show: Defendant McNeill was driving her Ford south on Highway 705 accompanied by fellow employees returning to their homes after the second shift at an Asheboro factory. She was driving at about 50 mph in the open country (presumably in a 55 mph speed zone) and reached the scene of the accident 22 miles from the factory at about 1:25 or 1:30 a.m. A passenger in her car testified: "* * * I didn't see anything until we hit something, and it was just like we went over something, like that. Just like it might be a log laying here in the road * * *. It seemed to me like the car ran over something two or three times. * * * I don't know if Mrs. McNeill had applied brakes just before we went over this bump. * * *"

Defendants Cheek were the owner and operator of a Falcon automobile following the McNeill car at a distance of six or seven car lengths. A passenger sitting on the right in the front seat of the Falcon testified that he saw a white object at the right rear bumper of Mrs. McNeill's white car. The driver of the Falcon cut sharply to the left but struck another object in the center of the road. The passenger testified: "I do not remember seeing any brake lights come on on Becky's [defendant McNeill's] car * * * Yes sir, this all happened in a split second. * * * I don't remember hear-

ing any horn immediately before I saw this white object. * * * We later determined that the object I had seen at the right rear of the McNeill car and the object which Danny's car hit, was a human body. * * *"

The investigating patrolman testified that he found three bodies at the scene. He arrived from a southerly direction and first saw the body of Charles Leroy Carter, clothed in dark pants and a white tee shirt, lying with his head across the center line and his feet approximately five feet from the east shoulder. Approximately 29 feet north lay the bodies of Clinton Eugene Cox and intestate, lying together diagonally across the west lane, with intestate's body being further to the north, his head approximately a yard from the edge of the highway and his feet approximately one foot from the edge. The patrolman observed what appeared to be intestate's last gasp for breath. All three boys sustained skull fractures and lacerations which an expert witness said were of a type that could cause death and could have been caused by being struck by a motor vehicle. There was evidence of flesh, blood and hair on the underside of defendant McNeill's automobile.

At the close of her evidence, plaintiff submitted to judgment of voluntary nonsuit as to defendants Cheek; defendant McNeill's motion for judgment of involuntary nonsuit was granted and appeal entries were made. There were extensions of time within which to docket case on appeal because of plaintiff's substantial difficulty in having the transcript prepared, and this Court in conference on 1 December 1969 allowed writ of certiorari.

H. Wade Yates for plaintiff appellant.

Perry C. Henson and Daniel W. Donahue for defendant appellee, Rebecca Brenda McNeill.

BRITT, J.

Conceding, *arguendo,* that plaintiff's evidence made out a case of actionable negligence, we are of the opinion that such evidence also (1) established contributory negligence as a matter of law and (2) failed to establish the element of last clear chance which renders that doctrine applicable only when the defendant "* * * 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 * * *." See *Wade v. Sausage Co.,* 239 N.C. 524, 80 S.E. 2d 150.

[1] (1) *Contributory Negligence.* Plaintiff alleges that intestate "was lying in a helpless condition on said N. C. Highway"; defendant admits that intestate "was lying" on the highway but denies the remainder of the allegation. Plaintiff's evidence tended to show that intestate was wearing bluejeans and a blue plaid shirt. At least one, perhaps both, of the other boys were wearing white tee shirts and both were wearing bluejeans. Intestate was 18 years old, in the Army, and "in the best of health." His mother testified: "He did not consume intoxicating beverages to my knowing," and "* * * that evening, as far as I could tell neither of the boys had been drinking. No, sir, as far as I could tell he was not taking any type of strong medicine or taking any drugs." An investigating patrolman testified: "As a part of my investigation on each person I did try to determine if there was the odor of alcohol, and I did not detect the odor of alcohol on either."

[1, 2] All three boys had severe head injuries, but there is no evidence of any other injuries, or any impact prior to that with the car driven by the defendant. Defendant has speculated that they were playing "chicken," or in view of the evidence that the asphalt was warmer than the unseasonably cool air, that they lay down to get warm and fell asleep. Plaintiff has speculated that someone injured or drugged them and placed them there. A reasonable inference is valid on nonsuit but speculations are not; the only reasonable inference which we may draw in the absence of evidence more compelling than that which is before us now is that intestate, for whatever reason, voluntarily placed himself on the highway. In so doing, he failed to exercise for his own safety the care of an ordinarily prudent person and his negligence was a proximate cause of his unnecessary death. *Starnes v. McManus,* 263 N.C. 638, 140 S.E. 2d 15. See also *Barnes v. Horney,* 247 N.C. 495, 101 S.E. 2d 315.

[3] (2) *Last Clear Chance.* In *Wade v. Sausage Co., supra,* Ervin, J., set out the following statement of the doctrine of last clear chance:

> "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. [Citing numerous authorities.]"

In *Aydlett v. Keim,* 232 N.C. 367, 61 S.E. 2d 109, the court said: "The doctrine contemplates a last 'clear' chance, not a last 'possible' chance, to avoid the accident * * *. * * * The application of the last clear chance doctrine is invoked only where there was a sufficient interval of time between the plaintiff's negligence and his injury during which the defendant, by the exercise of reasonable care could or should have discovered the perilous position of the plaintiff in time to avoid injuring him."

The defendant was operating her automobile at a speed of 50 miles per hour (72 feet per second) along un unlighted rural road. She came over a knoll some 450 feet from the point at which the first two bodies were found; the road then leveled off at approximately 150 feet from that point. There is no evidence of the number of feet of highway made visible by her headlights. Judicial notice is taken of G.S. 20-129 and G.S. 20-131 which require visibility of 200 feet. Defendant had perhaps 150 or 200 feet, that is, from less than two to as much as 2.6 seconds within which to recognize that the dark shapes on the edge of the asphalt road were not shadows, patches, or something else inanimate, but were in fact human beings in peril, and not only to recognize this fact but to react in such manner as to prevent the tragedy.

The fact that Mrs. Shamburger was able to avoid striking the bodies when she subsequently arrived upon the scene driving her car in a southerly direction is of no probative value as evidence in the nature of an experiment. The conditions are too dissimilar: Her attention was attracted by persons standing in the road waving their arms; she was thus warned of some abnormal situation, and one body wearing a white tee shirt was separate from the others, lying in the middle of the road where it could be more easily seen.

The strongest precedent for plaintiff's case is *Wade v. Sausage Co., supra.* There, however, the plaintiff lay in the center of the road, defendant drove a truck (which, being higher, would allow better visibility), the headlights "rendered it [plaintiff's body] plainly visible * * * 225 feet away," and defendant was driv-

ing 45 miles per hour (at 65 feet per second, 3.5 seconds within which to react). The substantial difference in the facts now before us dictates a different result. The facts in our case show at best only a "possible chance" and not a "clear chance" to have averted the tragedy; in such a case the doctrine will not be applied.

In *Chaffin v. Brame,* 233 N.C. 377, 64 S.E. 2d 276, where the plaintiff collided with the rear of an unlighted truck parked on the highway at night, the court stated: "The duty of the nocturnal motorist to exercise ordinary care for his own safety does not extend so far as to require that he must be able to bring his automobile to an immediate stop on the sudden arising of a dangerous situation which he could not reasonably have anticipated. Any such requirement would be tantamount to an adjudication that it is negligence to drive an automobile on the highway in the nighttime at all. The law simply decrees that a person operating a motor vehicle at night must so drive that he can stop his automobile or change its course in time to avoid collision with any obstacle or obstruction *whose presence on the highway is reasonably perceivable to him or reasonably expectable by him.* It certainly does not require him to see that which is invisible to a person exercising ordinary care." (Emphasis added.)

In *Barnes v. Horney, supra,* plaintiff fell asleep lying between the ruts in a crooked country road lined with weeds and bushes. He was injured when he was struck by defendant's oil pan as defendant's car passed over him. The court held last clear chance inapplicable for the reason that there was no clear evidence that defendant should have recognized that the object which he saw in the road was a human body. It was not, in the words of *Chaffin,* "reasonably perceivable." We consider such a rationale appropriate as applied to facts of this instant case and for that reason hold last clear chance inapplicable to the facts of this case and unavailable to plaintiff in her effort to survive nonsuit.

For the reasons stated the judgment of the superior court is

Affirmed.

BROCK, J., concurs.

HEDRICK, J., dissents.

LILLIAN B. SAWYER v. WILLIAM SHACKLEFORD

No. 7012SC360

(Filed 15 July 1970)

1. Rules of Civil Procedure § 50— motion for directed verdict

Where a motion for a directed verdict is made under Rule 50 at the conclusion of the plaintiff's evidence, the trial judge must determine whether the evidence, taken in the light most favorable to the plaintiff and giving it the benefit of every reasonable inference which can be drawn therefrom, was sufficient to withstand defendant's motion for a directed verdict. G.S. 1A-1.

2. Landlord and Tenant § 8— defective stairs — patent defect — injury to plaintiff — directed verdict

In plaintiff's action to recover for personal injuries resulting from a fall down the allegedly defective stairs of a beach cottage rented from defendant, the trial court properly granted defendant's motion for a directed verdict at the close of plaintiff's evidence, where there were findings, supported by the evidence, (1) that the defective condition of the stairs was patent and that plaintiff had noticed this condition upon her arrival at the cottage, (2) that plaintiff had vowed a few hours before her fall that she would not use the stairs again, and (3) that plaintiff's negligence in hurrying down the stairs was a contributing cause to her injury.

3. Landlord and Tenant § 8— patent defects — duty of landlord

A landlord does not normally have a duty to warn his tenant about patent defects in the demised premises.

APPEAL by plaintiff from *Hobgood, J.*, 21 January 1970 Session of CUMBERLAND Superior Court.

Plaintiff was seriously injured when she fell down the steps leading from the second floor to the basement of a beach cottage at Emerald Isle owned by William Shackleford. Plaintiff and her family rented the cottage for the weekend of 29 October 1966 from a rental agent at Emerald Isle.

A motion was made by the defendant for directed verdict under G.S. 1A-1, Rule 50, at the close of the plaintiff's evidence. This motion was granted. Pursuant to a motion entered under G.S. 1A-1, Rule 52, Judge Hobgood made extensive findings of fact and conclusions of law. Judgment was entered for the defendant. In view of the detail of the following judgment, it is deemed unnecessary to provide a further statement of facts on this appeal.

"*JUDGMENT* of HOBGOOD, J. (Filed Jan. 21, 1970)

THIS CAUSE came on to be heard at the January 5, 1970, Session of the Superior Court Division of the General Court of

Justice, before his Honor Hamilton H. Hobgood, Judge Presiding, and a jury; and

Prior to the introduction of evidence certain stipulations were entered into by counsel for the plaintiff and counsel for the defendant; thereafter, opening statements were made by counsel for the plaintiff and counsel for the defendant; whereupon the plaintiff offered evidence and, after the close of the plaintiff's evidence and upon the plaintiff resting her case, the defendant through counsel moved for a directed verdict in favor of the defendant; and

The Court heard the argument of counsel for the defendant in support of said motion and heard the argument of plaintiff's counsel against said motion; and at the conclusion of said arguments and upon consideration of the admissions in the pleadings, the stipulations of counsel and the evidence adduced at the trial, the Court finds the following facts and makes the following conclusions of law:

1. That on October 29, 1966, the defendant was the owner of a certain beach cottage near the Town of Emerald Isle in Carteret County, North Carolina, which said beach cottage was not at said time within the corporate limits of the Town of Emerald Isle, North Carolina, nor within the corporate limits of any other municipality.

2. That on October 29, 1966, the plaintiff rented from the defendant the said beach cottage in its entirety and paid a part of the rental for said cottage for the week-end of October 29, 1966, and went into possession of the same at about three o'clock P.M. on said date with members of her family.

3. That said beach cottage consisted of two stories, the bottom floor being of concrete block construction, and the top floor, wood-framed, redwood exterior, with three bedrooms and an apartment; the floor of the lower floor was concrete, and the cottage had an asphalt shingle roof; that there were two entrances to the cottage, one through the carport and lower floor, from which there was a set of stairs running upstairs to the second floor of the cottage; that the most direct entry from the front of the house, leading from the ground to the front door of the upper floor; that these were the only stairs going up to the second floor of the cottage; that the most direct entry from the carport into the house was through the door that led off the carport into the downstairs portion of said cottage, which at

said time was an unfinished open basement. That this means of ingress and egress was regularly used by persons renting the cottage from the defendant and was used for said purpose by the plaintiff and her family and friends on the date in question.

4. That said stairway leading from the ground floor or basement of the cottage to the upstairs portion or second floor of the cottage was approximately eight to ten feet in height and was constructed of unfinished lumber two inches thick; that the threads *(sic)* or steps of the stairway were approximately four feet wide and were constructed of 2 x 4s, 2 x 5s or 2 x 6s, pieces of unfinished lumber; that there were no risers at the backs of the steps or threads, and that the height or rise, between the thread was uneven, that the bottom step was about four inches from the floor of the basement and the top step was some ten or twelve inches from the floor of the second story, and the height, or rise, between the threads was not the same between any two treads; that said stairway had no handrails on either side; that the threads or steps on the stairway overlapped each other about an inch or one and a half inches; that the angle or pitch of said stairway was very steep and was approximately 45 degrees; that said stairway and steps were in their first constructed and completed condition and had not required any repairs or maintenances since their original construction; that light fixtures downstairs and upstairs provided illumination of said stairway; that in the downstairs or basement portion of the cottage the fixtures were plain sockets with large, uncovered, bare bulbs approximately one or two hundred watts each.

The cottage of the defendant was built by the defendant and under his personal supervision, using his own labor, and not by any contractor. The steps hereinafter alluded to were in their first constructed and completed condition, and the condition of the steps was well known to the defendant as they were constructed by him.

5. That during the middle of the afternoon of Saturday, October 29, 1966, the plaintiff and her son-in-law and daughter and two granddaughters obtained the key to the cottage from a local rental agency, arrived at the defendant's cottage, entered the cottage through the carport and downstairs door, and went up the steps of the stairway in question to the second floor; that plaintiff carried a few things up said steps with her; that

the plaintiff had difficulty going up the steps, formed the opinion that they were dangerous, and vowed never to use the steps again; that the plaintiff observed that the steps had no risers nor handrails, found that the first two steps and the top step were of uneven height as compared to the risers of the rest of the steps, and formed the opinion at that time that the threads or steps of the stairway were too narrow, that the pitch was similar to a stepladder and too steep; that she further formed the opinion at that time that the steps were dangerous for her use or for use by anyone else because they had no risers, no handrails, the top and bottom steps were uneven in amount of rise, the threads or steps were too narrow and the pitch or angle of incline of the stairway was too steep.

6. That the other members of the plaintiff's family also entered the cottage through the carport-basement entrance.

7. That on October 29, 1966, the plaintiff was 55 years of age, fiive feet six inches tall and weighed 175 pounds.

8. That at approximately five o'clock P.M., another couple, a Mr. and Mrs. Hanshaw, arrived with their five-year-old daughter to spend the night and the next night with the plaintiff and her family.

9. That on said date, at approximately 8:00 P.M., the plaintiff and her son-in-law and daughter and Mr. and Mrs. Hanshaw and the plaintiff's two granddaughters were in the kitchen of said beach cottage, which is located on the second floor near the top of the stairway in question; that the plaintiff and her son-in-law and her daughter and Mr. and Mrs. Hanshaw heard a loud thump and noise in the basement below and heard a child cry out in a loud scream; that all of said persons went down the stairway to the basement or first floor to see what was wrong; that none of said persons called down to the basement prior to going down the stairway.

10. That the first person to go down the stairway was the plaintiff's son-in-law, who 'flew' down the stairs; that the plaintiff's son-in-law was followed down the stairs by the plaintiff, then Mr. Hanshaw, then plaintiff's daughter, and then Mrs. Hanshaw and plaintiff's two granddaughters.

11. That at said time, the lights were on both at the top and at the bottom of the steps and said steps could be seen.

12. That plaintiff's son-in-law, who went down the steps first, could see the steps and did not fall.

13. That Mr. Hanshaw, who came down the steps behind the plaintiff, could see the steps and did not fall going down the steps; that he saw the plaintiff fall forward and to the right, but did not know why she fell; that the other persons thereafter following did not fall.

14. That the plaintiff was barefooted and went down the steps rapidly behind her son-in-law; that the plaintiff did not keep her eyes upon the steps as she went down them; that when plaintiff was approximately half way down the steps, about three to five feet from the bottom, she realized she was losing her balance, and tried to jump, her heel became caught in some manner and she fell forward and to the right onto the floor, sustaining a broken hip.

15. That the stairway was not in a condition of disrepair; and said steps were in their newly constructed condition, and the defendant had not undertaken to alter their construction.

16. That the design and nature of construction of said stairway and the condition thereof was obvious and could readily be determined from a reasonably careful inspection.

17. That the plaintiff had used the steps a few hours prior to her fall and was fully aware of the manner in which said steps were constructed, and the nature and condition thereof, and formed the opinion that said steps were defective in construction and were dangerous for her use.

18. That there was no hidden defect in the design, construction or condition of said steps, and there was no failure on the part of the defendant to disclose any aspect of the design, construction and condition of said steps to the plaintiff.

Upon the foregoing findings of fact the Court makes the following conclusions of law:

1. That on October 29, 1966, at the time the plaintiff sustained the injuries which she complains of, there existed as between the plaintiff and the defendant in regard to her use of the defendant's beach cottage the relationship of landlord and tenant.

2. That the defendant's duty to the plaintiff at said time and place was to disclose to the plaintiff and warn the plaintiff of the existence of any dangerous conditions which were known by him to exist in the premises at the time the premises were rented to the plaintiff and which probably would not be dis-

covered by the plaintiff in the course of a reasonably careful inspection on her part.

3. That the defendant breached no duty which he owed to the plaintiff.

4. That the defendant was not negligent in any manner, and no act by the defendant, nor any failure on his part to act, proximately caused the plaintiff's injury.

5. That the proximate cause of plaintiff's injuries, or at least one of the proximate causes of plaintiff's injuries, was the plaintiff's own negligent failure to exercise due care under the circumstances for her own safety.

IT IS THEREFORE ORDERED that the defendant's motion for a directed verdict in favor of the defendant be, and the same is hereby allowed.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED upon said verdict for the defendant that the plaintiff have and recover nothing of the defendant, that this action be, and the same is hereby dismissed, and that the costs of this action be taxed against the plaintiff.

This 6th day of January, 1970.

HAMILTON H. HOBGOOD
Judge Presiding"

Plaintiff appeals assigning as error the granting of defendant's motion for a directed verdict.

Nelson W. Taylor for plaintiff appellant.

Brock & Gerrans; White, Hooten & White by Thomas J. White, III, for defendant appellee.

CAMPBELL, J.

[1] When a motion for directed verdict is made under G.S. 1A-1, Rule 50, at the conclusion of the plaintiff's evidence, the trial judge must determine whether the evidence, taken in the light most favorable to the plaintiff and giving to it the benefit of every reasonable inference which can be drawn therefrom was sufficient to withstand defendant's motion for a directed verdict. *Magnolia Apartments v. Hanes,* 8 N.C. App. 394, 174 S.E. 2d 828 (Filed 24 June 1970). The directed verdict, in this sense, is similar to the motion as of nonsuit in the practice of this State before 1 January 1970.

[2, 3] Judge Hobgood ruled here, in effect, that the defendant, as a landlord, was not negligent in that he did not have any duty to warn about patent defects in the beach cottage and that the plaintiff's negligence in hurrying down the allegedly defective steps was a contributing or sole cause of her injury. The latter is predicated in part at least upon the findings that the plaintiff had notice of the condition of the stairs and had vowed not to use them and that she did not keep her eyes on the stairs as she descended them. We hold that these findings of fact are adequately supported by plaintiff's evidence in this case.

A landlord does not normally have a duty to warn his tenant about patent defects in the demised premises. *Harrill v. Refining Co.*, 225 N.C. 421, 35 S.E. 2d 240 (1945); *Phillips v. Stowe Mills, Inc.*, 5 N.C. App. 150, 167 S.E. 2d 817 (1969). The condition of the stairs was patent and obvious. In fact, plaintiff admitted that she observed the condition of the stairs and made a mental note not to use them again. As such, it was proper for Judge Hobgood to conclude, as a matter of law, that the defendant was not liable to the plaintiff here. We hold that the motion for a directed verdict was properly granted.

Affirmed.

PARKER and VAUGHN, JJ., concur.

RANDOLPH TERRY AND WILLOW L. TERRY v. JIM WALTER CORPORATION

No. 7010DC348

(Filed 15 July 1970)

1. Trespass § 8— building of shell home on plaintiffs' lot — damages — instructions

In this action to recover damages for trespass to land by construction of a shell home on plaintiffs' lot, the trial court failed to declare and explain the law arising on the evidence when it instructed the jury that the measure of damages is the reasonable cost of the removal of the house plus the difference between the fair market value of the property immediately before the trespass and immediately after the house is removed, and that the jury had heard the evidence and should allow plaintiffs what it found to be the reasonable cost of removal, evidence having been introduced by plaintiff of the cost of removing the house intact and by plaintiff and defendant of the cost of destroying the house and clear-

ing the debris, and it being incumbent upon the court to instruct the jury that plaintiffs were not entitled to have the house removed intact but simply to have it removed and the debris cleaned up.

2. Trespass § 4— building of house on plaintiffs' lot — election of plaintiffs

Where a house was wrongfully constructed on plaintiffs' land by a defendant which is not a public authority or clothed with any right of eminent domain, plaintiffs can elect either to keep the house on their lot or demand that defendant remove it and seek damages for the wrongful trespass.

APPEAL by defendant from *Barnette, District Judge,* December 1969 Session of the General Court of Justice of WAKE County, District Court Division.

The plaintiffs, in October 1958, lived in Wake County, North Carolina, and, at that time, purchased Lot No. 6 of Appleton Acres as shown on Map Book 1959 at Page 78 in the Wake County Public Registry. They recorded the deed to their lot. At the time they purchased their lot, there were no trees or vegetation on the lot. The lot was located on an unimproved, dirt street and had a frontage of 100 feet and a depth of 262 feet. The plaintiffs planted pine trees on their lot shortly after having purchased it with the intention of later building a home there.

In 1959 the plaintiffs moved to Florida, where they still live. They return to Wake County, North Carolina, from time to time and go by to see their lot. In 1967 on a trip from Florida to Wake County, North Carolina, they visited their lot and found a house located thereon. This house was occupied by Jesse Earl Tillery and family (Tillery). The plaintiffs observed that numerous pine trees on their lot had been cut. The house was located about 80 feet from the street and in approximately the center of the lot. The plaintiffs had paid between $800 and $1,000 for their lot. They had recently agreed with a relative to a sale of the lot for the sum of $3,000; but when the purchaser found the house located on the lot, he refused to go through with the purchase.

The plaintiffs instituted this action for wrongful trespass and damage to their lot and prayed judgment in the amount of $4,500.

The plaintiffs offered Tillery as a witness. Tillery testified that in 1966 he had entered into a contract to purchase Lot. No. 7 of Appleton Acres Subdivision. Before he completed his payments for the lot and procured a deed thereto, he and his wife entered into a contract with the defendant to construct a so-called shell house on the lot. His testimony was as follows:

"At the time I contacted Jim Walter's agent, Mr. Mitchell, I was buying this lot from Mr. Drake, was in the process of buying this lot when I got in touch with him. I made arrangements to buy the lot myself. I had paid part of it before I built the house on it. I had paid Mr. Drake some of the money already. My lot adjoins the Terry lot, that is, the one that we have been talking about that is owned by Mr. Terry. I guess it is the same size as my lot, about the same size I would say. It has the same kind of subsoil. It is on the same street. It has neither water nor sewer. The purchase price of my lot was $1,000.00. I agreed to pay Mr. Drake $1,000.00 for it. I had not started doing any work on my lot before I contacted Mr. Mitchell. I had done nothing. I had not cut any trees before I contacted Mr. Mitchell. Mr. Mitchell went out on the lot with me to locate the house on the lot. I told him where my lot was; where I thought it was, anyway. In other words, I showed Mr. Mitchell where I thought my lot was. He put the house where I thought my lot was. I showed him the place where to put it, and that is where he built it. I don't know the exact time that Jim Walters remained on the job site. It was the last of March when they got through. They got out sometime in March, 1967. I moved in right after they got out. It was about the last of March when I moved in. I have been living there ever since. I have a good relationship with Jim Walters. I cut some of the trees down around my house. I cut the ones down from the road and just a few where they built the house. I have a lavatory built back of my house and I build *(sic)* a little shelter there. I did this myself. I cut the trees down there myself. There is a house on the lot which I own directly below me. I do own a 100 feet of lot on this road. I own Lot 7 which is the adjoining lot to where I live. The Farleys live in the house on Lot 7. There are about four houses on the road now leading from Evans Road down to the back. All the houses are on the right as you turn off Evans Road. There are no houses on the left of the road as you come down from Evans Road. This is a dead-end street. I have not seen anyone keeping up the road that leads from Evans Road down to my house. It is not kept up. . . ."

The evidence discloses that the plaintiffs own Lot 6 in the subdivision and that the Tillerys own Lot 7. The Tillerys prepared Lot 6 for erection of a house thereon by the defendant. The Tillerys cut the trees and selected the location for the house put thereon by the defendant. It also appears that on the adjacent Lot No. 7, which is

actually owned by the Tillerys, there is now located a brick house, occupied by the Farleys.

The plaintiffs offered other evidence as to the costs of moving the house on Lot 6. There was evidence on behalf of the plaintiffs that it would cost in the neighborhood of $2,100 to move the house intact. This evidence as to cost of moving the house intact included such items as improving the road in front of the house in order to get the necessary equipment to the house site and so the house could be removed safely; constructing an access way for the equipment and the house to be moved; relocating the house on another lot; and damage to trees. The plaintiffs also offered evidence that the value of the lot without the house on it was $2,750.

The trial judge submitted two issues to the jury as follows:

"1. Did defendant trespass upon the lands of plaintiffs, as alleged in the complaint?

2. In what amount, if any, were plaintiffs damaged by the trespass of defendant?"

The trial judge instructed the jury peremptorily to answer the first issue "Yes." The second issue was answered by the jury in the amount of $3,125.00. The trial judge stated that in his opinion the verdict was excessive and against the weight of the evidence, and he would allow a motion of the defendant to set the verdict aside and for a new trial, unless the plaintiff filed a remittitur and consented to a reduction of the verdict to $2,200. The plaintiffs filed such a remittitur, and the judge thereupon signed a judgment in favor of the plaintiffs against the defendant in the amount of $2,200. From the entry of this judgment the defendant appealed.

Emanuel and Emanuel by W. Hugh Thompson for plaintiff appellees.

Booth, Fish and Adams by Roy M. Booth and H. Marshall Simpson for defendant appellant.

CAMPBELL, J.

At the outset it is noted that the appellant failed to comply with the rules of this Court in that the brief does not "contain, properly numbered, the several grounds of exception and assignment of error with reference to the pages of the record, and the authorities relied on classified under such assignment." Rule 28.

[1] The defendant assigns as error the charge of the trial court on the second issue as to the measure of damages.

The trial court instructed the jury as follows:

> "The measure of damages in this case is first the reasonable cost of the removal of the house plus the difference between the fair market value of the property immediately before the trespass and the fair market value of the property immediately after the house is removed.
>
> As to the reasonable cost of removal of the house, I do not think that needs any further explanation. You have heard the evidence as to that. You are to allow the plaintiffs what you find to be the reasonable cost of removal."

The trial judge committed error in this instruction. Rule 51 of the Rules of Civil Procedure which became effective January 1, 1970, prior to the trial of this case, provides that the judge "shall declare and explain the law arising on the evidence given in the case." This requirement is a continuation of the requirement previously contained in G.S. 1-180.

> "It is the duty of the trial court to declare and explain the law arising on the evidence as to all substantial features of the case, without any special prayer for instructions to that effect, and a mere declaration of the law in general terms and a statement of the contentions of the parties is insufficient. . . ." *Therrell v. Freeman,* 256 N.C. 552, 124 S.E. 2d 522 (1962).

The vice of the instruction in the instant case is clearly shown by the answer of the jury to this issue. While the plaintiffs in case of a wrongful trespass by the defendant were entitled to have their land restored to its previous condition before the trespass, nevertheless, they had offered evidence showing what it would cost to move the house and keep the house intact. The plaintiffs' evidence tended to show that this would cost in the neighborhood of $2,100.00 because of the necessary preparation that would have to be undertaken. The plaintiffs' evidence further showed that the house could simply be destroyed and the debris cleaned up at a cost not exceeding $500.00, and the defendant had offered evidence that this could be done at a cost of $250.00. It was incumbent upon the trial judge to explain these various factors to the jury and to explain to the jury that the plaintiffs were not entitled to have the house removed intact, but simply to have it removed from the premises and any debris cleaned up. The court further instructed the jury that in determining the difference between the fair market value of the prop-

erty immediately before the trespass and the fair market value of the property immediately after the house is removed the jury could take into consideration "the evidence concerning the cost of replacing any trees that were cut down." There was no evidence introduced that the defendant had cut down any trees. The testimony of the plaintiffs' witness Tillery was to the effect that Tillery had done the cutting of the trees. There was no evidence that Tillery was an agent of the defendant; but on the contrary, Tillery cut the trees down in order to prepare for the location of the house he was having the defendant erect and which house Tillery bought and is still occupying.

The trial judge further instructed the jury that in answering the second issue, the jury might award the plaintiffs an amount of money and that "the amount may be anywhere from one cent to $4500 which is the figure prayed for by the plaintiffs in their prayer for relief in the complaint, or the amount may be anywhere in between these figures." The plaintiffs did not offer evidence which would substantiate any such damages. The plaintiffs' evidence shows $500 to remove house and clear up debris and $250 for loss in value of the lot.

[2] It is to be noted that since the defendant is not a public authority or clothed with any right of eminent domain, the plaintiffs, as the landowners, could elect either to keep the house on their lot or demand that the defendant remove it and seek damages for the wrongful trespass. *Leigh v. Mfg. Co.*, 132 N.C. 167, 43 S.E. 632 (1903).

For an interesting article pertaining to remedies for trespass to land, see the article by Professor Dobbs, 47 N.C.L. Rev., 334, et seq. Likewise see *Homes, Inc. v. Holt,* 266 N.C. 467, 146 S.E. 2d 434 (1966), where a shell home was placed on the wrong lot and the landowner refused to permit the construction company to remove the home, and the construction company brought an action for unjust enrichment.

In the instant case the landowner elected not to keep the home, but instead sought damages for the wrongful trespass.

Since there must be a new trial, we refrain from further discussion as the same evidence and questions of law may not be presented on the second trial.

New trial.

PARKER and VAUGHN, JJ., concur.

LONA ROTEN v. STATE OF NORTH CAROLINA

No. 7023SC350

(Filed 15 July 1970)

Deeds § 16— estate on condition subsequent — deed states purposes for which property to be used

A deed conveying property to the State and setting forth the purposes for which the property should be used, but which contains no reverter or reentry clause, does not create an estate on condition subsequent but conveys an absolute fee to the State.

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

This action was brought by Lona Roten (Roten), under the authority of G.S. 41-10.1, against the State of North Carolina in which she seeks to have the court declare her the owner in fee simple of a certain 140 acre tract of land in Wilkes County known as Rendezvous Mountain. The heirs of T. B. Finley executed and delivered a Quitclaim Deed to Rendezvous Mountain to Roten on 8 May 1967, said deed being the basis of plaintiff's claim to the said property. The State asserts its claim to this property under a deed dated 4 December 1926 from T. B. Finley and his wife recorded in Deed Book 142, at page 453, in the Office of the Register of Deeds of Wilkes County, North Carolina, said deed being as follows:

"WARRANTY DEED

STATE OF NORTH CAROLINA

WILKES COUNTY

THIS DEED, Made this the 4th day of December, 1926, by and between T. B. Finley and wife, C. L. Finley, of Wilkes County, State of North Carolina, parties of the first part, to the State of North Carolina, party of the second part,

Witnesseth: That Whereas, during the Revolutionary War, Wilkes County, North Carolina, set [sic] 225 picked soldiers from Rendezvous Mountain to the Battle of Kings Mountain under the command of Col. Benjamin Cleveland and Captain (Afterwards General) William Lenoir, and nine other captains.

And Whereas, from this point Wilkes County furnished a larger number of troops in winning the Battle of Kings Mountain than any other county in the present State of North Carolina.

And Whereas, the Battle of Kings Mountain was the deciding battle in the freedom of the colonies.

And Whereas, the ten companies of Wilkes County were assembled at Rendezvous Mountain and the 225 men were selected and started on the March to join the other patriots at Quaker Meadows in Burke County, North Carolina.

And Whereas, Rendezvous Mountain was the meeting and training place of the soldiers during the Revolutionary War.

And Whereas, T. B. Finley desires to perpetuate the historic importance of Rendezvous Mountain and make it a patriotic schrine [sic] where the people of North Carolina, together with the hundreds of thousands of descendants of these soldiers scattered over practically all of the States in the Union, their friends and tourists generally, will visit as they pass through this part of the State and this [sic] aid in the permanent advertisement of our State.

Now Therefore, the said T. B. Finley and wife, C. L. Finley in consideration of the purposes herein expressed have bargained and sold, and by these presents do bargain, sell and convey to the State of North Carolina, party of the second part, a certain parcel or tract of land situated in Wilkes County, North Carolina, and known as the Rendezvous Mountain land.

'Beginning at the Southwest corner of this boundary on a pine stump definitely located by marked witness trees, being the corner between the lands of T. B. Finley on the north and Ervin McNeil on the south, about 100 yards west of the top of the ridge thence north 9 degs. west 40 poles to a stake, thence north 44 degs. west 27 poles to a chestnut oak, thence north 38 degs. west 62 poles to a small dogwood about 2 poles west of Owen Springs, thence north 7½ degs. west 82 poles to a stake, witnessed by two chestnut oaks, small chestnut oak west, large chestnut oak southeast, this line passes by three gums on the ridge 11 poles from the dogwood, thence north 73½ degs. east 68 poles to a chestnut oak, (not located), thence north 73½ degs. east 61 poles to a large chestnut oak on the ridge, well defined, thence south 3½ degs. east 56 poles to a hickory, well defined, thence south 8 degs. west 19 poles to a persimmon, not definitely located, thence S 20 degs. east 31 poles to a mulberry near the branch in the corner of fence, thence north 80 degs. east 5 poles to a stake, thence south 42 poles to a dogwood, not clearly defined, thence south 8½ degs. east 71 poles to a white pine tree, well defined, thence south 82½ degs. west 76 poles to the beginning. Containing 140 acres, more or less.'

To Have and to Hold, the above described land and premises and the appurtenances thereto belonging to the said State of North Carolina, upon the following trusts and stipulations, to-wit:

(1) That the highest peak on said property, known as Rendezvous Mountain, with its surroundings, shall be used by the Daughters of the American Revolution, for the purpose of erecting a monument and placing thereon a bronze tablet containing the names of the 225 soldiers above mentioned, and for the purpose of utilizing the same as a park and preserving the primeval forest of oak, poplar, chestnut, hickory, maple, linn, cucumber and a variety of pines, together with the dogwoods, rhododendron, laurel, azalea and other floral growth, and beautify the coves, springs and branches, where tourist camp sites may be constructed in order that the entire development may be a patriotic inspiration to all the people of the State, and enjoyed by them and the tourists.

(2) That the second highest peak be held in trust by the State for the purposes aforesaid, and for the further purpose of erecting thereon a summer capitol or club house for the benefit of all State officials.

(3) That the third highest peak on said property be held in trust by the State for the Daughters of the American Revolution on which to erect a club house as a summer Rendezvous for their entire organization.

(4) That the State hold all said property, not otherwise utilized as above stated, for forest demonstration, showing the public the necessity of forest conversation [sic] and the success of reforestation.

(5) In order that this purpose may be accomplished and that the public especially the school children and tourists, may become acquainted with the history of this section and become enthused with the patriotic aroma of this historic spot, and appreciate the spendid [sic] views over the large, vaired [sic] and attractive section, it is desired that the State officials and all other broad minded, patriotic citizens use their influence in securing the passing of a bill by the present Legislature to insure sufficient funds to build a first class road from the Boone Trail Highway #60, to this property.

And, the said T. B. Finley and wife, C. L. Finley, covenants to and with the State of North Carolina, that they are seized of

said premises and have a right to convey same in fee simple, that same are free from all encumbrances and that they will warrant and defend the title to same against the claims of all persons whatsoever. This deed is executed and title is received under Consolidated Statutes, Section 6124.

IN TESTIMONY WHEREOF, we have hereunto affixed our hands and seal, the day and year above written.

T. B. Finley, Seal.
C. L. Finley, Seal."

On 9 March 1970 the State, by written motion, moved for a summary judgment pursuant to G.S. 1A-1, Rule 56(b), Rules of Civil Procedure.

The State's motion for a summary judgment was supported by the following exhibits: (1) A document citing the power vested in the State to acquire land as a State forest, which document states that such gifts must be absolute and unconditional; (2) an excerpt from the Second Biennial Report of the Department of Conservation and Development of the State of North Carolina describing plans made in connection with the property in question; (3) an excerpt from the Third Biennial Report of the Department of Conservation and Development indicating an intention by that department to use the land in question for experimental forestry; and (4) certain stipulations entered into between the parties to the present action. The plaintiffs also submitted exhibits to the court including a letter from Attorney General Harry McMullan, two letters from Thomas C. Ellis, Superintendent of State Parks, and an excerpt from the Minutes of the Council of State on 19 August 1954 indicating that the State intended to reconvey this property to the heirs of T. B. Finley. After considering the pleadings, exhibits of both parties, briefs and argument of counsel, Judge Armstrong on 10 March 1970 allowed defendant's motion, and entered a summary judgment dismissing plaintiff's action. To the entry of the summary judgment, the plaintiff excepted and gave notice of appeal to the North Carolina Court of Appeals.

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

Robert Morgan, Attorney General, and Rafford E. Jones, Staff Attorney, for the State.

HEDRICK, J.

G.S. 1A-1, Rule 56(b), Rules of Civil Procedure, provides: "A party against whom a claim, counterclaim, or crossclaim is asserted or a declaratory judgment is sought, may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof."

G.S. 1A-1, Rule 56(c), Rules of Civil Procedure, establishes the procedure to be followed by the court when considering a motion for summary judgment as follows: "The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law."

In the instant case we hold that the court properly allowed the defendant's motion for a summary judgment.

The appellants argue in their brief that the deed from T. B. Finley and wife to the State of North Carolina is not absolute in that it contains conditions subsequent which render it unacceptable. G.S. 113-34 provides:

> "The Governor of the State is authorized upon the recommendation of the Board of Conservation and Development to accept gifts of land to the State, the same to be held, protected and administered by said Board as State Forests, and to be used so as to demonstrate the practical utility of timber culture and water conservation, and as refuges for game. Such gifts must be absolute except in such cases as where the mineral interest on the land has previously been sold."

The State on the other hand contends that the deed is absolute for that the language contained therein merely expressed the wishes of the grantor and the purposes for which the conveyance was made.

A careful examination of the deed from T. B. Finley and his wife to the State of North Carolina shows that it contains many clauses whereby the grantor expressed his desires that certain things be done upon the property by the State.

In *Hall v. Quinn*, 190 N.C. 326, 130 S.E. 18 (1925), we find the following language:

> "An estate on condition expressed in the grant itself is where an estate is granted, either in fee simple or otherwise, with an express qualification annexed whereby the estate granted shall either commence, be enlarged, or be defeated, upon performance or breach of such qualification or condition; and a condition

subsequent operates upon an estate already created and vested, rendering it liable to be defeated if the condition is broken. 2 Bl., 154 . . . .

". . . A clause in a deed will not be construed as a condition subsequent unless it expresses in apt and appropriate language the intention of the parties to this effect (*Braddy v. Elliott,* 146 N.C., 578) and a mere statement of the purpose for which the property is to be used is not sufficient to create such condition. (cites omitted). In *Rawson v. School District,* 7 Allen, 125, *Chief Justice Bigelow,* in a discussion of the question, made use of the following language, which we may adopt as applicable in the present case: 'We believe there is no authoritative sanction for the doctrine that a deed is to be construed as a grant on a condition subsequent solely for the reason that it contains a clause declaring the purpose for which it is intended the granted premises shall be used, where such purpose will not inure specially to the benefit of the grantor and his assigns, but is in its nature general and public, and where there are no other words indicating an intent that the grant is to be void if the declared purpose is not fulfilled. . . .'"

After carefully examining the deed in the present case, it is our opinion that the language contained therein does not create an estate on condition subsequent. The language used by our Supreme Court in *Lassiter v. Jones,* 215 N.C. 298, 1 S.E. 2d 845 (1939), best sums up our decision:

"The deed does not create an estate on condition subsequent for the reason that nowhere in the deed is there a reverter or reentry clause. There is no language in the deed and no intention can be gathered from it that a reversionary interest exists and the grant is limited. There is no language in the deed that can be construed as a forfeit, that the property is either transferred to another or reserved by the original grantor."

Although the appellant has brought forward other assignments of error in this appeal they are contingent upon the finding in regard to the quality of the deed. Since it is our decision that the deed in the present case is absolute, the other assignments of error are overruled.

The summary judgment dated 10 March 1970 dismissing plaintiff's action is

Affirmed.

BROCK and BRITT, JJ., concur.

CITY OF CHARLOTTE, A MUNICIPAL CORPORATION PETITIONER v. MARGARET C. MCNEELY AND HUSBAND, SAM S. MCNEELY, JR. RESPONDENTS

No. 7026SC395

(Filed 15 July 1970)

1. Eminent Domain § 7— condemnation by municipality — compliance with statutory procedures — dismissal

A municipality was not entitled to condemn a right-of-way over a strip of respondent's land for purpose of widening a street, and consequently its condemnation proceeding was properly dismissed, where there was no indication that the municipality had ever adopted a resolution stating the nature of the proposed improvement for which the land is required, or that it had appointed a time and place for its final determination, or that it had caused notice of such time and a brief description of the improvement to be published in a local newspaper — all as required by G.S. 160-207.

2. Eminent Domain § 1— nature of the power

The exercise of the power of eminent domain is in derogation of common right, and all laws conferring such power must be strictly construed.

3. Eminent Domain § 4— delegation of power — allegation and proof of compliance with statute

Where a municipality undertook to exercise the power of eminent domain which had been granted to it by the Legislature, it was necessary that the municipality both allege and prove compliance with statutory procedural requirements.

ON Certiorari to review a judgment of *Bryson, J.*, 7 July 1969, Schedule "A" Civil Session of MECKLENBURG Superior Court.

This is a condemnation proceeding instituted on 2 April 1965 in which petitioner, a municipal corporation, seeks to condemn a right-of-way over a strip of land 20 feet wide from the western portion of property belonging to the feme respondent for the purpose of widening Alleghany Street in the area between Wilkinson Boulevard and Denver Avenue in the City of Charlotte, N. C. The petitioner alleged prior good faith efforts to buy and that "the necessity of acquiring the right-of-way for public use for the aforesaid purposes has been duly determined by the City Council of the City of Charlotte." Respondents filed answer on 30 April 1965 in which they admitted prior efforts of the City to purchase, but denied they had received any notice of any proposal being sent to the City Council of the City of Charlotte to take and condemn any of their lands and alleged that if any such action was taken, it was arbitrary and constituted a taking of their property without due process of law. After hearings, the clerk of Superior Court filed judgment on 2 August

1966, making 30 findings of fact. Finding of Fact Number 24 was as follows:

> "24. There is no evidence that the City Council has officially or specifically authorized the widening and paving of Alleghany Street between Wilkinson Boulevard and Denver Avenue, but did approve condemnation proceedings to take the Respondents' land for that purpose."

Upon the findings of fact, the Clerk made the following conclusions of law:

> "1. That there is no public convenience and necessity to support and substantiate condemning the lands of the Respondents.
>
> "2. That Petitioner, through its City Council, acted arbitrarily, without adequate determining principle, and in abuse of its legal discretion in directing and ordering condemnation of Respondents' lands described in the Petition filed herein.
>
> "3. That the City Council of the City of Charlotte is not entitled to condemn the lands of Respondents described in the Petition."

Upon these findings and conclusions, the court ordered that the petition be dismissed. Upon appeal by the petitioner to the judge of Superior Court, the parties stipulated that the judge might hear the matter upon the transcript and exhibits which had been introduced before the clerk of Superior Court. After hearing, Judge Bryson filed judgment on 11 August 1969 in which he adopted all findings of fact and conclusions of law made by the clerk of Superior Court and affirmed the order which had been entered by the clerk of Superior Court. Petitioner filed notice of appeal to the Court of Appeals. Subsequently the Court of Appeals granted petitioner's petition for writ of certiorari to perfect a late appeal.

W. A. Watts for petitioner appellant.

Haynes & Baucom, by Lloyd F. Baucom and Elbert E. Foster for respondent appellees.

PARKER, J.

This proceeding was commenced prior to the effective date of Chapter 713 of the 1965 Session Laws, which was enacted 26 May 1965 and became effective 1 July 1965 and which revised the Charter of the City of Charlotte. Therefore, the provisions relat-

ing to the power of eminent domain as contained in the revised Charter are not here applicable, and for purposes of this case reference must be had to the prior City Charter provisions. These were contained in Chap. 366, Public-Local Laws of 1939, Section 51 of which was as follows:

> "Sec. 51. The City of Charlotte is hereby vested with all power and authority now or hereafter granted to municipalities under the Public Laws of North Carolina, with respect to condemnation of property, rights, privileges or easements for public use, and in the exercise thereof the said City of Charlotte shall follow exclusively the procedure outlined and provided by the Public Laws of North Carolina, as the same may now or hereafter be enacted; . . ."

By virtue of this section of its Charter, which was in effect at the time the present proceeding was commenced, the petitioner derived its powers with respect to condemnation from, and in the exercise of those powers was required to follow exclusively the procedure outlined and provided by, the Public Laws of North Carolina. For municipal corporations, these are contained in General Statutes, Chap. 160, Municipal Corporations. For purposes of the questions raised by this appeal, pertinent portions of that Chapter are as follows:

> G.S. 160-204. "When in the opinion of the governing body of any city . . . having and exercising . . . the management and control of the streets, . . . any land, right of way, . . . privilege, or easement . . . shall be necessary for the purpose of opening, . . . widening, . . . or operating any such streets, . . . such governing body . . . of such city may purchase such land, right of way, . . . privilege, or easement from the owner or owners thereof and pay such compensation therefor as may be agreed upon."
>
> G.S. 160-205. "If such governing body . . . of such city are unable to agree with the owners thereof for the purchase of such land, right of way, privilege, or easement, for the purposes mentioned in the preceding section, . . . condemnation of the same for such public use may be made in the same manner and under the same procedure as is provided in chapter Eminent Domain, article 2; and the determination of the governing body, . . . of such city of the land necessary for such purposes shall be conclusive."
>
> G.S. 160-207. "When it is proposed by any municipal corporation to condemn any land, rights, privileges or easements

for the purpose of opening, extending, widening, altering or improving any street . . . *an order or resolution of the governing body of the municipality at a regular or special meeting shall be made stating generally, or as nearly as may be, the nature of the proposed improvement for which the land is required. . . . The governing body shall appoint a time and place for its final determination thereof, and cause notice of such time and a brief description of such proposed improvement to be published in some newspaper published in said municipality for not less than ten days prior to said meeting. At said time and place said governing body shall hear such reasons as shall be given for or against the making of such proposed improvement, and it may adjourn such hearing to a subsequent time. . . .*" (Emphasis added.)

[1] The record before us in the present case does not reveal that there has been compliance with these statutory requirements. Appellants contend compliance may be found in the minutes of meetings of the Charlotte City Councel held 10 September 1962 and 15 February 1965. The first of these shows adoption of a motion authorizing expenditure of funds for surfacing Alleghany Street at locations other than involved in the present condemnation proceeding, which resolution included a statement that "in the interim that we contact the property owners affected and get the street opened to Wilkinson Boulevard in a joint effort." The second resolution, adopted at the 15 February 1965 meeting, merely authorized condemnation "of 8,142.10 sq. ft. of property on the east side of Alleghany Street, between Wilkinson Blvd., and Havelock Avenue, owned by Margaret C. McNeely and Sam S. McNeely, Jr." These resolutions, which are the only ones to which appellant has directed our attention and the only ones which, insofar as the record before us reveals, were ever adopted by the Charlotte City Council relating to the widening of Alleghany Street over the lands of respondents, fall short of meeting the statutory requirements. There is no indication that the Charlotte City Council ever adopted a resolution stating "the nature of the proposed improvement for which the land is required," or that it ever "appointed a time and place for its final determination thereof," or that it caused "notice of such time and a brief description of such proposed improvement to be published in some newspaper published in said municipality for not less than ten days prior to said meeting," all as required by G.S. 160-207.

[2, 3] "The exercise of the power of eminent domain is in derogation of common right, and all laws conferring such power must be

strictly construed." *Redevelopment Comm. v. Abeyounis,* 1 N.C. App. 270, 161 S.E. 2d 191. In the present case, when the City undertook to exercise the power of eminent domain which had been granted to it by the Legislature, it was necessary that it both allege and prove compliance with statutory procedural requirements. It has failed to carry its burden of proof in this respect. The trial court's Finding of Fact No. 24 is supported by the record. That finding in turn supports the conclusion and judgment that the City is not entitled to condemn the lands of the respondents and that the present proceeding be dismissed.

Certain other findings of fact made by the trial court are irrelevant, but do not vitiate the judgment of dismissal and may be treated as surplusage. Dismissal of the present proceeding in no way bars the City, it if is so advised, from widening Alleghany Street or any other street in the City as the City's governing body may decide, and for such purpose the City may institute new condemnation proceedings in compliance with currently applicable charter and statutory procedural requirements.

The judgment dismissing the present proceeding is

Affirmed.

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

STATE OF NORTH CAROLINA v. LEROY HARRIS

No. 7010SC405

(Filed 15 July 1970)

1. Robbery § 1— armed robbery — gist of offense

The gist of the offense of robbery with firearms or other dangerous weapons is not the taking of personal property, but a taking or attempted taking by force or putting in fear by the use of firearms or other dangerous weapon.

2. Robbery § 4— exhibition of firearm — threat to victim's life

Exhibition of a pistol or shotgun while demanding money conveys the message loud and clear that the victim's life is being threatened.

3. Robbery § 1— robbery of two different persons in store — separate offenses

Armed robbery of grocery store manager followed by armed robbery

of a checker at a cash register in the store would constitute two separate offenses although they occurred in the same building, and the person involved could be indicted and tried for each offense separately.

4. Indictment and Warrant § 17; Robbery § 4— indictment naming store manager as robbery victim — evidence that cashier was also robbed — variance

There was no fatal variance between allegations in an indictment charging defendant with the armed robbery of a grocery store manager and evidence of the State that defendant not only took money from the presence of the store manager but subsequently took money from the person and presence of a checker at a cash register in the store, the indictment being sufficient to enable the court to proceed to judgment and to bar a subsequent prosecution for the armed robbery of the store manager.

5. Criminal Law § 118; Robbery § 5— failure to state contention of defendant — absence of request

In this armed robbery prosecution, the trial court did not err in failing to mention in the charge defendant's contention that only three persons were involved in the robbery and that it had been shown that three persons had already been convicted of the crime absent a timely request by defendant for such instruction.

APPEAL by defendant from *Bailey, J.*, 16 March 1970 Session, WAKE Superior Court.

Defendant was charged in a bill of indictment with armed robbery in violation of G.S. 14-87.

Evidence for the State tended to show the following:

David Navahlee Devaughn, manager of the A & P Store on Newcombe Road in Raleigh, on Saturday, 15 February 1969, between 8:30 and 9:00 a.m., was taking trash out the back door of the store when he saw an automobile, with what appeared to him to be four colored males inside, pull in the store lot and head toward a filling station on the same lot. He then went back inside and when he returned with more trash the car had stopped, backed up toward the store, and then headed back approximately half way up the side of the building. He then went inside again and got more trash, and when he returned one of the men came around one side of the trash disposal carrying a shotgun and one of the men came around the other side of the trash disposal carrying a pistol. They both had on ski masks and the only part of their faces he could see was their eyes. He was told this was a stickup. The man with the pistol then ushered Devaughn to his office where Devaughn unlocked the safe and put all the currency, approximately $800, in a paper bag. The man with the pistol took the bag of money, left the office and went

toward the cash registers, one of which was being operated by Roland Dutton. No State's witness testified that he saw money taken from the cash register. By this time, the car in which the men had been riding had pulled up and parked in front of the store. The man with the pistol and the man with the shotgun got into the car with the other two men.

The State then offered the testimony of Warren Reginald Dunston tending to show that he was one of the four men involved in the robbery. He then went on to name the defendant Leroy Harris as the man who entered the store carrying the shotgun. He further testified that he and the two other men involved had been convicted and sentenced for their part in the robbery.

G. C. Jones, manager of Plaza Dry Cleaners, located adjacent to the A & P Store in question, testified as a witness for the State, that he was in the A & P Store when he saw Devaughn enter his office followed by a man wearing a ski mask and carrying a pistol. Jones paid for his purchases, left the store and went to his place of business where he attempted to call the police, but before the call could be completed a man wearing a ski mask and carrying a shotgun entered and ushered him back to the A & P Store. Upon returning to the store, he saw another man wearing a ski mask and carrying a shotgun, other than the one who had accosted him in his place of business. He then testified that he was in the A & P Store when the robbers left and that of the people engaged in the robbery, he saw three leave as far as he knew.

At the close of the State's evidence, defendant moved for judgment as of nonsuit and to dismiss on the grounds of variation between the proof and the bill of indictment, each of which was denied. Defendant offered no evidence and renewed his motion for dismissal as of nonsuit, which motion was denied.

The jury, after deliberation, returned a verdict of guilty of armed robbery as charged in the bill of indictment. Defendant appeals.

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

Peyton B. Abbott for appellant.

BROCK, J.

[4] Appellant contends there was a fatal variance between the allegations in the bill of indictment and the proof offered by the State

in that there was evidence offered by the State to the effect that the robbers also took money from the person and presence of one Roland Dutton, a checker at a cash register in the A & P Store, and that therefore even though defendant may have been acquitted in this trial he could have been indicted and tried for the armed robbery of Roland Dutton.

The bill of indictment charged as follows:

> "THE GRAND JURORS FOR THE STATE UPON THEIR OATH PRESENT, That Leroy Harris late of the County of Wake on the 15th day of February, 1969, 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, and other dangerous weapons, implements, and means, to wit: a shotgun whereby the life of David Navahlee Devaughn was endangered and threatened, did then and there unlawfully, wilfully, forcibly, violently and feloniously take, steal, and carry away U. S. money of the value of $800.00 from the presence, person, place of business, and residence of David Navahlee Devaughn contrary to the form of the statute in such case made and provided and against the peace and dignity of the State."

The bill of indictment charges that the appellant, with the use and threatened use of a shotgun, endangered and threatened the life of one David Navahlee and that appellant feloniously stole and carried away from David Navahlee Devaughn's presence $800.00 in U. S. currency. The essential elements of the offense of robbery with firearms (G.S. 14-87) are alleged in the bill of indictment and the evidence offered by the State supports the charges in the bill of indictment.

[1, 2] In an indictment for robbery with firearms or other dangerous weapons (G.S. 14-87), the gist of the offense is not the taking of personal property, but a taking or attempted taking by force or putting in fear by the use of firearms or other dangerous weapon. *State v. Rogers,* 273 N.C. 208, 159 S.E. 2d 525. And exhibition of a pistol (or shotgun) while demanding money conveys the message loud and clear that the victim's life is being threatened. *State v. Green,* 2 N.C. App. 170, 162 S.E. 2d 641.

[3] The armed robbery of David Navahlee Devaughn and the armed robbery of Roland Dutton, if such did occur, would constitute two separate offenses although they may have occurred in the same building; and the person involved could be indicted and tried for each offense separately.

"The purpose of the rule as to variance is to avoid surprise and to protect the accused from another prosecution for the same offense. . . ." 42 C.J.S., Indictments and Information, Sec. 254. And "[e]very defendant has the constitutional right to be informed of the accusation against him and the warrant or indictment must set out the charge with such exactness that he can have a reasonable opportunity to prepare his defense, can avail himself of his conviction or acquittal as a bar to a subsequent prosecution for the same offense, and the charge must be such as to enable the court, on conviction, to pronounce sentence according to law." *State v. Rogers, supra.*

[4] The indictment charged the offense in a plain, intelligible and explicit manner, and contained averments sufficient to enable the court to proceed to judgment, and to bar a subsequent prosecution for the armed robbery of David Navahlee Devaughn. This assignment of error is overruled.

[5] Appellant next assigns as error the failure of the court to mention in its charge to the jury appellant's contention that only three persons were involved in the robbery and that it had been shown already that one person had pleaded guilty and two others had been convicted. This contention overlooks the clear inference from the evidence that three were in the store and a fourth was driving the getaway car.

Nevertheless, it is well settled that a judge is not required by law to state the contentions of the litigants. Likewise, the court is not required to give all the contentions of the parties, but only to give them as fairly to one side as for the other and if a party desires a fuller statement of his contentions he must aptly tender a request therefor. 3 Strong, N. C. Index 2d, Criminal Law, Sec. 118.

If appellant had desired to have a fuller statement of his contentions presented in the charge of the court, the proper remedy was to call the court's attention to this omission by a timely request therefor.

Appellant concedes that his assignment of error No. 2 is without merit in that there was sufficient evidence to take the case to the jury. Likewise we find that the court did not abuse its discretion by its failure to grant appellant's motion to set aside the verdict as contrary to the evidence. This being the subject of appellant's assignment of error No. 3, it is overruled. Appellant's assignment of error No. 4 is based on the court's denial of defendant's motion that the verdict be set aside for error committed during the course of the

trial. Finding no error in the trial prejudicial to the defendant, this assignment of error is overruled.

No error.

BRITT and HEDRICK, JJ., concur.

J. V. SOLES, EMPLOYEE v. STEPHENS FARM EQUIPMENT COMPANY, EMPLOYER, TRAVELERS INSURANCE COMPANY, CARRIER

No. 7013IC367

(Filed 15 July 1970)

Master and Servant § 65— ruptured disc — accident in course of employment — sufficiency of evidence

Plaintiff's evidence was sufficient to support a finding that he sustained an injury by accident arising out of and in the course of his employment with defendant where it tends to show that plaintiff experienced pain when he bent over and attempted to pick up a tractor tire, and plaintiff's doctor testified that he diagnosed plaintiff's injury as a ruptured disc when he first saw and treated plaintiff for the injury complained of and that bending over or lifting objects can cause such a condition.

APPEAL by defendants from an opinion and award of the North Carolina Industrial Commission filed 19 February 1970.

Plaintiff claims benefits under the Workmen's Compensation Act for an alleged injury to his back on 25 October 1968. The deputy commissioner, after hearing the evidence, found facts, made conclusions of law, and entered an award for temporary total disability and medical expenses. The deputy commissioner found as a fact and also as a conclusion of law that the plaintiff had not reached maximum improvement at the time of the hearing and that, therefore, his permanent partial disability, if any, could not be determined at that time. Defendants excepted and appealed to the Full Commission. The Full Commission overruled the exceptions filed by defendants and adopted as its own the opinion and award of the deputy commissioner. Defendants appealed to the Court of Appeals.

Williamson & Walton by Benton H. Walton, III, for plaintiff appellee.

Powell & Powell by Frank M. Powell for defendants appellants.

MALLARD, C.J.

Defendants' only assignment of error is to "the finding of fact that there is competent evidence in this record to substantiate a finding of injury by accident." Defendants contend that there is no evidence establishing a causal relation between plaintiff's condition and the alleged accident. Defendants also contend that there is not a scintilla of medical evidence that plaintiff's ruptured disc might, with reasonable probability, have resulted from the alleged accident upon which he bases his claim.

Plaintiff testified that on Friday, 25 October 1968, he was employed by the Stephens Farm Equipment Company (Stephens) as general manager. On that date he and another employee, Osborne Taylor (Taylor), were inspecting some tractor tires owned by Stephens. That "whenever I inspected one laying on the right; in other words, it was kind of in a tilted position, and I turned to the left, twisted to the left to pick up one to inspect it that had water in it, and whenever I did that, I felt a pain in my back and burning. I stood the tire up; in other words, I was standing it up." He told Taylor that he had hurt his back. He then went back into his office and told the office secretary that he had hurt his back and asked her to report it to their insurance carrier. He went to Dr. Carroll about the pain in his back three or four days later. Dr. Carroll examined him, gave him prescriptions for medicine for pain, and sent him home. He was admitted to the hospital on 1 November 1968. After his release, it was necessary that he be readmitted to the hospital. He was thereafter repeatedly admitted to a Charlotte hospital, and on his third admission, surgery was performed on his back on 21 February 1969. Plaintiff testified that prior to 25 October 1968 he had not had any trouble with his back since 1963. He is still required to wear a brace, has pain in his back, and his left leg is numb.

Plaintiff also testified that in 1960 or 1961 he had an injury to his back and that Dr. Miller had operated on him in 1961 for a ruptured disc. Plaintiff testified that he had "completely recovered from 1961 operation" and had had no trouble with his back from 1963 until 25 October 1968, and that prior to 25 October 1968 he had operated a chain saw and a tractor and had lifted sheets of tobacco weighing as much as two hundred pounds.

Dr. Carroll, as an expert medical witness, testified for the plaintiff that the plaintiff came to see him on 1 November 1968 and told him he had hurt his back lifting a tire several days before. Dr. Carroll thought he had a ruptured disc and treated him, putting

him in the hospital for several days. He then released him, but the condition grew worse, and he readmitted him. Dr. Carroll testified, in substance, that after 25 November 1968 the defendant continued to have trouble "to where he could not do anything" and that the plaintiff had not reached maximum improvement. On cross-examination, Dr. Carroll testified that "(b)ending over or lifting objects can cause a disc." Dr. Carroll also testified that he had treated plaintiff for a herniated disc in 1961 but that any treatment relating directly to the 1961 injury had not been given for "one or two years" and that the plaintiff "was able to work the last time I saw him previous to November 25."

Defendants' witness Taylor testified that plaintiff lifted the tire while trying to find a tire to fit a tractor Stephens had sold and that plaintiff did not usually lift tires. Taylor said that plaintiff told him then that he had hurt his back.

The question involved in this case is one of causation. A similar question arose in *Tickle v. Insulating Co.*, 8 N.C. App. 5, 173 S.E. 2d 491, *cert. denied,* 276 N.C. 728, (12 June 1970). However, in the *Tickle* case there was no question of disc or nerve involvement. This court held in *Tickle* that "the evidence was that the onset pain of which plaintiff complained was simultaneous with the accident." As such, it did not matter that "plaintiff failed to elicit from the doctor any evidence of diagnosis nor did defendants elicit from him any evidence as to whether the unexpected occurrence of two bundles coming off the stack together could have produced the back condition * * *." In the case before us the evidence is even stronger. The onset of pain, according to the evidence, was simultaneous with the accident. In addition, Dr. Carroll testified that (1) "(b)ending over or lifting objects can cause a disc," (2) by reason of "his back" plaintiff had been disabled, (3) the plaintiff had told him that he was in an awkward position lifting a tire at work and had experienced the pain, (4) that his diagnosis of the plaintiff "at that time, Nov. 1, 1968, was probable ruptured disc," (5) that Dr. Wrenn of the Miller Clinic did "repeat laminectomy" on the plaintiff, and (6) that Dr. Carroll thinks the plaintiff has some permanent partial disability "by reason of his back."

Defendants, in support of their contentions, cite *Hood v. Kennedy,* 5 N.C. App. 203, 167 S.E. 2d 874 (1969); *Miller v. Lucas,* 267 N.C. 1, 147 S.E. 2d 537 (1966); *Gillikin v. Burbage,* 263 N.C. 317, 139 S.E. 2d 753 (1965); and *Lockwood v. McCaskill,* 262 N.C. 663, 138 S.E. 2d 541 (1964).

In the case before us there was no award made for permanent

injuries, if any, sustained by plaintiff. The *Hood* case and the *Gillikin* case are distinguishable from the case before us. In *Hood* and in *Gillikin* the plaintiffs sought to recover for alleged permanent injuries sustained in a collision of vehicles, and it was held that there was insufficient testimony of the permanency of the injuries alleged to have been sustained.

In the case before us the evidence was that the pain began when the plaintiff bent over and attempted to pick up a tractor tire and was simultaneous with the accident. Dr. Carroll testified that bending over or lifting objects can cause "a disc" and that he diagnosed the plaintiff's injury as a ruptured disc when he first saw and treated the plaintiff for the injury complained of. We think that there was sufficient evidence in the case before us to support a finding that the injury sustained by plaintiff on 25 October 1968 was caused by the plaintiff's bending over to pick up a tractor tire and that the factual situation in the *Miller* case and the *Lockwood* case relating to the question of the causation of an injury are distinguishable from the case before us.

In the case of *Tickle v. Insulating Co., supra,* Judge Morris said:

> "We agree that where the injury or illness is such that a lay person could have no well-founded knowledge with respect thereto and could do no more than engage in speculation as to the cause of the condition complained of, then expert medical testimony is necessary, but 'There are many instances in which the facts in evidence are such that any layman of average intelligence and experience would know what caused the injuries complained of.' *Gillikin v. Burbage, supra; Jordan v. Glickman,* 219 N.C. 388, 14 S.E. 2d 40 (1941). We think the case now before us falls in the latter category, and the plaintiff introduced evidence from which the trier of the facts might draw a *reasonable inference* that the particular injury of which he complained was the proximate result of the accident. * * *" (Emphasis Added.)

In the case at bar we hold that there was ample evidence to support the finding that on 25 October 1968 the plaintiff sustained an injury by accident arising out of and in the course of his employment with the defendant employer and the award based on such finding. The award of the Industrial Commission in this case is affirmed.

Affirmed.

MORRIS and GRAHAM, JJ., concur.

WILLIAM LEE ORMOND, PETITIONER v. JOE W. GARRETT, NORTH CAROLINA COMMISSIONER OF MOTOR VEHICLES, RESPONDENT

No. 7010SC212

(Filed 15 July 1970)

Automobiles § 2— suspension of license — epilepsy — sufficiency of findings by medical board

A finding by the Medical Review Board of the Motor Vehicles Department that the petitioner has been suffering from epilepsy since 1951 does not warrant suspension of the petitioner's license for a twelve-month period, where the Board also made a finding that the petitioner's condition was controlled by dilatin and phenobarbital, and where there were no findings that the petitioner was suffering from such physical or mental disability that would prevent him from exercising reasonable and ordinary control over a motor vehicle. G.S. 20-9(e).

BROCK, J., dissents.

APPEAL by respondent from *Bailey, J.*, 13 January 1970 Session of WAKE Superior Court.

This is a civil action instituted under the provisions of Article 33 of Chapter 143 of the General Statutes of North Carolina to review an order of the North Carolina Drivers License Medical Review Board under G.S. 20-9(g)(4) denying petitioner's application for a driver's license.

The petitioner in this case has a long history of epilepsy dating back to 1951. In 1964, while operating a motor vehicle, he was involved in a single vehicle accident in Pitt County, North Carolina, which apparently was caused by a "blackout" attributed to an epileptic seizure. The petitioner was granted full driving privileges in 1966 and since that time he has driven approximately 75,000 miles per year without an accident. On 8 August 1969, at the request of the Department of Motor Vehicles, the petitioner underwent an extensive examination by Dr. James J. Smith. During this examination the petitioner voluntarily revealed that while in Tennessee on vacation in June 1969 he had a mild blackout in his motel early one morning while dressing. The petitioner told Dr. Smith that this attack occurred without any warning. Dr. Smith, in his report to the Department of Motor Vehicles, stated that he had prescribed an increase in the medication being taken by the petitioner and that in his opinion the petitioner was capable of driving a motor vehicle. Upon receipt of a copy of the results of this examination a panel of medical consultants reviewed his case and recommended on 5 September 1969 that his driving privileges be disapproved and reviewed again on or after June, 1970. On 17 September 1969 the Department

of Motor Vehicles suspended his driving privileges and notified him of their decision by letter. The petitioner requested a hearing before the Driver License Medical Review Board and a hearing was set for 8 October 1969. At the hearing evidence was presented to establish the competency of the petitioner to operate a motor vehicle. After hearing the evidence the Medical Review Board rendered its decision which included the following findings of fact and conclusions of law:

"FINDINGS OF FACT

"1. That petitioner is a 37-year-old white male who lives at Greenville, North Carolina.

"2. That petitioner's driving privilege was suspended after evaluation of a medical report dated August 20, 1969, signed by Dr. James J. Smith, and Veterans Administration Hospital records from Durham.

"3. That petitioner has suffered from epilepsy since 1951.

"4. That petitioner has been involved in eight motor vehicle accidents.

"5. That petitioner was involved in a motor vehicle accident on September 2, 1964, and the officer's report reveals that petitioner stated, 'He blacked out and left the street and ran into the front loading ramp of the FCX store'.

"6. That petitioner's medical report reveals that he experienced his sixth seizure in September 1968.

"7. That petitioner experienced his last seizure in June 1969.

"8. That petitioner had no warning period prior to the last two seizures.

"9. That petitioner's condition is controlled by dilantin and phenobarbital.

"CONCLUSIONS

"It is the collective opinion of this Board that Mr. William Lee Ormond suffers from epilepsy and that his driving privilege should not be restored until he furnishes medical proof, satisfactory to the Department of Motor Vehicles, that he has been free of seizures for a period of twelve months dating from July 1, 1969, and then only after passing a complete license examination to be given by the Department of Motor Vehicles. Further that after restoration of his driving privilege, he should submit to medical and license examinations at twelve-month

intervals thereafter for such period of time as the Department of Motor Vehicles should deem necessary in the interest of highway safety. Further that the results of such medical and license examinations should be furnished to the Department of Motor Vehicles as supporting evidence of his continued competency to operate a motor vehicle."

The Board then proceeded to enter its decision and order implementing the conclusions.

The petitioner was notified of the decision of the Medical Review Board on 21 October 1969 and on 18 November 1969 petition was filed in Wake County Superior Court to review the decision of the Medical Review Board.

The matter came on for hearing in the Superior Court of Wake County, and on 13 January 1970, following a hearing, Judge Bailey entered judgment in pertinent part as follows:

"(1) That the Decision and Order of the North Carolina Driver License Medical Review Board, dated October 21, 1969, is not supported by the record, including hearings conducted in that there is a finding and evidence to support such finding that petitioner's physical or medical condition is controlled by dilantin and phenobarbitol [sic] and, that the petitioner has driven several hundred thousand miles for the past several years and has not been charged with a motor vehicle violation since 1961.

"(2) That there is no finding nor is there any evidence to support such finding that petitioner is afflicted with or suffering from any uncontrolled medical, physical or mental disability which would prevent him from exercising reasonable and ordinary control over a motor vehicle while operating same on the highways of North Carolina.

"(3) That the Decision and Order of the North Carolina Driver License Medical Review Board as well as the decision of the respondent in the above matter are unsupported by competent, material and substantial evidence in view of the entire record as submitted and are arbitrary and capricious.

"NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the Decision and Order of the Respondent, be and the same is hereby reversed."

From the entry of this judgment the respondent appealed to the Court of Appeals assigning error.

Everett and Cheatham, by James T. Cheatham, for petitioner appellee.

Robert Morgan, Attorney General, and T. Buie Costen, Staff Attorney, for the State.

HEDRICK, J.

The appellant, Joe W. Garrett, North Carolina Commissioner of Motor Vehicles, assigns as error the decision of Judge Bailey reversing the order of the North Carolina Driver License Medical Review Board denying the petition of William Lee Ormond for a North Carolina motor vehicle operator's license. The appellee contends that the findings, inferences, conclusions and decision of the Medical Review Board of the North Carolina Department of Motor Vehicles denying him an operator's license were not supported by competent, material and substantial evidence in view of the entire record as submitted.

An appeal to the Superior Court of Wake County is provided from the denial of a driver's license under G.S. 143-306, *et seq.* G.S. 20-9(g)(4)(f). Under the provisions of G.S. 143-315, the Superior Court of Wake County is given the power to reverse decisions of administrative agencies if the petitioner's substantial rights have been prejudiced because the administrative findings, inferences, conclusions, or decisions are unsupported by competent, material, and substantial evidence in view of the entire record as submitted. *Waggoner v. Board of Alcoholic Control,* 7 N.C. App. 692, 173 S.E. 2d 548 (1970).

Prior to 1967, G.S. 20-9(d) prohibited the licensing of anyone who had been diagnosed as having grand mal epilepsy. In 1967 this section was amended to delete the words "grand mal epilepsy".

The Department of Motor Vehicles, in finding that the petitioner was incompetent to operate a motor vehicle, and in suspending his driver's license on 17 September 1969, apparently proceeded under G.S. 20-9(e) which provides:

> "The Department shall not issue an operator's or chauffeur's license to any person when in the opinion of the Department such person is afflicted with or suffering from such physical or mental disability or disease as will serve to prevent such person from exercising reasonable and ordinary control over a motor vehicle while operating the same upon the highways, ..."

The Medical Review Board in the present case found as a fact

that the petitioner has been suffering from epilepsy since 1951. All of the evidence received by the Medical Review Board was to the effect that the petitioner's epilepsy was controlled and that he was capable of operating a motor vehicle. The Board, in finding of fact number 9, found that the petitioner's condition was controlled by taking prescribed medication in the form of dilantin and phenobarbital. However, after finding that his condition was controlled medically, the Board proceeded to deny him driving privileges. The decision and order of the Medical Review Board does not contain any finding that the petitioner is afflicted with or suffering from "such physical or mental disability or disease as will serve to prevent such person from exercising reasonable and ordinary control over a motor vehicle while operating the same upon the highways, ..." In the absence of such a finding, it is our opinion that the Board was without authority to deny the petitioner his driving privileges.

The judgment appealed from is affirmed.

Affirmed.

BRITT, J., concurs.

BROCK, J., dissents.

CAROLYN GASH SHERRILL v. CLAUDE A. SHERRILL

No. 7028SC299

(Filed 15 July 1970)

1. Divorce and Alimony §§ 19, 23— modification of alimony and support decree — husband's change of occupation — findings of good faith

A husband who sought modification of an alimony and support decree on the ground that he was changing his occupation on account of a diabetic condition and expected a reduction in income could not complain that the trial court made no finding as to his good or bad faith in changing his occupation, where the husband made no request for such a finding.

2. Divorce and Alimony §§ 19, 23— modification of alimony and support decree — change of conditions — burden of proof

A husband who sought modification of an alimony and support decree on the ground that he was changing his occupation and expected a reduction in income assumed the burden of showing that circumstances had

changed between the time of the decree and the time of the hearing upon his motion.

3. Divorce and Alimony § 23— custody and support of children — polar star rule

The welfare of the children is the "polar star" in matters of custody and maintenance, yet common sense and common justice dictate that the ultimate object in such matters is to secure support commensurate with the needs of the children and the ability of the father to meet the needs.

4. Divorce and Alimony §§ 19, 23— modification of alimony and support decree — sufficiency of order

A husband who sought modification of an alimony and support decree on the ground that he was changing his occupation on account of a diabetic condition and expected a reduction in income failed to show that the trial court erred in refusing to modify the decree.

APPEAL by defendant from *Hasty, J.*, 9 February 1970 Session of the BUNCOMBE County Superior Court.

A consent judgment was entered by Judge Frank Snepp on 4 February 1969 awarding alimony to the plaintiff Carolyn Sherrill in the amount of $75.00 per month for four years and the sum of $400.00 per month for support of their three minor children, and the defendant was authorized to proceed with his action for an absolute divorce. In a petition filed 21 January 1970, the defendant requested that the court modify the above judgment. He alleged that he had been engaged in the practice of dentistry in Asheville at the time of the above judgment and decree; that he has diabetes mellitus and is advised that certain degenerative changes may take place in the future which would make it inadvisable for him to continue the practice of dentistry; that because of this information, petitioner determined that he would enter the graduate school of the University of Michigan to pursue studies leading to a degree of Doctor of Philosophy in the field of dental materials and metallurgy; that with this preparation, he would then teach in the field of dentistry; that this would provide him with a longer period of productive employment than would the actual private practice of dentistry; that his adjusted gross income in 1969 was $17,322.00; that his stipend at Michigan would be $6,000.00 per year plus $500.00 per year per dependent; that this is now his sole income while he pursues his studies; that the plaintiff was now employed; that he now seeks to have the judgment of 4 February 1969 modified to provide that the permanent alimony be reduced from $75.00 per month to $50.00, and that the support payments for his three minor children be reduced from $400.00 per month to $225.00.

Plaintiff answered the petition and alleged that the diabetic condition had been in existence some time before the decree of 4 February 1969; she denied that the decision of defendant to pursue further his studies in the field of dentistry was caused by his physical condition; she is employed as student counsellor at a high school and such employment was contemplated at the time of the judgment in order to provide the necessary living expenses; and that she and the children presently required some $972.00 a month to subsist (as itemized in an attached schedule). In that schedule attached to the answer she showed a net income of $351.00 a month from her employment.

The evidence of the defendant tended to support his allegations that he was a diabetic and had been at least 14 years, and he had the future prospects of a diabetic; that there was a possibility of degenerative changes — mainly circulatory and related problems — in his physiological makeup which would limit his active practice of dentistry, and that an academic atmosphere would be more acceptable. Defendant testified that he did not now own property other than a Volkswagen automobile, his dental equipment (chairs, x-ray, drilling equipment, etc.) which had a "lien" on it to cover a loan from his father, and assorted other personal property that he is presently using in his studies. He testified that his 1969 income taxes of some $2,100.00 were still outstanding, and his bank account amounted to about $300.00 on 9 February 1970. It was admitted that he had complied with the judgment and was current with its provisions.

Prior to offering any evidence, the defendant withdrew his petition to modify the alimony payments to the plaintiff and sought only to modify the provision of the previous judgment for child support. At the conclusion of the defendant's evidence, Judge Hasty found as a fact that there had been no substantial change, degeneration or modification in the defendant's physical condition and general health since the entry of the judgment; that the defendant's decision to terminate his dental practice and enroll as a student was not caused by any change in his physical condition and general health which had occurred since the previous judgment; that the defendant had not shown substantial change in his earning capacity, in the amount of support required by his children, nor any other substantial change of condition which would support the conclusion that the best interests of the children require modification of the previous judgment by a reduction in their support payments. Based upon these findings, Judge Hasty denied any modification of the

previous judgment. Defendant appealed from this order of Judge Hasty.

Gudger, Erwin and Crow by Lamar Gudger for plaintiff appellee.

Van Winkle, Buck, Wall, Starnes and Hyde by Herbert L. Hyde and Emerson D. Wall for defendant appellant.

CAMPBELL, J.

[1] Defendant asserts error for that Judge Hasty failed to make a finding as to the good faith of the defendant in changing from the active practice of dentistry to a student and thereby reducing his income. The defendant asserts that if this change was brought about in good faith, then a change of condition justifying a modification of the previous judgment was established. The defendant made no request of Judge Hasty in this regard, and in the absence of such a request it was not error not to make a finding as to the good or bad faith of the defendant in changing his occupation. The defendant further asserts as error the failure of Judge Hasty to make a finding with regard to whether the plaintiff's employment subsequent to the February 1969 judgment constituted such a change of circumstances as to afford relief to the defendant and justify a reduction in the payments by the defendant for the support of his children. Again, the defendant failed to request such a finding when he had ample opportunity to do so. "The primary obligation for support of a minor child rests upon the father." *Williams v. Williams,* 261 N.C. 48, 134 S.E. 2d 227 (1963).

[2, 3] When the defendant moved that the previous judgment be modified, he assumed the burden of showing that circumstances had changed between the time of the judgment and the time of the hearing upon his motion. The welfare of the children is the "polar star" in the matters of custody and maintenance, yet common sense and common justice dictate that the ultimate object in such matters is to secure support commensurate with the needs of the children and the ability of the father to meet the needs. *Crosby v. Crosby,* 272 N.C. 235, 158 S.E. 2d 77 (1967).

[4] The defendant had the burden of establishing the change of conditions. The defendant relies on *Nelson v. Nelson,* 225 Ore. 257, 357 P. 2d 536, 89 A.L.R. 2d 1 (1960). In that case it is stated:

> "The sole question presented on appeal is the validity of the court's assumption that such a voluntary change in position precludes a modification of a support decree."

In the instant case, the defendant fails to establish that Judge Hasty, in refusing to modify the previous judgment, acted on an assumption that the defendant's voluntary change in position precluded such a modification. Judge Hasty found "that the defendant has not shown substantial change in his earnings (*sic*) capacity, substantial change in the amount of support required by his children, nor any other substantial change of condition such as would support the conclusion that the best interests of the children of the parties require modification of the Consent Judgment of February 4, 1969, by reduction of child support provision of the said judgment."

The findings of Judge Hasty were supported by the evidence and will not be disturbed on appeal. *Allen v. Allen*, 7 N.C. App. 555, 173 S.E. 2d 10 (1970).

Affirmed.

BRITT and VAUGHN, JJ., concur.

BRUCE E. COMER, A MINOR, BY AND THROUGH HIS NEXT FRIEND, E. L. COMER v. HAROLD P. CAIN, RALPH SHAW AND LAFAYETTE MOTOR SALES OF FAYETTEVILLE, A CORPORATION

No. 7020SC337

(Filed 15 July 1970)

1. Rules of Civil Procedure § 51— instructions — contentions of the parties — unequal length

Plaintiff was not prejudiced by the fact that the trial court used more words to state defendants' contentions on the issue of contributory negligence than he used to state plaintiff's contentions on the issue.

2. Games and Exhibitions § 2— contributory negligence of spectator — instructions

In an action by a drag race spectator to recover for injuries sustained when he left the stands, along with other spectators, in order to view a disabled car, the trial court's instructions were not susceptible to interpretation that plaintiff's mere presence on the track was sufficient to permit a finding of contributory negligence if the presence was a proximate cause of the injury, where the instructions, when considered contextually, made it clear that plaintiff would be guilty of contributory negligence only if he failed to keep a proper lookout or to exercise due care for his own safety.

APPEAL by plaintiff from *McConnell, J.*, 19 January 1970 Regular Civil Session, MOORE Superior Court.

This is a civil action in which plaintiff seeks to recover damages for personal injuries sustained by him as the result of being struck by a trailer allegedly owned by defendants Cain and Shaw and pulled by a Ford automobile owned by the corporate defendant.

The complaint alleged and the evidence tended to show: On the afternoon of 29 August 1965, plaintiff, 16 years old at the time, was a paid spectator at a "drag race" or exhibition at the Sanford Drag Strip. A 1965 Mustang automobile was giving a speed exhibition but developed mechanical trouble on the race track some 200 or 300 feet from the starting line. A large number of the spectators, including plaintiff, left the stands and went onto the track for purpose of investigating the cause of the Mustang's disability. One of the defendants was slowly driving the Ford pulling the trailer on the track, making his way to the Mustang for purpose of removing it from the track. Plaintiff "hopped" on the trailer and rode to a point some 100 feet from the Mustang after which he alighted from the trailer and proceeded to the right side of the disabled car. The Ford and trailer proceeded on at slow speed in an attempt to get through the crowd, pass by the right side of the Mustang and get in front of it. As the trailer which was a little wider than the Ford approached the point where plaintiff was standing, someone yelled, "Watch out." Plaintiff turned (evidently to his left) and the left front wheel of the trailer passed over his right foot after which a protruding medal blade on the hubcap on the left rear wheel of the trailer struck and severely cut the calf of plaintiff's right leg.

Plaintiff alleged that the driver of the Ford pulling the trailer was negligent "in that he drove said Ford car and trailer into a crowd of people, including plaintiff, whose attention was directed to a disabled car, without giving them adequate warning of his approach, without keeping a proper lookout and without keeping said Ford car and trailer under proper control * * *." In their answer defendants pleaded contributory negligence on the part of plaintiff including allegations that plaintiff left a place of safety and entered into a place of danger when he knew or, by the exercise of due care, should have known that he might receive some type of bodily injury, that he failed to keep a proper lookout and failed to exercise ordinary care for his own safety under the existing circumstances.

Issues of negligence, contributory negligence and damage were submitted to the jury who answered the first and second issues yes. From judgment denying recovery and dismissing the action, plaintiff appealed.

Pittman, Staton & Betts by Lowry M. Betts for plaintiff appellant.

William D. Sabiston, Jr., for defendant appellees.

BRITT, J.

Plaintiff's two assignments of error are to portions of the trial judge's jury instructions relating to the issue of contributory negligence.

[1] First, plaintiff contends that the court committed prejudicial error by failing to give equal stress to the contentions of plaintiff on the issue of contributory negligence, in contravention of Rule 51(a) of the Rules of Civil Procedure. We do not think this assignment of error has sufficient merit to justify a new trial, therefore, it is overruled. It is well-settled in this jurisdiction that the trial court is not required to state the contentions of the parties, but when it undertakes to state the contentions of one party upon a particular phase of the case, it is incumbent upon the court to give the opposing contentions of the adverse party upon the same aspect; however, it is not required that the statement of such contentions be of equal length. 7 Strong, N.C. Index 2d, Trial, § 24, p. 336. Although in the instant case the trial court used more words to state defendants' contentions on the issue of contributory negligence, we think the court sufficiently stated plaintiff's contentions on the issue.

[2] In his second assignment of error, plaintiff contends the trial court erroneously instructed the jury that plaintiff's mere presence on the race track, if a proximate cause of the accident, was sufficient to permit a finding of contributory negligence. The pertinent portion of the charge which is the subject of this assignment of error is as follows:

> "Therefore, I charge you that if the defendant has satisfied you from the evidence and by its greater weight that on this occasion the plaintiff Bruce Comer was negligent in one or more of those respects, that is that he went out on the track, that he rode on the tow car and knew it was approaching, and that *thereafter* he failed to keep a proper lookout, or failed to exercise due care for his own safety, and not only that he was negligent in one or more of those respects, but that his negligence was one of the proximate causes of the resulting collision with the trailer and his injury, if the defendant has so satisfied you from the evidence and by its greater weight, it would be your duty to answer the second issue YES * * *." (Emphasis added.)

We do not agree with the construction placed by plaintiff on the quoted portion of the charge. The quoted portion follows a paragraph in which the court stated defendants' contentions on the second issue, and after reviewing the evidence pertinent to defendants' contentions stated: "* * * and his [plaintiff's] actions in not keeping a proper lookout, not exercising due care for his own safety were negligence, and that his negligence was one of the proximate causes of the resulting collision and injury to the plaintiff." When the instruction quoted above is considered together with the instruction immediately preceding it, we think the court made it clear that if plaintiff were guilty of contributory negligence it was in failing to keep a proper lookout or failing to exercise due care for his own safety. We also think that the word "thereafter" emphasized above is significant in that it separated a statement of something that plaintiff did — "went out on the track * * * rode on the tow car and knew it was approaching" — from a statement of two acts or omissions that would constitute contributory negligence. We hold that plaintiff was not prejudiced by this portion of the charge and the assignment of error relating thereto is overruled.

Although defendants' brief indicates that defendants timely moved for a directed verdict, the disallowance of such motion or motions, if made, is not before us and we do not pass upon the sufficiency of the evidence to make out a case of negligence against the defendants or the showing of contributory negligence on the part of plaintiff as a matter of law.

No error.

BROCK and HEDRICK, JJ., concur.

PERCY J. HOLCOMBE, T/D/A BLUE-GRAY AUTO SALES v. JAKE H. BOWMAN AND MELVIN D. POOVEY, T/D/A LAMAR MOTORS AND GRAMCO FINANCE COMPANY, INC. (GRAMCO OF NORTH CAROLINA, INC.)

No. 7025SC313

(Filed 15 July 1970)

1. Judgments § 29— meritorious defense — mere denial of indebtedness

The trial court properly found that defendant failed to show a meritorious defense where defendant's affidavit in support of his motion to set

aside a judgment against him merely stated, "I have a good defense to this action, as will appear from my Answer," and defendant's answer to the complaint merely denied plaintiff's allegations and alleged no facts tending to show a meritorious defense.

2. Judgments § 25— inexcusable neglect — failure to appear at trial

In this proceeding upon motion of defendant to set aside a judgment rendered against him in a trial at which he failed to appear, the trial court did not err in its findings of fact and conclusion of law that defendant failed to show excusable neglect, where affidavits presented at the hearing showed that defendant received a calendar showing when his case was scheduled for trial, that the trial was held at the scheduled time and place, that defendant was subpœnæd to appear at the trial, that he went to the courtroom, without counsel, at the designated hour but did not remain in the courtroom or make any inquiry of the attorneys, clerk or judge as to the status of his case, and that he did not present himself or make inquiry when he heard the name of his co-defendant mentioned by the presiding judge.

APPEAL by defendant Jake H. Bowman from *Martin (Harry C.), J.*, 5 January 1970 Regular Civil Session, CATAWBA Superior Court.

This is a civil action in which the plaintiff, Percy J. Holcombe, t/d/a Blue-Gray Auto Sales, hereinafter referred to as Auto Sales, sought to recover the purchase price of seven (7) automobiles which were sold by Auto Sales to Lamar Motors on 15 June 1964 at a price of $17,300.00. Lamar Motors issued seven (7) checks to Auto Sales but such checks were not honored by Northwestern Bank due to insufficient funds in the account of Lamar Motors.

Auto Sales filed a complaint on 11 August 1964 seeking payment from Jake H. Bowman and Melvin D. Poovey as owners of Lamar Motors and from Gramco Finance Company, Inc., hereinafter referred to as Gramco Finance, who Auto Sales alleged to be in possession of the automobiles. The defendants answered separately denying the allegations of Auto Sales. Gramco Finance further alleged that Auto Sales delivered the automobiles to Lamar Motors along with bills of sale and thereafter Lamar Motors executed mortgages to Gramco Finance borrowing $15,000.00 which has not yet been repaid in full.

The cause came on for hearing before Froneberger, J., at the 25 April 1966 Term of the Superior Court of Catawba County. Representatives and counsel for Auto Sales and Gramco Finance were present upon the cause coming for trial and were ready for trial. Neither of the individual defendants were present nor represented by counsel. Trial of the case proceeded. The parties present in court settled, adjusted and compromised all matters in controversy be-

tween them. Evidence was heard and issues submitted to the court sitting as a jury. Judgment was entered in favor of Auto Sales against the individually named defendants in the amount of $17,300.00.

On 29 April 1966, appellant Bowman moved that the judgment against him be set aside, alleging no notice of the prior proceeding and the existence of a meritorious defense, surprise and excusable neglect. Affidavits were offered in support of his contentions. On the same day an order was entered by Judge Froneberger restraining Auto Sales and the Sheriff of Catawba County from executing the judgment until hearing at the next civil term. The motion came on for hearing before Ervin, J., on 12 September 1967 who refused to hear the matter because of lack of jurisdiction since the appellant had appealed the judgment to the North Carolina Supreme Court. The appeal was dismissed on 30 August 1968 for failure of appellant Bowman to perfect his appeal.

The motion was heard before Martin (Harry C.), J., at the 5 January 1970 Session of the Superior Court of Catawba County. The court made findings of fact and conclusions of law denying appellant Bowman's motion to set the judgment aside. From his order appellant Bowman appeals.

Simpson and Martin by Dan R. Simpson for plaintiff appellee.

Tate, Weathers and Young By E. Murray Tate, Jr., for defendant appellee Gramco Finance Company, Inc.

Butner and Gaither by James M. Gaither, Jr., for defendant appellant Bowman.

VAUGHN, J.

The appellant contends that the trial court erred as a matter of law in its findings of fact and conclusions of law that the appellant Bowman failed to show a meritorious defense to the plaintiff's action.

[1] The appellant offered two contentions to support his claim of a meritorious defense; namely, his general denial by way of answer to the complaint and his specific denial of being in partnership with Melvin D. Poovey. The court's findings of fact that defendant failed to show a meritorious defense are supported by the evidence and are conclusive on appeal. *Floyd v. Dickey,* 245 S.C. 589, 96 S.E. 2d 731; *Dillingham v. Blue Ridge Motors,* 234 N.C. 171, 66 S.E. 2d 641; *Craver v. Spaugh,* 226 N.C. 450, 38 S.E. 2d 525; *Hodge v. First Atlantic Corp.,* 6 N.C. App. 353, 169 S.E. 2d 917. The answer of Bow-

man to the complaint merely denied the plaintiff's allegations and alleged no facts tending to show a meritorious defense. To merely deny indebtedness and assert the presence of a meritorious defense is not sufficient. *Hooks v. Neighbors,* 211 N.C. 382, 190 S.E. 236. The affidavit of Bowman in support of his motion only states, "I have a good defense to this action, as will appear from my Answer." This assignment of error is overruled.

[2] The appellant further contends that the trial court erred as a matter of law in the findings of fact and conclusions of law that appellant Bowman failed to show his neglect to be excusable.

The trial court found:

> "F. That, taken as a whole, the affidavits of Jake H. Bowman show inexcusable neglect and a failure to give his defense the attention a man of ordinary prudence would give his important business."

It is our opinion that the finding was fully supported by the affidavits introduced at the hearing and is conclusive upon this appeal. *Moore v. Deal,* 239 N.C. 224, 79 S.E. 2d 507.

In *Hodge v. First Atlantic Corp.; supra,* Britt, J., writing for this Court, it is said:

> "The exceptional relief of G.S. 1-220 [repealed as of 1 January 1970, replaced by Rules of Civil Procedure, Chapter 1-A, Rule 60] to set aside a judgment for mistake, inadvertence, surprise, or excusable neglect will not be granted where there is inexcusable neglect on the part of the litigant. 'A lawsuit is a serious matter. He who is a party to a case in court "must give it that attention which a prudent man gives to his important business." [citations]' *Pepper v. Clegg,* 132 N.C. 312, 43 S.E. 906. 'When a man has a case in court the best thing he can do is to attend to it. If he neglects to do so he cannot complain because the other party attended to his side of the matter.' *Pepper v. Clegg, supra.* * * *"

The affidavits presented at the hearing tended to show that Bowman received a calendar when his case was scheduled for trial in April 1966, that he was served with a subpœna by the Deputy Sheriff of Catawba County ordering him to be at trial and that he did come to the courtroom, without counsel, at the designated hour but did not remain in the courtroom or make any inquiry of the opposing attorneys, of the clerk, or of the presiding judge of the status of his case nor did he present himself or make inquiry when he heard the name of his co-defendant, Melvin D. Poovey, mentioned by the

presiding judge. Before the case was tried, the deputy sheriff called out the defendant's name three times in a loud voice and looked for him in the area surrounding the courtroom. The trial was had at the time and place at which the case had been scheduled.

There was plenary evidence to support the decision of the trial court and the appellant's motion to set aside the judgment was properly denied. We have considered the appellant's remaining assignment of error and find it to be without merit. Upon the facts shown, defendant is not entitled to relief under G.S. 1-220, the statute in effect at the time he filed his motion, or under Rule 60 of the Rules of Civil Procedure which became effective 1 January 1970.

The order appealed from is

Affirmed.

CAMPBELL and BRITT, JJ., concur.

STATE OF NORTH CAROLINA v. WILLIAM EARL KEYES

No. 702SC317

(Filed 15 July 1970)

1. Robbery § 4— common law robbery — force — sufficiency of evidence

State's evidence that the defendant gave a service station employee two one-dollar bills for gas, that the defendant then insisted he had given the employee a twenty-dollar bill, that the employee denied the statement and refused to give change, that the defendant showed the employee the back part of a knife and repeated his demand for change, and that the employee immediately gave the defendant eighteen dollars from the cash register, *held* sufficient to sustain a conviction for common law robbery.

2. Robbery § 1— definition of robbery

Robbery is the taking of money or goods with felonious intent from the person of another, or in his presence, against his will, by violence or putting him in fear.

3. Robbery § 1— force

Force as an element of robbery may be actual or constructive.

4. Robbery § 1— presumption of fear

Fear will be presumed if there are just grounds for it.

5. Robbery § 5; Criminal Law § 172— error cured by guilty verdict on lesser offense

Conviction of common law robbery rendered harmless any error with respect to submitting the question of defendant's guilt of armed robbery, absent some showing that the verdict of guilty of common law robbery was affected by the submission of the greater offense.

6. Criminal Law § 71— shorthand statement of the facts

Testimony by the arresting officer in a robbery prosecution that defendant's female companion "tried" to grab the eighteen dollars which defendant was attempting to pass to her, *held* admissible as a shorthand statement of the facts.

APPEAL by defendant from *Mintz, J.*, January 1970 Criminal Session of BEAUFORT County Superior Court.

Defendant was tried under a bill of indictment charging armed robbery. The court instructed the jury that they could return one of three verdicts: guilty of armed robbery, guilty of robbery, or not guilty. The jury verdict was guilty of robbery. Judgment was entered imposing a prison sentence of not less than eight nor more than nine years and defendant appealed.

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

Wilkinson & Vosburgh by John A. Wilkinson for defendant appellant.

GRAHAM, J.

[1] Defendant's first assignment of error is to the court's refusal to allow his motion to dismiss for a lack of sufficient evidence. Defendant offered no evidence. Evidence offered by the State tended to show the following:

On the afternoon of 12 October 1969, defendant and two companions drove up to a service station being operated by James Boyd. A man called "Martin" was driving and defendant was sitting in the right front seat. Martin purchased two dollars worth of gas and paid for it with two one dollar bills. He then said he needed a quart of oil. Defendant said, "Put the oil in," and Boyd did so. Defendant then got out of the car and looked in his wallet, but he took no money out, and Boyd, who was standing nearby saw no money in the wallet. Martin asked Boyd if he would trust him with the oil until he could go to Blount's Creek and return. Boyd agreed to do so. Boyd then went inside the station and defendant followed him. Defendant's two companions remained outside. Boyd testified:

"When he opened the door, he looked at me, says, 'I give you a

twenty dollar bill.' I made the statement, 'You didn't give me any money.' He made a statement not to jive with his money.

* * *

I told him I was not jiving with his money. He come right up to the desk and made the statement again he give me a twenty dollar bill. I said, 'Martin paid me two one dollar bills for gas.' I said, 'You didn't give me a twenty dollar bill.'

The money that Martin gave me for the gas was two one dollar bills. No sir, the defendant Keys had not given me any money at that time. I had not even had any contact with him. After I told him Martin gave me two dollars he said again he give me a twenty dollar bill. He stuck his right hand in his pocket and I was watching. He was making a motion with his hand, going around in there. I made the statement again, 'Now, you didn't give me a twenty dollar bill,' and at that time he come up with his hand and I saw the back part of a knife. He said he was going to ask me one more time for the money. I opened the cash register and handed it to him. I handed him eighteen dollars."

[1-3] In our opinion the evidence was sufficient to sustain a conviction for common law robbery. Robbery has been defined numerous times as the taking of money or goods with felonious intent from the person of another, or in his presence, against his will, by violence or putting him in fear. See 6 Strong, N.C. Index 2d, Robbery, § 1, and cases therein cited. Force as an element of robbery may be actual or constructive. If the threatened use of force is sufficient under the circumstances to put a man of reasonable firmness in fear and induce him to give up his property to avoid apprehended injury there is sufficient constructive force. *State v. Norris,* 264 N.C. 470, 141 S.E. 2d 869; *State v. Sawyer,* 224 N.C. 61, 29 S.E. 2d 34. The taking may be by violence or *intimidation. State v. Smith,* 268 N.C. 167, 150 S.E. 2d 194.

[4] Defendant, while displaying the fact that he was armed with a knife, told Boyd that he was going to ask him one more time for the money. This brought forth a reasonable and natural response from Boyd who immediately surrendered the money. Under the circumstances, a man of reasonable firmness should not have been expected to wait and see what defendant's next step would be, once defendant had made it clear that he was through asking. Fear will be presumed if there are just grounds for it. 46 Am. Jur., Robbery, § 16, p. 147.

[5] Defendant asserts as prejudicial error the submission to the jury of the question of his guilt as to armed robbery, contending the evidence was insufficient to support a verdict of guilty as to that offense. It is not necessary that we inquire into the sufficiency of the evidence with respect to the charge of armed robbery, for the jury acquitted defendant of that offense. Conviction of the lesser offense of robbery rendered harmless any error with respect to submitting the question of defendant's guilt of the more serious offense, absent some showing that the verdict of guilty of a lesser offense was affected thereby. *State v. Casper,* 256 N.C. 99, 122 S.E. 2d 805; *State v. DeMai,* 227 N.C. 657, 44 S.E. 2d 218. Defendant has not shown that his conviction was affected in any way by the jury's consideration of his possible guilt of the more serious charge.

[6] The State attempted to show that when defendant was arrested a short time after the alleged offense, he attempted to pass the eighteen dollars which he had in his pocket to a woman who was with him. On direct examination a deputy sheriff testified:

> "There was a lady standing behind him. I was behind the defendant and she was directly behind me. The money got to her hand. Her hand touched it.
>
> Q. Did she grab any of it?
>
> A. She tried.
>
> OBJECTION OVERRULED MOTION TO STRIKE DENIED EXCEPTION NO. 1"

Defendant contends the court committed error in refusing to strike the witness' answer. Although the answer was in the nature of a conclusion, it was competent as a shorthand statement of the facts. "An observer may testify to common appearances, facts and conditions in language which is descriptive of facts observed so as to enable one not an eyewitness to form an accurate judgment in regard thereto." *State v. Goines,* 273 N.C. 509, 513, 160 S.E. 2d 469; *Tyndall v. Hines Co.,* 226 N.C. 620, 39 S.E. 2d 828. See also 2 Strong, N.C. Index 2d, Criminal Law, § 71.

Defendant's final contentions relate to the charge. A review of the charge in its entirety fails to show that it contains prejudicial error.

No error.

MALLARD, C.J., and MORRIS, J., 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

ADMINISTRATIVE LAW

§ 2. Exclusiveness of Statutory Remedy

Nonprofit hospitals which challenged the validity of hospital charges approved by the Industrial Commission in the treatment of workmen's compensation cases were not entitled to maintain the action in superior court on the ground that they had exhausted their administrative remedies before the Commission. *Wake County Hospital v. Industrial Comm.*, 259.

When the legislature has provided an administrative remedy, it is exclusive. *Ibid.*

APPEAL AND ERROR

§ 1. Jurisdiction in General

Supreme Court is given exclusive authority to make rules of practice and procedure for the appellate division. *Fetherbay v. Motor Lines*, 58.

§ 2. Review of Decision of Lower Court

Where appeal to the superior court in this condemnation proceeding was premature, questions with respect to the hearing of evidence in the superior court and the court's findings of fact and conclusions of law are not properly presented on appeal to the Court of Appeals. *Redevelopment Comm. v. Grimes*, 376.

§ 9. Moot Questions

Questions presented by appeal of plaintiff bank acting as executor of an estate was rendered moot where Court of Appeals had affirmed an order setting aside plaintiff's letters testamentary. *Bank v. Bank*, 333.

§ 14. Appeal and Appeal Entries

Appeal from order holding defendant in contempt for failure to make child support payments is dismissed where defendant did not attempt to appeal from the order until a month after it was entered, and the record shows that defendant has purged himself of contempt. *Kelly v. Kelly*, 569.

§ 24. Objections, Exceptions and Assignments of Error in General

Appellant's attack on authority of district court to enter order holding him in contempt for failure to comply with an alimony consent order entered in the superior court must fail where there is no showing in the record that he entered timely objection to the jurisdiction or venue of the district court. *Peoples v. Peoples*, 136.

Court of Appeals considered indigent juvenile's appeal even though the record on appeal contained no assignments of error. *In re Whichard*, 154.

Where there is no objection to an offer of evidence or motion to strike after its admission, objection or exception is waived. *Dunn v. Brookshire*, 284.

§ 26. Assignment of Error to Judgment

Assignment of error to the entry of judgment presents question whether the facts found support the judgment. *Roughton v. Jim Walter Corp.*, 325.

§ 28. Exceptions to Findings of Fact

Findings of fact to which no exception has been made are deemed supported by the evidence. *McWhirter v. Downs*, 50.

APPEAL AND ERROR — Continued

§ 30. Exception to Evidence

Exception to the admission of evidence is waived when evidence of the same import is thereafter admitted without objection. *Equipment Co. v. Hooks*, 98.

§ 31. Exception to the Charge

Court of Appeals will not consider broadside exception to the charge. *Pence v. Pence*, 484.

§ 39. Time of Docketing

Appeal is dismissed where the record on appeal was not docketed within 90 days after the date of the judgment appealed from, and no order extending the time for docketing was entered by the trial court. *Harrell v. Brinson*, 341; *Church v. Cheek*, 581.

Appeal is dismissed for failure to docket record on appeal within time extended by trial court. *Craven v. Dimmette*, 75.

Provisions of the Court of Appeals rules relating to the time of docketing the record on appeal prevail over conflicting provisions in the Workmen's Compensation Act. *Fetherbay v. Motor Lines*, 58.

§ 40. Necessary Parts of Record

Appeal is dismissed for failure to include the judgment appealed from in the record on appeal. *Craven v. Dimmette*, 75.

§ 44. Time for Filing Briefs and Effect of Failure to File

Appeal is subject to dismissal for failure to file brief on time. *Fetherbay v. Motor Lines*, 58.

A "brief" that was filed with the clerk after argument in the Court of Appeals was not considered where appellant failed to obtain leave of the Court as required by Rule 11. *Roughton v. Jim Walter Corp.*, 325.

§ 45. Effect of Failure to Discuss Exceptions and Assignments of Error in Brief

Assignment of error is deemed abandoned where it is not brought forward and argued in the brief. Court of Appeals Rule No. 28. *Tickle v. Insulating Co.*, 5; *S. v. Foster*, 67; *In re Whichard*, 154; *Pence v. Pence*, 484.

§ 50. Harmless and Prejudicial Error in Instructions

Where the jury returns answers to other issues which establish the rights of the parties irrespective of the answer to the questioned issue, any error in the instructions on such issue is harmless. *Mode v. Mode*, 209.

§ 54. Discretionary Matters

Where facts are set forth in the affidavit supporting a motion for change of venue, their sufficiency rests in the discretion of the judge and his decision upon them is final; but where no facts are stated in the affidavit, the ruling of the trial court is subject to review on appeal. *Everett v. Robersonville*, 219.

§ 57. Findings or Judgments on Findings

An appeal itself constitutes an exception to the judgment and presents the question of whether the facts found support the judgment. *Fox v. Miller*, 29.

ARBITRATION

§ 2. Agreement to Arbitrate as Bar to Action

An agreement to arbitrate controversies which might arise under a contract does not bar a legal action on the contract. *Lumber Co. v. Taylor*, 255.

ARREST AND BAIL

§ 3. Right of Officer to Arrest Without Warrant

The entry of police officers into the house in which the defendant and his companions were hiding, and the arrest without warrant of the occupants therein for the offense of armed robbery, *held* proper and lawful. *S. v. Basden*, 401.

§ 6. Resisting Arrest

Where defendant in resisting arrest prosecution offered evidence that the officer had struck the first blow and that defendant was forced in self-defense to take the action which resulted in the charges against him, trial court should have instructed the jury to acquit defendant if they found that he was legitimately exercising a right of self-defense. *S. v. May*, 423.

ASSAULT AND BATTERY

§ 15. Instructions in Criminal Prosecution

Instructions which would permit the jury to find an intent to kill if defendants intended to kill or inflict great bodily harm is prejudicial error. *S. v. Cooper*, 79.

In a prosecution on indictment alleging an assault with a deadly weapon with intent to kill inflicting serious injury not resulting in death, the instructions of the trial court, which correctly charged the jury on defendant's right of self-defense in repelling a felonious assault, *held* not prejudicial in failing to charge on defendant's right of self-defense in repelling a nonfelonious assault, although there was evidence to support such an instruction, where the jury's verdict of guilty as alleged in the indictment established the defendant's intent to kill and thereby rendered unavailing his right to rely on self-defense in repelling a nonfelonious assault. *S. v. Barnette*, 199.

Where defendant offered evidence that the officer had struck the first blow and that defendant was forced in self-defense to take the action which resulted in the charges against him, trial court should have instructed the jury to acquit defendant if they found that he was legitimately exercising a right of self-defense. *S. v. May*, 423.

ATTACHMENT

§ 1. Nature and Grounds of Remedy

On motion to dissolve an attachment, the judge of superior court has concurrent jurisdiction with the clerk of superior court. *Hiscox v. Shea*, 90.

§ 9. Vacation and Dissolution of Attachment

On appeal to superior court from an order of the clerk dissolving an attachment, failure of the judge to make findings of fact in his order which vacated the clerk's order was erroneous. *Hiscox v. Shea*, 90.

ATTORNEY AND CLIENT

§ 2. Admission to Practice

Out-of-state attorneys who are not members of N. C. Bar and were not authorized to appear in appeal in compliance with statute will not be considered as participating attorneys. *S. v. Daughtry*, 318.

AUTOMOBILES

§ 2. Grounds and Procedure for Suspension or Revocation of Drivers' Licenses

In a hearing to determine the validity of a Department of Motor Vehicles order suspending petitioner's driver's license upon the basis of two convictions in one year of speeding over 55 mph, the trial court erred in reversing the Department's order on the ground that the Department did not have as a part of its evidence a "valid warrant" or a "valid judgment of conviction." *Tilley v. Garrett*, 557.

Although a hearing conducted pursuant to G.S. 20-25 may be as informal as the particular judge permits, nevertheless there should be sufficient formality in compiling a record of the proceeding so as to permit an appellate review. *Ibid.*

Department of Motor Vehicles had no authority to suspend petitioner's license on the ground that he had been suffering from epilepsy since 1951 where there was evidence that petitioner's condition was controlled by medication. *Ormond v. Garrett*, 662.

§ 5. Sale and Transfer of Title

Plaintiff finance company which failed to perfect its liens on automobiles as required by law was estopped from asserting its liens against an automobile auction company. *Finance Corp. v. Shivar*, 489.

§ 6. Negligence in Sale of Defective Vehicles

The retail sale of an automobile by a dealer without first having the official inspection required by G.S. 20-183.3 is negligence *per se*. *Anderson v. Robinson*, 224.

§ 8. Look-out and Due Care

Driver of automobile on servient street has positive duty to determine by proper lookout that he can safely enter intersection with dominant highway. *Gregor v. Willis*, 538.

§ 11. Following Vehicles

The rule that the mere fact of a rear-end collision with the car ahead may furnish some evidence that the following motorist was negligent held inapplicable in this case. *Curry v. Brown*, 464.

§ 19. Right-of-way at Intersection

Driver of automobile on servient street has positive duty to determine by proper lookout that he can safely enter intersection with dominant highway. *Gregor v. Willis*, 538.

§ 23. Brakes and Defects in Vehicles

The retail sale of an automobile by a dealer without first having the official inspection required by G.S. 20-183.3 is negligence *per se*. *Anderson v. Robinson*, 224.

AUTOMOBILES — Continued

§ 40. Pedestrians

The term "unmarked crosswalk at intersection" defined. *Downs v. Watson*, 13.

A person who attempts to cross a "Y" intersection at a point other than within a marked or unmarked crosswalk has the duty to yield the right-of-way to vehicles. *Ibid.*

§ 42. Liability for Creating Dangerous Conditions on Highway

As a general rule, a defective bridge railing will not be considered as the probable reason that a car might run off a bridge. *Lassiter v. Jones*, 506.

§ 43. Pleadings and Parties

In an action for damages by a plaintiff who was injured when the automobile driven by the original defendant, who was also the third party plaintiff, collided into two automobiles which had earlier collided on an icy hill and which were being separated by plaintiff and the drivers at the time of the second collision, the third party plaintiff failed to state a cause of action against the drivers of the two automobiles involved in the earlier collision. *Abdella v. Stringfellow*, 480.

§ 44. Presumptions and Burden of Proof

The doctrine of res ipsa loquitur is inapplicable in a father's action against the mother to recover damages sustained when their minor daughter fell out of the cab of a moving pickup truck driven by the mother. *Johnson v. Johnson*, 274.

The burden of proof on the issue of plaintiff's contributory negligence is on defendant. *Atkins v. Moye*, 126.

Res ipsa loquitur applies where automobile leaves highway for no apparent reason. *Stancil v. Blackmon*, 499.

Doctrine of res ipsa loquitur was applicable to raise prima facie case of negligence against driver of an automobile that ran through the railing of a temporary bridge and sank in a millpond. *Lassiter v. Jones*, 506.

The doctrine of res ipsa loquitur was inapplicable where the driver of a following automobile collided with a parked car on the inside lane of a curve in an attempt to avoid colliding with the car ahead. *Curry v. Brown*, 464.

Where there was evidence that defendant's car left the road and struck plaintiff's car which was completely off the highway, the doctrine of res ipsa loquitur was applicable to take the case to the jury. *Broadnax v. Deloath*, 620.

§ 45. Relevancy and Competency of Evidence

In an action for personal injuries sustained in automobile accident, trial court erred in allowing defendant driver to testify that he had not been involved in any previous accidents. *Rouse v. Huffman*, 307.

§ 56. Hitting Vehicle Stopped or Parked on Highway

Passenger failed to show that defendant was negligent in hitting parked car on a curve. *Curry v. Brown*, 464.

Evidence that defendant struck rear of turning automobile and then struck plaintiff's automobile held sufficient for jury on issue of defendant's negligence in failing to keep proper lookout. *Cole v. Vogel*, 577.

AUTOMOBILES — Continued

§ 57. Exceeding Speed and Failing to Yield Right-of-way at Intersection

In an action for injuries received in intersection accident, evidence held sufficient for jury on issue of negligence of driver on servient street. *Gregor v. Willis*, 538.

§ 62. Striking Pedestrians

Plaintiff's evidence presented question for jury in action for personal injuries allegedly sustained by plaintiff pedestrian when she was struck by defendant's automobile while crossing street within pedestrian crosswalk at an uncontrolled intersection. *Brown v. Weaver*, 290.

§ 66. Identity of Driver

The identity of the driver may be established by circumstantial evidence. *Lassiter v. Jones*, 506.

§ 68. Defective Vehicles

Evidence offered by plaintiff passenger is held sufficient to go to the jury on the issue of defendant driver's negligence in operating a vehicle with defective brakes. *Anderson v. Robinson*, 224.

§ 73. Nonsuit on Ground of Contributory Negligence

Trial court erred in allowing motion for nonsuit on ground of contributory negligence in action for injuries sustained when defendant's car left the road in front of plaintiff's car and caused plaintiff's car to be wrecked. *Stancil v. Blackmon*, 499.

§ 79. Contributory Negligence in Intersection Accidents

Plaintiff's evidence disclosed contributory negligence as a matter of law on part of driver of his automobile who was making a left turn at a controlled intersection. *Turpin v. Gallimore*, 554.

§ 83. Pedestrian's Contributory Negligence

point other than a marked or unmarked cross-walk held to disclose intestate's automobile while the intestate was attempting to cross a "Y" intersection at a point other than a marked or unmarked cross-walk held to disclose intestate's contributory negligence as a matter of law. *Downs v. Watson*, 13.

Evidence tending to show that plaintiff's intestate voluntarily lay upon an unlighted rural road at night, where he was struck and fatally injured by defendant's automobile, held to disclose intestate's contributory negligence as a matter of law. *Williamson v. McNeill*, 625.

§ 88. Sufficiency of Evidence of Contributory Negligence for Jury

Issue of plaintiff's contributory negligence on the ground that plaintiff was under the influence of intoxicants at the time of the collision between plaintiff's automobile and defendant's stopped truck on the highway, held improperly submitted to the jury. *Atkins v. Moye*, 126.

§ 89. Sufficiency of Evidence of Last Clear Chance

Evidence that defendant had approximately two seconds in which to recognize that the dark shapes on the road ahead of her were the intestate

AUTOMOBILES — Continued

BURGLARY AND UNLAWFUL BREAKINGS — Continued

Felonious breaking and entering is a lesser included offense of first-degree burglary. *Dawson v. State*, 566.

§ 4. Competency of Evidence

Trial court properly excluded evidence that stolen television sets were on consignment and were not owned by appliance company. *S. v. Richardson*, 298.

Trial court properly admitted stolen television sets found along route that defendants were pursued by officers from crime scene. *Ibid.*

§ 5. Sufficiency of Evidence

Evidence, including testimony that a dog trailed defendants from crime scene, held sufficient for jury in prosecution for breaking and entering a furniture store. *S. v. Bines*, 1.

State's evidence held sufficient to show present intent on part of defendant to take property belonging to another and convert it to his own use. *S. v. Thompson*, 313.

§ 6. Instructions

In a felonious breaking and entering prosecution under G.S. 14-54 as amended in 1969, defendants were prejudiced when the trial court charged on G.S. 14-54 as it existed prior to the 1969 amendment. *S. v. Perry*, 83.

Defendants were properly convicted of felonious breaking and entering of an appliance store and felonious larceny of property therefrom without evidence of the value of the property taken and without requiring the jury to fix the value of the property taken. *S. v. Richardson*, 298.

§ 8. Sentence and Punishment

Sentence of eight years' imprisonment imposed upon defendant's guilty plea to felonious breaking and entering is not cruel and unusual. *S. v. Prince*, 94.

§ 10. Prosecutions for Possession of Housebreaking Implements

Defendant's confession sufficiently connected defendant with a safe door and with burglary tools dropped by a passenger who fled from defendant's car to render them admissible in evidence against defendant. *S. v. Jordan*, 203.

CARRIERS

§ 2. State License and Franchise

The Utilities Commission properly granted an application for a contract carrier permit which would authorize the applicant to transfer bank documents and other commodities between banks in the State. *Utilities Comm. v. American Courier Corp.*, 358; *Utilities Comm. v. American Courier Corp.*, 367.

CONSPIRACY

§ 6. Sufficiency of Evidence

Presence of a conspiracy need not be proved by direct evidence of acts which precede the commission of the actual crime. *S. v. Locklear*, 535.

State's evidence of events which occurred after alleged conspiracy had been consumated was sufficient to support a finding by the jury that defendant and another had combined or agreed to commit larceny by unlawfully re-

CRIMINAL LAW — Continued

§ 31. Judicial Notice

Court will take judicial notice that City of Hendersonville is a municipal corporation. *S. v. Turner*, 73.

§ 32. Burden of Proof and Presumptions

Where there is no admission by defendant and no presumption against him is raised, his plea of not guilty challenges the credibility of the evidence, even if uncontradicted, and raises a presumption of his innocence. *S. v. Huffman*, 85.

§ 33. Facts Relevant to Issues in General

Testimony that syringes stolen from a drugstore could be used to administer drugs also stolen was properly admissible to show the motive of defendants in committing the felonious breaking and entering. *S. v. Taylor*, 88.

§ 42. Articles Connected with the Crime

Defendant's confession sufficiently connected defendant with a safe door and with burglary tools dropped by a passenger who fled from defendant's car to render them admissible in evidence against defendant. *S. v. Jordan*, 203.

§ 43. Photographs

In this drunken driving prosecution, the trial court did not err in the admission of motion pictures taken of defendant at the police station where defendant failed to object at the trial and made no request to preview the film. *S. v. Davis*, 589.

§ 44. Bloodhounds

Trial court properly admitted testimony that dog followed trail from crime scene to defendants. *S. v. Bines*, 1.

§ 58. Evidence in Regard to Handwriting

Without aid of expert testimony, defendant could not submit evidence of his signature to the jury for comparison. *S. v. Simmons*, 561.

§ 60. Evidence in Regard to Fingerprints

Evidence that defendant's fingerprint was found on knife used to stab deceased was competent notwithstanding defendant was shown to have been at crime scene earlier that day and there was an unidentifiable fingerprint on the knife. *S. v. Britt*, 262.

§ 61. Evidence as to Shoe Prints

Trial court properly admitted plaster casts of footprints found near store which had been broken and entered. *S. v. Bines*, 1.

§ 71. "Shorthand" Statement of Fact

Testimony by arresting officer was admissible as shorthand statement of the facts. *S. v. Keyes*, 677.

§ 74. Confessions

An extra-judicial statement of an accused is a confession if it admits defendant's guilt of the offense charged or an essential part of the offense. *In re Ingram*, 266.

CRIMINAL LAW — Continued

§ 75. Admissibility of Confession

The confession of an eight-year-old boy was inadmissible in a juvenile hearing in the absence of determination that the boy was advised of his *Miranda* rights and that the confession was voluntary. *In re Ingram*, 266.

§ 76. Voluntariness of Confession and Admissibility in General

Objection to testimony of defendant's in-custody statements cannot be raised for the first time on appeal. *S. v. Barker*, 311.

The trial court did not err in failing to conduct a *voir dire* hearing to determine the voluntariness of defendant's in-custody statements when the arresting officer, while testifying for the State, volunteered the statement that defendant told him he had pawned the stolen radio, where the court sustained defendant's objection to the testimony and instructed the jury not to consider it. *Ibid.*

A general objection is sufficient to challenge admissibility of a confession. *In re Ingram*, 266.

Defendant's confession was properly admitted in evidence after an extensive voir dire hearing. *S. v. Jordan*, 203.

Written waiver of right to remain silent and to counsel at police interrogation and written confession were inadmissible in prosecution for attempted armed robbery where voir dire evidence shows they were induced by promise that defendant would not be indicted on charge of possession of marijuana. *S. v. Smith*, 442.

In homicide prosecution, trial court committed prejudicial error in admission of defendant's in-custody statements that she was glad deceased was dead and that she had not been hurt by deceased without voir dire hearing to determine admissibility of the statements. *S. v. Massenburg*, 494.

§ 77. Admissions and Declarations

Defendant's statement to a police officer, made during a search of defendant's person, that the money taken from his right front pocket was "yours" and the money in the right rear pocket was "his," which statement was volunteered to the officer after defendant's arrest for armed robbery, *held* admissible on the trial of defendant for armed robbery. *S. v. Basden*, 401.

§ 82. Privileged Communications

A petitioner in a post-conviction hearing waived the benefit of the rule protecting privileged communications between himself and his court-appointed counsel at his trial where the petitioner indiscriminately attacked the professional integrity of his court-appointed counsel. *Battle v. State*, 192.

§ 84. Evidence Obtained by Unlawful Means

Where defendants made a motion to suppress evidence of cigarettes found in their car by a search and seizure without a warrant, the trial court erred in failing to conduct a voir dire to determine the legality of the search and seizure. *S. v. Wood*, 34.

The warrantless seizure of burglary tools and other articles from defendant's car was lawful, and the tools and other articles were properly admitted in the trial of defendant for possession of burglary tools, where (1) defendant had been stopped and placed under arrest for running a red light, (2) a passenger in defendant's car had fled when officers approached, (3) the ar-

CRIMINAL LAW — Continued

resting officer observed burglary tools lying on the floorboard of the car and charged defendant with possession thereon, and (4) other articles admitted in evidence were thereafter discovered by search of the glove compartment. *S. v. Jordan*, 203.

Failure of the trial court to make findings of fact following a voir dire hearing into the admissibility of the evidence obtained by a warrantless search held not fatal where there was no conflict in evidence on the voir dire. *S. v. Basden*, 401.

Trial court did not err in failing to conduct voir dire hearing to determine the admissibility of evidence obtained by search without warrant where defendant did not object to admissibility of the evidence. *S. v. Edwards*, 503.

§ 85. Character Evidence Relating to Defendant

Defendant who takes the stand may be cross-examined with respect to prior convictions. *S. v. Edwards*, 503.

§ 87. Direct Examination of Witnesses

The presiding judge has wide discretion in permitting leading questions. *S. v. Dunbar*, 17; *S. v. Tipton*, 53; *S. v. Davis*, 589.

§ 88. Cross-examination

Trial court did not err in refusing to allow court reporter to read to the jury portions of testimony of the prosecuting witness after the witness denied on cross-examination that he had testified to certain facts on direct examination. *S. v. Gaiten*, 66.

§ 89. Credibility of Witnesses; Corroboration and Impeachment

Trial court did not err in admission of testimony that the witness "thought" defendant came in a night club "around" 12:30 or 1:00 o'clock. *S. v. Tipton*, 53.

Trial judge was not required to conduct a voir dire examination of the corroborating witness to determine whether or not the witness's testimony would in fact corroborate previous witnesses. *S. v. Dixon*, 37.

Slight variances in corroborating testimony do not render such testimony inadmissible. *Ibid.*

Police officer's testimony was admissible to corroborate testimony of State's witness relating to a robbery notwithstanding defendant's contention that the testimony of the officer was much stronger than that of the witness. *S. v. Thompson*, 313.

Slight variance between corroborating testimony and testimony sought to be corroborated was not prejudicial to defendant. *S. v. Long*, 600.

Solicitor could properly cross-examine defendant's alibi witness with respect to inconsistent statements to the officers investigating the offense. *S. v. Jenkins*, 532.

§ 91. Continuance

Trial court's refusal to grant defendant's motion for continuance until his witnesses could be found was not reversible error. *S. v. Scott*, 281.

§ 92. Consolidation

Trial court properly consolidated for trial charges of breaking and entering and larceny against two defendants. *S. v. Bines*, 1.

CRIMINAL LAW — Continued

Trial court's instruction, apparently in reference to defendant's plea of not guilty by reasoon of insanity, that both defendant and his attorney admitted defendant had committed the crime charged in the indictment was prejudicial error. *S. v. Sykes*, 592.

§ 115. Instructions on Lesser Degrees of Crime

Where there is no conflict in the evidence, the mere contention that the jury might accept the evidence in part and reject it in part is insufficient to require an instruction on a lesser included offense. *S. v. Gurkin*, 304.

Where there is no evidence that would permit a jury to find defendant guilty of a lesser included offense, it is not incumbent on the court to charge with respect thereto. *S. v. Jenkins*, 532.

§ 117. Charge on Credibility of Witness

Instructions to scrutinize testimony of an alleged accomplice are not required when no request therefor has been made. *S. v. Dunbar*, 17; *S. v. Taylor*, 88.

§ 118. Charge on Contentions of the Parties

Exceptions to portions of the charge wherein the court stated the contentions of the parties will not be considered on appeal where no objection was made at the time they were given. *S. v. Jordan*, 203.

Trial court did not express opinion that certain facts were fully proven in portion of the charge in which court reviewed State's contentions in drunken driving prosecution. *S. v. Rennick*, 270.

Although trial judge is not required to state contentions of the parties, it is permissible for him to do so. *S. v. Holway*, 340.

§ 127. Arrest of Judgment

Judgment must be arrested where warrant on which defendant was tried failed to charge defendant with a crime. *S. v. Satterfield*, 597.

§ 134. Form and Requisites of Sentence

Defendant failed to show a violation of his constitutional rights by the reduction of his sentence without his knowledge or presence. *Dawson v State*, 566.

§ 135. Judgment and Sentence in Capital Case

The punishment for first degree murder provided by G.S. 14-17 does not constitute coercion so as to render void defendant's plea of guilty of first degree murder tendered and accepted pursuant to the provisions of G.S. 15-162.1 as it existed prior to its repeal in 1969. *Garner v. State*, 109; *S. v. Smith*, 348.

On post-conviction hearing to review the constitutionality of defendant's sentence of life imprisonment imposed upon his guilty plea of first-degree murder, the court properly found that his plea was freely and voluntarily entered, and there was no merit to defendant's argument that the death penalty constituted a coercive effect so as to render his guilty plea involuntary. *Dixon v. State*, 408.

§ 137. Conformity of Judgment to Indictment

In prosecution upon indictment charging defendant with larceny and receiving stolen goods, a single judgment imposed upon a verdict of guilty as

CRIMINAL LAW — Continued

§ 148. Judgments Appealable

A judgment in superior court denying defendant's application for a writ of certiorari to review the proceedings of the district court in a criminal case was not a final judgment, and defendant was not authorized to appeal therefrom to the Court of Appeals as a matter of right. *S. v. Flynt*, 323.

§ 150. Right of Defendant to Appeal

There was unwarranted interference with defendant's right of appeal where the trial court, upon hearing of defendant's intention to appeal, struck defendant's suspended sentences and imposed active sentences. *S. v. May*, 423.

§ 151. Appeal and Appeal Entries

Appeal is subject to dismissal for failure to comply with statutes where record does not show that defendant gave notice of appeal. *S. v. Carroll*, 336.

§ 154. Case on Appeal

Where defendants are charged in the same bill of indictment and are tried together, one record on appeal will suffice. *S. v. Huffman*, 85.

It is the appellant's duty to see that the record on appeal is properly made up and transmitted to the Court of Appeals. *S. v. Evans*, 469.

§ 155.5. Docketing of Transcript of Record in Court of Appeals

Appeal is subject to dismissal for failure to docket the record on appeal within the time required by Rule 5. *S. v. Bocage*, 64; *S. v. Thompson*, 316; *S. v. Daugherty*, 318; *S. v. Gibbs*, 339; *S. v. Evans*, 469.

Appeal is subject to dismissal where record on appeal was filed after time for perfecting appeal had expired and after Court of Appeals had denied defendant's petition for writ of certiorari. *S. v. Carroll*, 336.

Order extending time for defendant to serve his case on appeal does not extend the time for docketing the record on appeal. *S. v. Brigman*, 316; *S. v. Gibbs*, 339.

Extension of time for docketing case on appeal may be granted only upon a finding that there was good cause. *S. v. Evans*, 469.

A judge who was not the trial judge was without authority to extend appellant's time to serve statement of case on appeal. *Ibid; S. v. Baker*, 588.

Where the time of docketing the case on appeal was beyond the maximum 150 days allowed by Rule 5, the appeal is subject to dismissal. *S. v. Isley*, 599.

§ 159. Form and Requisites of Transcript

Appeal is dismissed for failure of defendants to state the evidence in narrative form. *S. v. Benfield*, 103.

Record on appeal is defective where proceedings are not set forth in order of time in which they occurred. *Garner v. State*, 109.

§ 161. Form and Requisites for Exceptions and Assignments of Error

An appeal is an exception to the judgment, presenting the face of the record proper for review. *S. v. Price*, 94.

Exception to judgment must fail if judgment is within statutory limits and is supported by the evidence, and there is no fatal defect appearing on face of record. *S. v. Hughes*, 334.

CRIMINAL LAW — Continued

§ 162. Objections to Evidence and Motion to Strike

Defendants who failed to object to in-court identification on the trial cannot raise objections thereto for the first time on appeal. *S. v. Gurkin*, 304.

Objection to introduction of evidence comes too late when first made on appeal. *S. v. Davis*, 589.

§ 163. Exception and Assignment of Error to Charge

Assignment of error based upon exception to the entire charge is broadside and ineffective. *S. v. Jordan*, 203.

§ 166. The Brief

Assignments of error not brought forward in the brief are deemed abandoned. *S. v. Tipton*, 53; *S. v. Chisholm*, 80; *S. v. Jordan*, 203; *S. v. Norman*, 239; *S. v. Eaton*, 321; *S. v. Edwards*, 503; *S. v. Davis*, 589.

Defendants' "supplementary brief" filed after argument and without leave of the Court of Appeals violates the Rules. *S. v. Evans*, 469.

§ 167. Harmless and Prejudicial Error in General

Any prejudicial error in trial of a case does not entitle defendant to a new trial where the case was consolidated for judgment with six other cases in which defendant entered pleas of guilty. *S. v. Davis*, 99.

§ 168. Harmless and Prejudicial Error in Instructions

Statement by the court in its instructions that "if your recollection of the testimony is different from what somebody says, then you take your own recollection, yours as determined from the evidence," *held* not to constitute prejudicial error when considered in context, it appearing from previous portions of the charge that "somebody" referred to defendant's attorney and the solicitor. *S. v. Rennick*, 270.

Trial court's instruction, apparently in reference to defendant's plea of not guilty by reason of insanity, that both defendant and his attorney admitted defendant had committed the crime charged in the indictment was prejudicial error. *S. v. Sykes*, 592.

§ 169. Harmless and Prejudicial Error in Admission or Exclusion of Evidence

Exclusion of evidence cannot be reviewed on appeal when the record does not disclose what the excluded evidence would have been. *S. v. Dunbar*, 17.

Defendant was not prejudiced by admission of evidence over objection where evidence of like import had been admitted without objection. *S. v. Davis*, 589.

§ 171. Error Relating to One Count or One Degree of Crime Charged

Lack of jurisdiction in superior court to enter judgment on two misdemeanor charges which were consolidated for judgment with felony charges does not entitle defendant to a new trial on the felony charges where the sentence imposed was less than the maximum which could have geen given after the felony cases were consolidated for judgment. *S. v. Taylor*, 544.

§ 172. Whether Error is Cured by Verdict

Conviction of common law robbery renders harmless any error with re-

DIVORCE AND ALIMONY

§ 1. Jurisdiction

Superior court had authority to transfer to the district court an action for absolute divorce which had twice ended in mistrial in superior court; the district court had jurisdiction to try the action. *Pence v. Pence*, 484.

§ 2. Process and Pleadings

Defendant wife in absolute divorce action was not prejudiced by trial court's refusal to submit issues relating to constructive abandonment. *Pence v. Pence*, 484.

Trial court properly restricted defendant's questioning of jurors on voir dire in an action for absolute divorce. *Ibid.*

Trial court's recital in a judgment awarding the husband absolute divorce did not correspond with the recoord and was therefore erroneous. *Anthony v. Anthony*, 20.

§ 6. Cross Actions

In the wife's cross action for alimony without divorce, an allegation that her husband had committed adultery is sufficient to withstand demurrer. *Anthony v. Anthony*, 20.

§ 16. Alimony Without Divorce

In the wife's action for alimony without divorce on the ground that her husband had abandoned her because of her lengthy illness, the wife's evidence was sufficient to withstand the husband's motion for nonsuit. *Mode v. Mode*, 209.

In the wife's action for alimony without divorce on the ground that her husband had abandoned her, the trial court, in the absence of a request by the husband, was not required to charge the jury that a husband is under a duty to support his wife only in the home he has provided. *Ibid.*

In the wife's action for alimony without divorce, it is competent for the wife to testify as to her physical condition from 1964 until the present in support of her allegations that her husband had abandoned her because of her lengthy illness. *Ibid.*

In the wife's cross action for alimony without divorce, an allegation that her husband had committed adultery is sufficient to withstand demurrer. *Anthony v. Anthony*, 20.

Where wife cross-claimed for alimony on ground of constructive abandonment by husband, trial court erred in giving jury instruction which placed burden of proof on issue of abandonment on husband. *Banks v. Banks*, 69.

In the wife's action for alimony without divorce and for child support, the Court of Appeals will not disturb an order of the trial court requiring the husband to make substantial payments to the wife for alimony and for support of the minor children, notwithstanding the husband's contention that he anticipates a substantial decrease in earnings, since the order is temporary in nature and is subject to modification upon change of circumstances. *Fonvielle v. Fonvielle*, 337.

§ 18. Alimony and Subsistence Pendente Lite

Authority of district court to punish as for contempt includes the authority to require the husband to pay reasonable counsel fees to his wife's counsel as a condition to being purged of wilful contempt in not complying with a child support order, notwithstanding the order also provided that the wife was not a dependent spouse. *Blair v. Blair*, 61.

DIVORCE AND ALIMONY — Continued

Wife in absolute divorce action failed to show that trial court abused its discretion in awarding her only $500 counsel fees. *Pence v. Pence*, 484.

§ 19. Modification of Decrees

A husband who sought modification of alimony and support decree on the ground that he was changing his occupation on account of a diabetic condition and expected a reduction in income failed to show that the trial court erred in refusing to modify the decree. *Sherrill v. Sherrill*, 666.

§ 21. Enforcing Payment

Finding by district court that husband possessed means and ability to comply with alimony order was amply supported by evidence of defendant's income and indebtedness. *Peoples v. Peoples*, 136.

District court had authority to hold party in contempt for failure to comply with alimony consent order entered in superior court. *Ibid.*

§ 22. Custody of Children of the Marriage

Courts of this State had no jurisdiction under former G.S. 50-13 to determine action for child custody instituted by father during temporary visit of children in this State where custody of the children had been awarded to mother by a foreign divorce decree and children became domiciled in another state. *Hopkins v. Hopkins*, 162.

Filing of an action in a cause in which the court had not acquired jurisdiction did not confer jurisdiction under G.S. 50-13.7 to determine custody of children who were physically present in this State during a temporary visit. *Ibid.*

Courts of this State can acquire jurisdiction in a child custody proceeding instituted after 1 October 1967 when the child is physically present in this State. *Ibid.*

Where the general county court had no jurisdiction in child custody action, judge of general county court did not err in setting aside custody orders entered in the matter by another judge of the county court. *Ibid.*

§ 23. Support of Children of the Marriage

In the wife's action for alimony without divorce and for child support, the Court of Appeals will not disturb an order of the trial court requiring the husband to make substantial payments to the wife for alimony and for support of the minor children, notwithstanding the husband's contention that he anticipates a substantial decrease in earnings, since the order is temporary in nature and is subject to modification upon change of circumstances. *Fonvielle v. Fonvielle*, 337.

§ 24. Custody of Children of the Marriage

Where there is no evidence that the fitness or unfitness of either party has changed, the trial court may not modify a prior order awarding custody unless some other sufficient change of condition is shown. *In re Poole*, 25.

Trial court's findings held not to support modification of a child custody order which had found the wife to be a fit and proper person to have custody of the children. *Ibid.*

Child custody order must be vacated and the cause remanded for detailed findings of fact when the trial court fails to find facts so that the appellate court can determine whether the order is supported by competent evi-

DIVORCE AND ALIMONY — Continued

dence and whether the welfare of the children has been served. *In re Moore*, 251.

In child custody proceeding wherein court found both parents were fit and proper persons to have custody, trial court erred in providing that the father should have custody of the children and that they should remain in the home of third persons over whom the court had no control. *Boone v. Boone*, 524.

DOMICILE

§ 3. Domicile of Children

Where custody of children was awarded to the mother by foreign divorce decree, children are considered domiciled where the mother is domiciled. *Hopkins v. Hopkins*, 162.

EJECTMENT

§ 8. Defendant's Bond

Defense bond required by G.S. 1-111 is not an "appeal bond" but is a bond which can be required before defendant is allowed to plead to the complaint. *Crockett v. Lowry*, 71.

When an answer has been filed in an action for possession of real property without the bond required by G.S. 1-111 and has remained on file without objection, it is improper for the trial judge to strike the answer and render judgment for plaintiff without notice to show cause or without giving defendant the opportunity to file a defense bond. *Ibid.*

The requirement that defendant execute and file a defense bond in an action for possession of real property may be waived unless seasonably insisted upon by plaintiff. *Ibid.*

§ 10. Nonsuit

In this action in ejectment wherein plaintiffs claim title to the disputed lands under a 1910 grant from the State which contains an exception to the described premises, the trial court properly entered judgment of nonsuit where it does not appear from plaintiffs' evidence or any admission of defendants that defendants are claiming within the exception, and plaintiffs failed to locate the exception in order to show that defendants' possessions are not within the exception. *Phipps v. Gaskins*, 585.

EMINENT DOMAIN

§ 1. Nature and Extent of Power

The exercise of the power of eminent domain is in derogation of common right, and all laws conferring such power must be strictly construed. *Charlotte v. McNeely*, 649.

§ 4. Delegation of Power

Where a municipality undertook to exercise the power of eminent domain which had been granted to it by the Legislature, it was necessary that the municipality both allege and prove compliance with statutory procedural requirements. *Charlotte v. McNeely*, 649.

§ 5. Amount of Compensation

Trial court's instructions on the measure of compensation were erroneous. ***Highway Comm. v. Reeves*, 47.**

EMINENT DOMAIN — Continued

§ 6. Evidence of Value

Although it was error in a highway condemnation proceeding to permit landowner's counsel to cross-examine the Commission's witness as to whether the witness knew that a named individual had sold twenty acres of his property for $12,000, there being no actual proof of the sales price, such error was not prejudicial where the named individual thereafter testified, without objection, that he had contracted to sell 76½ acres of his property for $12,000. *Highway Comm. v. McDonald*, 56.

§ 7. Proceeding to Take Land

Municipality which failed to comply with statutory procedures was not entitled to maintain a condemnation proceeding against a landowner. *Charlotte v. McNeely*, 649.

§ 9. Condemnation by Housing Authority

Requisites of petition for condemnation of land by redevelopment commission. *Redevelopment Comm. v. Grimes*, 376.

§ 10. Petition for Appointment of Commissioners of Appraisal

In special proceeding to condemn land for urban renewal, clerk of superior court did not have authority to appoint commissioners of appraisal where respondents denied allegations of the petition and the record does not show that after a proper hearing the clerk had determined the controverted facts in favor of petitioners. *Redevelopment Comm. v. Grimes*, 376.

§ 11. Report of Appraisers, Confirmation, Exceptions, and Trial Upon Exceptions

Trial court should have conducted a pretrial conference in this condemnation proceeding where the record shows the parties had different concepts of what phase of the matter they were going to try. *Redevelopment Comm. v. Grimes*, 376.

In a condemnation proceeding, the clerk must hear and make a determination of exceptions to the commissioners' report before an appeal lies to the judge of the superior court. *Ibid.*

ESCAPE

§ 1. Prosecutions for Escape

Evidence held sufficient to show that prisoner on work release was guilty of escape by wilfuly failing to return to an appointed place at an appointed time. *S. v. Foster*, 67.

ESTATES

§ 3. Nature of Life Estates and Remainders

The trial court did not abuse its discretion in failing to require a life tenant to account to the court annually for portion of timber proceeds to be administered by the life tenant in the nature of a trustee. *Godfrey v. Patrick*, 510.

§ 5. Actions for Waste

A contingent remainderman cannot maintain an action at law against the tenant in possession to recover damages for waste. *Godfrey v. Patrick*, 510.

ESTOPPEL

§ 4. Equitable Estoppel

Equitable estoppel is to be applied as a means of preventing injustice and must be based on the conduct of the party to be estopped which the other party relies upon and is led thereby to change his position to his disadvantage. *Finance Corp. v. Shivar*, 489.

Plaintiff finance company which failed to perfect its liens on automobiles as required by law was estopped from asserting its liens against an automobile auction company. *Ibid.*

EVIDENCE

§ 15. Relevancy and Competency in General

Trial court did not err in admission of testimony that the witness "thought" defendant came in a night club "around" 12:30 or 1:00 o'clock. *S. v. Tipton*, 53.

§ 19. Evidence of Similar Facts

Evidence that automobile driver has had no previous accidents is not competent on issue of driver's negligence in accident in question. *Rouse v. Huffman*, 307.

§ 26. Physical Objects

Trial court properly excluded a plate relating to the operation of a motorboat where the party who offered the plate failed to make proper identification thereof. *Kale v. Daugherty*, 417.

§ 44. Nonexpert Opinion Evidence as to Physical Ability and Health

It was competent for a minister to testify that he had observed a person in the hospital and had found that she was unable to take care of herself. *Mode v. Mode*, 209.

EXECUTORS AND ADMINISTRATORS

§ 20. Claims on Notes and Contracts

Consent judgment entered into by a father agreeing to pay for the college education of his children did not create a debt in the legal sense which would survive the father's death and become an obligation of the estate. *Mullen v. Sawyer*, 458.

FIDUCIARIES

While the court has the inherent power to require any appointed fiduciary to file periodic accounts, the court is not compelled as a matter of law to do so. *Godfrey v. Patrick*, 510.

The trial court did not abuse its discretion in failing to require a life tenant to account to the court annually for portion of timber proceeds to be administered by the life tenant in the nature of a trustee. *Ibid.*

FIRES

§ 3. Negligence in Causing Fires

Proof of origin of fire may be established by circumstantial evidence. *Mills, Inc. v. Foundry, Inc.*, 521.

Plaintiff's evidence was insufficient to be submitted to jury on issue of

HOMICIDE — Continued

§ 14. Presumptions

The intentional use of a deadly weapon, when death proximately results from such use, gives rise to presumptions that the killing was (1) unlawful and (2) with malice. *S. v. Drake*, 214.

§ 20. Demonstrative Evidence; Physical Objects

Evidence that defendant's fingerprint was found on knife used to stab deceased was competent notwithstanding defendant was shown to have been at crime scene earlier that day and there was an unidentifiable fingerprint on the knife. *S. v. Britt*, 262.

§ 21. Sufficiency of Evidence and Nonsuit

Evidence held sufficient for jury in second degree murder prosecution. *S. v. Miller*, 82.

State's evidence held sufficient for jury on issue of defendant's guilt of first degree murder by stabbing deceased with a knife and beating her with an iron poker and frying pan. *S. v. Britt*, 262.

Circumstantial evidence was sufficient to send case to jury on issue of defendant's guilt of first degree murder of his wife by shooting her and beating her with a hoe handle, and to support verdict of guilty of second degree murder. *S. v. Drake*, 214.

Evidence of defendant's guilt of second-degree murder by use of a shovel was sufficient to go to the jury. *S. v. Edwards*, 296.

§ 24. Instructions on Presumptions and Burden of Proof

Trial court did not err in failing to give jury specific instructions as to the importance of presumption of innocence, the manner in which the jury should consider inferences, or that each juror must decide the case upon his own opinion of the evidence. *S. v. Britt*, 262.

Trial court erred in instructing jury that once a killing is proven to have been done with a deadly weapon the law presumes malice, since presumption of malice does not arise unless it is established or admitted that defendant intentionally used a deadly weapon, as a weapon, and inflicted wounds proximately resulting in death. *S. v. Drake*, 214.

§ 28. Instructions on Defenses

Instruction on self-defense that defendant could use no more force than was reasonably necessary to repel an assault, without instruction on apparent necessity, is erroneous. *S. v. Smith*, 77; *S. v. Edwards*, 296.

§ 30. Submission of Question of Guilt of Lesser Degree of Crime

Where defendant's evidence in a second-degree murder prosecution would have warranted a verdict of involuntary manslaughter had that issue been submitted to the jury, defendant was entitled to a new trial on that ground notwithstanding the punishment imposed upon her conviction of voluntary manslaughter was within the maximum allowed for involuntary manslaughter. *S. v. Batts*, 551.

Trial court in first-degree murder prosecution properly refused to submit issue of involuntary manslaughter to the jury when there was no suggestion in the evidence that the two shots fired by defendant into deceased's stomach

HOMICIDE — Continued

were fired involuntarily or by reason of culpable negligence. *S. v. Johnson*, 579.

§ 31. Verdict and Sentence

The punishment for first degree murder provided by G.S. 14-17 does not constitute coercion so as to render void defendant's plea of guilty of first degree murder tendered and accepted pursuant to the provisions of G.S. 15-162.1 as it existed prior to its repeal in 1969. *Garner v. State*, 109; *S. v. Smith*, 348.

HUSBAND AND WIFE

§ 11. Construction and Operation of Separation Agreement

Separation agreement in which the former wife of deceased relinquished all her right, title and interest in deceased's property, *held* not to constitute a revocation of the designation of the former wife as beneficiary under a group life and accidental death policy furnished deceased by his employer. *DeVane v. Insurance Co.*, 247.

INDICTMENT AND WARRANT

§ 8. Duplicity of Indictment

A defendant who fails to make a motion to quash waives opportunity to contest the duplicity of the indictment. *S. v. Turner*, 541.

§ 10. Identification of Accused

Warrant failed to charge defendant with crime of nonsupport of illegitimate child where name of defendant did not appear in affidavit upon which the warrant was based. *S. v. Satterfield*, 597.

§ 11. Identification of Victim

Indictment charging larceny of a truck which was the property of "oue City of Hendersonville, North Carolina" sufficiently alleges that the owner of the stolen property is a legal entity capable of owning property. *S. v. Turner*, 73.

§ 17. Variance Between Averment and Proof

In a prosecution for the offense of going armed with unusual and dangerous weapons to the terror of the people, variance between warrant and proof was not fatal. *State v. Dixon*, 37.

Variance between indictment and proof in bigamy prosecution was not prejudicial to defendant. *S. v. Simmons*, 561.

There was no fatal variance between allegations charging defendant with armed robbery of grocery store manager and evidence that defendant not only took money from the presence of the manager but subsequently took money from the person and presence of a cashier in the store. *S. v. Harris*, 653.

INFANTS

§ 9. Hearing and Grounds for Awarding Custody of Minor

Child custody order must be vacated and the cause remanded for detailed findings of fact when the trial court fails to find facts so that the appellate court can determine whether the order is supported by competent evidence and whether the welfare of the child has been served. *In re Moore*, 251.

INSURANCE — Continued

insurance which he has undertaken to provide has not been obtained is liable for the resulting damage which his client suffered from lack of insurance. *Ibid.*

§ 11. Liability for Failure to Procure Policy

Plaintiff's evidence was sufficient to be submitted to the jury on issue of whether defendant savings and loan association had undertaken to procure a policy of insurance on the life of its debtor and on issue of negligence of defendant in failing to give its debtor notice that the policy had not been obtained. *Musgrave v. Savings & Loan Assoc.*, 386.

§ 13. Effective Date of Life Policy

Where life insurance policy is issued without prior medical examination, a "good health" clause in the application will be construed liberally as requiring good health at time policy is issued or delivered and will not be construed as applying only to changes in applicant's health since making or accepting application. *Huffman v. Ins. Co.*, 186.

§ 18. Avoidance of Policy for Misrepresentation or Fraud

Statements as to insured's health in an application for life insurance policy are material as a matter of law. *Huffman v. Ins. Co.*, 186.

§ 29. Rights to Proceeds; Beneficiaries

Neither separation agreement in which former wife of deceased relinquished all right, title and interest in deceased's property, nor absolute divorce obtained by deceased from his former wife, revoked designation of the former wife as beneficiary under a group life and accident policy on deceased's life. *DeVane v. Insurance Co.*, 247.

§ 37. Actions on Life Policies

Where beneficiary of a life insurance policy made a prima facie case for the jury, defendant insurer had burden of showing legal excuse for not making payment according to terms of the policy. *Huffman v. Ins. Co.*, 186.

In action on life insurance policy, trial court erred in instructing jury that to avoid the policy defendant insurer was required to prove not only that insured answered incorrectly questions as to her health but that she did so with intent to deceive and mislead defendant into issuing the policy. *Ibid.*

§ 44. Actions to Recover Disability Benefits

In an action on a disability policy, plaintiff's evidence was sufficient to support a jury finding that her complaints resulted from back injuries sustained in a fall and that these complaints led to the total loss of time by plaintiff from any occupation. *Seibold v. Health and Accident Assoc.*, 277.

§ 45. Definitions in Accident Policies

Language in an accident policy is interpreted to mean that the cause of the compensable event must be accidental in nature. *Eason v. Ins. Co.*, 293.

§ 67. Actions on Accident Policies

Evidence held insufficient to support a jury finding that the insured under an accident policy, a policeman, died solely from accidental means when he was shot while searching a suspect. *Eason v. Ins. Co.*, 293.

Plaintiff has the burden to show that the loss sued upon falls within the coverage of an accident policy. *Ibid.*

JUDGMENTS

§ 17. Void Judgments

When a court decides a matter without having jurisdiction, the whole proceeding is null and void. *Hopkins v. Hopkins*, 162.

§ 25. Setting Aside Judgment for Excusable Neglect

Trial court properly set aside a default judgment on the ground that the failure of defendants to file answer was occasioned by their excusable neglect in relying upon the assurance of their attorney that he would prepare the necessary pleadings. *Lumber Co. v. Taylor*, 255.

Trial court properly found that defendant's failure to appear for trial was the result of inexcusable neglect. *Holcombe v. Bowman*, 673.

§ 29. Meritorious Defense

In a hearing to set aside default judgment, the fact that the contract sued upon by the corporate plaintiff contained an arbitration clause did not preclude defendant from asserting a breach of the contract as a meritorious defense to plaintiff's action. *Lumber Co. v. Taylor*, 255.

Mere denial of indebtedness and assertion of the presence of a meritorious defense is insufficient to show meritorious defense. *Holcombe v. Bowman*, 673.

§ 34. Trial, Determination and Judgment

Findings of fact by the trial court in the hearing of a motion to set aside a judgment are conclusive on appeal. *Lumber Co. v. Taylor*, 255.

§ 51. Foreign Judgments

Jurisdiction will be presumed until the contrary is shown. *Marketing Systems v. Realty Co.*, 43.

Provision of contract entered in another state naming a person in that state to serve as defendant's agent for receipt of service of process held sufficient to give courts of such state jurisdiction over the person of defendant in an action on the contract by service of process on the appointed agent. *Ibid.*

JURY

§ 6. Examination of Jurors

The trial court has broad discretion in the *voir dire* questioning of jurors. *Pence v. Pence*, 484.

§ 7. Challenges

Motion to quash the supplemental jury venire rests within the discretion of the trial court. *S. v. Midgett*, 230.

LANDLORD AND TENANT

§ 8. Liability for Injury to Person; Duty to Repair

Landlord was not liable for defective condition of stairs where the defect was patent and plaintiff was aware of the condition. *Sawyer v. Shackleford*, 631.

LARCENY

§ 3. Degrees of the Crime

Larceny committed pursuant to a breaking and entering is a felony without regard to the value of the property involved. *S. v. Richardson*, 298.

LARCENY — Continued

§ 4. Warrant and Indictment

Indictment charging larceny of a truck which was the property of "one City of Hendersonville, North Carolina" sufficiently alleges that the owner of the stolen property is a legal entity capable of owning property. *S. v. Turner*, 73.

Indictment in automobile larceny prosecution was sufficient to bar prosecution for the same offense. *S. v. Turner*, 541.

§ 6. Competency and Relevance of Evidence

Trial court properly excluded evidence that stolen television sets were on consignment and were not owned by appliance company. *S. v. Richardson*, 298.

Trial court properly admitted stolen television sets found along route that defendants were pursued by officers from crime scene. *Ibid.*

§ 7. Sufficiency of Evidence

Evidence, including testimony that a dog trailed defendants from the crime scene, held sufficient for jury in prosecution for larceny by breaking and entering a furniture store. *S. v. Bines*, 1.

Evidence of defendant's guilt of felonious larceny of an automobile from the lot of an automobile dealer held sufficient to go to jury. *S. v. Bocage*, 64.

State's evidence held sufficient to show present intent on part of defendant to take property belonging to another and convert it to his own use. *S. v. Thompson*, 313.

§ 8. Instructions

Trial court committed prejudicial error in giving instruction susceptible to interpretation that defendant had burden of rebutting presumption of guilt raised by his possession of recently stolen automobile. *S. v. Chisholm*, 80.

Defendants were properly convicted of felonious breaking and entering of an appliance store and felonious larceny of property therefrom without evidence of the value of the property taken and without requiring the jury to fix the value of the property taken. *S. v. Richardson*, 298.

In prosecution for conspiracy to commit larceny and for larceny, failure of court to instruct jury as to essential elements of larceny entitles defendant to new trial on both charges. *S. v. Locklear*, 535.

§ 10. Judgment and Sentence

Sentence of 18 to 24 months for misdemeanor larceny is within the statutory limits. *S. v. Hullender*, 41.

Sentence of 18 months' imprisonment imposed upon defendant's plea of guilty of larceny is within statutory limits. *S. v. Tomlinson*, 345.

In prosecution upon indictment charging defendant with larceny and receiving stolen goods, a single judgment imposed upon a verdict of "guilty as charged" will be upheld when the prosecution is free from error. *S. v. Turner*, 541.

LIMITATION OF ACTIONS

§ 1. Nature and Construction of Statute of Limitation

The court has no discretion when considering whether a claim is barred by the statute of limitations. *Congleton v. Asheboro*, 571.

MASTER AND SERVANT — Continued

§ 66. Accidents Followed by Disease

Plaintiff's evidence was insufficient to support her contention that she is entitled to compensation for total disability to work on account of a hysterical conversion reaction resulting from her injury. *Snead v. Mills, Inc.*, 447.

§ 69. Recovery, Generally

"Disability" as used in the Workmen's Compensation Act means impairment of wage earning capacity rather than physical impairment. *Snead v. Mills, Inc.*, 447.

§ 77. Review of Award for Change of Condition

Injured employee was not entitled to a review of an agreement to pay compensation where his application for review was made more than 12 months after the last payment of the compensation under the agreement. *Gantt v. Sales, Inc.*, 559.

§ 79. Persons Entitled to Payment

A daughter who was 18 years old when her father died from an injury arising out of his employment was not entitled to "next of kin" compensation, but she was entitled to compensation as a partial dependent. *Jones v. Sutton*, 302.

§ 85. Nature and Extent of Jurisdiction of Industrial Commission

The jurisdiction of the Industrial Commission is not limited solely to questions arising out of an employer-employee relationship. *Wake County Hospital v. Industrial Comm.*, 259.

Nonprofit hospitals which challenged the validity of hospital charges approved by the Industrial Commission in the treatment of workmen's compensation cases were not entitled to maintain the action in superior court on the ground that they had exhausted their administrative remedies before the Commission. *Ibid.*

§ 94. Findings and Award of Commission

The Industrial Commission is not required to make a finding as to each fact presented by the evidence. *Starr v. Paper Co.*, 604.

Findings by the Industrial Commission are supported by competent evidence and justify its conclusion that plaintiff's temporary total disability terminated on a specified date and that plaintiff sustained a 5% permanent partial disability to her back as a result of the accident in question. *Snead v. Mills, Inc.*, 447.

§ 96. Review in Court of Appeals

Findings of Industrial Commission are conclusive on appeal if supported by any competent evidence. *Snead v. Mills, Inc.*, 447.

§ 97. Disposition of Appeal

Provisions of the Court of Appeals rules relating to the time of docketing the record on appeal prevail over conflicting provisions in the Workmen's Compensation Act. *Fetherbay v. Motor Lines*, 58.

MUNICIPAL CORPORATIONS

§ 1. Definition, Creation and Requisites of Municipal Corporations

Municipal Board of Control erred in incorporating town of "Indian Hills" without making findings of fact that area does not lie within three miles of limits of any city, town or incorporated village. *In re Incorporation of Indian Hills*, 564.

§ 4. Powers of Municipalities — Urban Renewal

Requisites of petition for condemnation of land by redevelopment commission. *Redevelopment Comm. v. Grimes*, 376.

In special proceeding to condemn land for urban renewal, clerk of superior court did not have authority to appoint commissioners of appraisal where respondents denied allegations of the petition and the record does not show that after a proper hearing the clerk had determined the controverted facts in favor of petitioners. *Ibid.*

§ 30. Zoning Ordinances and Building Permits

Municipal Board of Adjustment did not exceed power delegated to it by municipal zoning ordinance in denying application for special use permit to construct mobile home park, even though proposed plan complied with requirements set forth in the ordinance for such a permit. *Keiger v. Board of Adjustment*, 435.

Provision of municipal zoning ordinance which requires Board of Adjustment to consider "the public interest" in acting upon application for special use permit is unconstitutional. *Ibid.*

Provision of municipal ordinance giving Board of Adjustment authority to grant or deny special use permit based upon its consideration of "the purpose and intent of this ordinance" held a constitutional delegation of administrative power. *Ibid.*

NEGLIGENCE

§ 1. Acts Constituting Negligence Generally

An unavoidable accident can occur only in the absence of causal negligence. *Kale v. Daugherty*, 417.

§ 6. Res Ipsa Loquitur

To invoke the doctrine of *res ipsa loquitur*, a plaintiff must show that an instrumentality was in the exclusive control of the defendant and that the accident is such as does not occur in the ordinary course of things if the person having control of the instrumentality uses proper care. *Lassiter v. Jones*, 506.

§ 27. Competency and Relevancy of Evidence

Evidence that automobile driver has had no previous accidents is not competent on issue of driver's negligence in accident in question. *Rouse v. Huffman*, 307.

§ 29. Sufficiency of Evidence of Negligence

Where plaintiff's evidence was sufficient to support a finding that defendant was negligent in at least one of the respects alleged in the complaint and that such negligence was a proximate cause of the injuries and death of the deceased, the evidence was sufficient to withstand defendant's motion for nonsuit. *Broadnax v. Deloatch*, 620.

ROBBERY — Continued

§ 2. Indictment

Bill of indictment for armed robbery sufficiently charged felonious intent where it alleged that defendants, by the use and threatened use of firearms whereby the life of a motel night clerk was endangered, unlawfully, wilfully and feloniously took money from the motel. *S. v. Frietch*, 331.

Bill of indictment for armed robbery need not allege that defendants intended to convert the personal property stolen to their own use. *Ibid.*

§ 4. Sufficiency of Evidence and Nonsuit

Testimony by armed robbery victim was sufficient for submission of case to jury. *S. v. Canady*, 320.

That neither defendant nor his companion made any verbal demand on the prosecuting witness to surrender the money does not entitle defendant to nonsuit in armed robbery prosecution. *S. v. Jenkins*, 532.

State's evidence was sufficient to sustain defendant's conviction of common law robbery from a gas station attendant. *S. v. Keyes*, 677.

There was no fatal variance between allegations charging defendant with armed robbery of grocery store manager and evidence that defendant not only took money from the presence of the manager but subsequently took money from the person and presence of a cashier in the store. *S. v. Harris*, 653.

Exhibition of a pistol or shotgun while demanding money conveys the message loud and clear that the victim's life is being threatened. *Ibid.*

§ 5. Instructions and Submission of Lesser Degrees of the Crime

In armed robbery prosecution, evidence did not warrant an instruction on the lesser offenses of assault with a deadly weapon and simple assault. *S. v. Gurkin*, 304.

Conviction of common law robbery renders harmless any error with respect to submitting the question of defendant's guilt of armed robbery. *S. v. Keyes*, 677.

Trial court did not err in failing to mention defendant's contention that only three persons were in the robbery and that it had been shown that three persons had already been convicted of the crime absent timely request for such instructions. *S. v. Harris*, 653.

§ 6. Verdict and Sentence

Exception to signing of judgment entered upon defendant's conviction of armed robbery is without merit. *S. v. Hughes*, 334.

Sentence of five years' imprisonment imposed upon verdict of guilty of common-law robbery is within the statutory maximum. *S. v. Jackson*, 346.

RULES OF CIVIL PROCEDURE

§ 50. Motion for Directed Verdict and for Judgment Notwithstanding Verdict

Trial court erred in granting defendant's motion for judgment notwithstanding verdict for plaintiff in action for negligent failure of savings and loan association to procure insurance upon life of its debtor. *Musgrave v. Savings & Loan Assoc.*, 386.

On appeal from entry of judgment for defendant notwithstanding verdict for plaintiff, new trial cannot be granted where neither plaintiff nor defendant moved for new trial. *Ibid.*

SEARCHES AND SEIZURES — Continued

were thereafter discovered by search of the glove compartment. *S. v. Jordon*, 203.

STATUTES

§ 5. General Rules of Construction

Interpretation given to proposed legislation by the department proposing it is helpful in the interpretation of the legislation. *Desk Co. v. Clayton*, 452.

A word of a statute may not be interpreted out of context. *Ibid.*

§ 7. Construction of Amendments

In construing a statutory amendment it is presumed that the legislature intended either to change the substance of the original act or to clarify its meaning. *Desk Co. v. Clayton*, 452.

SUNDAYS AND HOLIDAYS

Trial court properly sustained a demurrer to a complaint attacking the constitutionality of the High Point Sunday observance ordinance. *Kresge Co. v. Davis*, 595.

TAXATION

§ 2. Uniform Rule and Discrimination

Double taxation, as such, is not prohibited by the Federal or State Constitutions. *Leasing Corp. v. High*, 179.

The imposition of a sales tax upon the gross proceeds received by a motel or hotel owner for the rental of a room, and upon the gross proceeds received by the lessor of television sets for the rental of a set located in that room, does not constitute double taxation, the taxes being imposed upon totally separate incidents. *Ibid.*

§ 19. Exemption from Taxation Generally

The burden of showing exemptions from taxing statutes is upon the one asserting the exemption. *Leasing Corp. v. High*, 179.

§ 23. Construction of Taxing Statutes

An administrative interpretation of a tax statute which has continued over a long period of time with the silent acquiescence of the Legislature should be given consideration in the construction of the statute. *Desk Co. v. Clayton*, 452.

§ 30. Income Tax on Foreign Corporations

In determining the percentage of net income allocable to this State for income taxation, a domestic corporation was not entitled to include in the numerator and denominator of its payroll ratio the amounts it had paid to certain sales representatives who were not employees of the corporation. *Desk Co. v. Clayton*, 452.

§ 31. Sales Tax

The retailer is liable for the sales tax notwithstanding he did not collect it from his customers. *Leasing Corp. v. High*, 179.

The leasing of a television set to a motel or hotel owner for use in a room rented to transients is not a "sale for resale" within the meaning of the Sales and Use Tax Act. *Ibid.*

some direct proceeding, ordinarily by motion to set aside the stipulation in the court in which the action is pending. *Napoli v. Philbrick*, 9.

Stipulations constitute judicial admissions and are binding upon the parties. *Dale v. Dale*, 96.

§ 7. Pretrial

Trial court should have conducted a pretrial conference in this condemnation proceeding where the record shows the parties had different concepts of what phase of the matter they were going to try. *Redevelopment Comm. v. Grimes*, 376.

§ 10. Expression of Opinion on Evidence by Court During Trial

Trial court's remark in a divorce action that the jury did not have to read all of a 149-page medical records exhibit introduced by the wife was not an expression of opinion and did not prejudice the wife. *Pence v. Pence*, 484.

Where jury originally answered issue of damages as "amount specified in contract," trial judge did not express an opinion when he informed jury that verdict should be in some dollar amount and inquired if they intended the amount set forth in the complaint. *Roberts Co. v. Mills, Inc.*, 612.

§ 11. Argument and Conduct of Counsel

Attorneys have wide latitude in arguing their case to the jury. *Pence v. Pence*, 484.

§ 21. Consideration of Evidence on Motion to Nonsuit

Upon motion for judgment of nonsuit the evidence of plaintiff must be taken as true and must be considered in the light most favorable to him. *Downs v. Watson*, 13; *Toothe v. Wilmington*, 171.

§ 22. Sufficiency of Evidence

An inference of fact may not be based upon an inference. *Mills, Inc. v. Foundry, Inc.*, 521.

§ 33. Statement of Evidence and Application of Law Thereto by Court in Instructions

Where trial judge charged incorrectly in one part of his instructions, the Court of Appeals will not assume the jury followed a correct instruction in another part of the charge. *Highway Comm. v. Reeves*, 47.

In the wife's action for alimony without divorce on the ground that her husband had abandoned her, the trial court, in the absence of a request by the husband, was not required to charge the jury that a husband is under a duty to support his wife only in the home he has provided. *Mode v. Mode*, 209.

§ 40. Form and Sufficiency of Issues

The pleadings determine the issues. *Golf, Inc. v. Poole*, 92.

Although the evidence in the wife's action for alimony without divorce was insufficient to justify the submission of an issue of cruelty and indignities to her person, the submission of such issue was not prejudicial to the husband where the jury's answer to abandonment effectively established the rights of the parties. *Mode v. Mode*, 209.

When pleadings and evidence raise several issues, submission of single

WORD AND PHRASE INDEX