NORTH CAROLINA COURT OF APPEALS REPORTS

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[1] Resigned 5 May 1973. Succeeded by Marshall E. Cline, Lenoir, 1 June 1973.
[2] Resigned 28 February 1973. Succeeded by Randy Dean Duncan, Hickory, 18 May 1973.
[3] Appointed 22 March 1973.

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CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

FALL SESSION 1972

STATE OF NORTH CAROLINA v. GEORGE E. MITCHELL

No. 7214SC769

(Filed 20 December 1972)

1. **Criminal Law § 92— charges of assault on officer and felonious assaults of others — consolidation for trial**

The trial court did not err in consolidating a charge of assault upon a law officer in the performance of his duty with three charges of assault with a deadly weapon with intent to kill inflicting serious injury where all of the alleged assaults occurred within a period of a few minutes at the same place.

2. **Criminal Law § 43— illustrative photographs — necessity for introduction in evidence**

The trial court did not abuse its discretion in ruling that photographs must be introduced in evidence in order for defendant to use them to illustrate testimony of a State's witness.

3. **Assault and Battery § 14— felonious assaults — assault on police officer — sufficiency of evidence**

The State's evidence was sufficient for submission to the jury on three charges of assault with a deadly weapon with intent to kill inflicting serious injury and on one charge of assault on a police officer in the performance of his duties where it tended to show that defendant and his wife had had an altercation, that the wife went to an adjoining apartment to call an emergency number, that when she came out of the apartment defendant shot her in the shoulder, damaging muscles, nerve and bone, that defendant shot his father-in-law and mother-in-law as they attempted to come up the stairs toward the apartment, that the mother-in-law was shot in the face and right hand and her injury required a muscle transplant in a finger, that the father-in-law was shot in the side and right hand and forearm, and that defendant pointed a shotgun at a police officer who was assisting defendant's wounded wife and pulled the trigger but the gun did not fire.

State v. Mitchell

APPEAL by defendant from *Cooper, Judge,* 1 May 1972 Criminal Session, Superior Court, DURHAM County.

Defendant was charged in separate bills of indictment with (1) assault with a deadly weapon with intent to kill on one Beulah Russell inflicting serious injury not resulting in death, (2) assault with a deadly weapon with intent to kill on one Edward Russell inflicting serious injury not resulting in death, (3) assault with a deadly weapon with intent to kill on Ann Mitchell inflicting serious injury not resulting in death, and (4) felonious assault with a firearm on a police officer in the performance of his duty. On the first two charges, he was found guilty of assault with a deadly weapon; on the third, assault with a deadly weapon inflicting serious injury; on the fourth, assault with a firearm upon a law enforcement officer in the performance of his duty. From judgments entered on the verdicts, defendant appealed.

Attorney General Morgan, by Assistant Attorney General O'Connell, for the State.

Arthur Vann for defendant appellant.

MORRIS, Judge.

[1] Upon the call of the cases, the State moved to consolidate the four cases for trial. Defendant moved for severance of the charge of assaulting the police officer. The court allowed the State's motion and denied defendant's motion. Defendant's exception is the basis for his first assignment of error. G.S. 15-152 provides that "[W]hen there are several charges against any person for the same act or transaction or for two or more acts or transactions connected together, or for two or more transactions of the same class of crimes or offenses, which may be properly joined, instead of several indictments, the whole may be joined in one indictment in separate counts; and if two or more indictments are found in such cases, the court will order them to be consolidated. . . . " All of the alleged assaults here occurred on the same day and within a period of a few minutes and at the same place. "Where a defendant is indicted in separate bills 'for two or more transactions of the same class of crimes or offenses' the court may in its discretion consolidate the indictments for trial. In exercising discretion the presiding judge should consider whether the alleged offenses are so separate in time or place and so distinct in circumstances as to ren-

der a consolidation unjust and prejudicial to the defendant. . . ." *State v. White,* 256 N.C. 244, 247, 123 S.E. 2d 483 (1962). Defendant has shown no abuse of discretion. It is clear that the offenses charged are not so separate in time or place and so distinct in circumstances as to render consolidation unjust and prejudicial to defendant. This assignment of error is overruled.

[2] Defendant next assigns as error the ruling of the court that in order for defendant to use photographs on cross-examination to illustrate testimony of State's witness, the photographs must be introduced in evidence. Defendant argues that this results in prejudice to him and constitutes an abuse of the court's discretion because if the defendant offers no evidence, the right to open and close the argument to the jury shall belong to him. We said in *State v. Rich,* 13 N.C. App. 60, 185 S.E. 2d 288 (1971), cert. denied and appeal dismissed 280 N.C. 304, 186 S.E. 2d 179 (1972), that photographs must be introduced in evidence before they may be used to illustrate testimony. The photographs are not included as exhibits in the record. We find no abuse of discretion. This assignment of error is without merit.

[3] Defendant next contends that his motion for nonsuit should have been granted. The evidence for the State tends to show, in brief summary, that defendant and his wife had had a disagreement and he had twisted her hand with sufficient violence to cause it to swell. She called her parents to come and take her to work. They came, waited for her a few minutes and during that time had no argument with defendant. Defendant then accused his mother-in-law of pointing a gun at him, threatened to call the police, and went next door. As his wife and her parents were leaving they were stopped by an officer who asked if the mother-in-law had a gun. A search failed to reveal a gun, and they were allowed to leave. They took defendant's wife to her place of employment. She went in and stayed a few minutes and arranged to be absent from work. They then took her "downtown" where she had a warrant issued for defendant for assault. They then returned to the apartment of defendant and defendant's wife went to the door. The door was chained and she advised defendant that that action would constitute abandonment. Whereupon he opened the door, she entered, and he hit her in the chest and knocked her against the rail. She went next door to call an emergency number.

While she was in that apartment her father came up the stairs to be sure she was all right. She heard a "commotion," started out, and was shot by defendant in her shoulder damaging muscles, nerve, and bone. She fell to the floor. Defendant shot his father-in-law and mother-in-law as they attempted to come up the stairs and also as they retreated from the scene. The mother-in-law was shot in the face and right hand. Her injury required a muscle transplant in a finger and she wore a cast for some five or six weeks. The father-in-law was shot in the side and right hand, wrist and forearm. Officer Ford answered the call and found defendant's wife lying in a pool of blood. He stooped to assist her, and defendant stepped from his apartment, pointed a shotgun at Officer Ford and pulled the trigger. The officer heard the click but the gun did not fire. Ford ran around the corner of the building, took cover, pulled his pistol and ordered defendant to drop his weapon. Defendant did so and stepped back into his apartment. When the officer ordered him to come out, he came out holding his baby in front of him and said: "I am here." Officer Ford was dressed in full uniform. The evidence was ample to take the case to the jury and the court did not, as defendant contends, err in instructing the jury that they could return a verdict against the defendant in three cases of "guilty of assault with a deadly weapon with intent to kill inflicting serious injury." Nor was there error in instructions to the jury upon the charge of willful and felonious assault of a police officer in the performance of his duty. Assignments of error 6, 9, 10 and 11 are overruled.

Defendant's remaining assignments of error are directed to alleged errors in admitting or excluding evidence, refusal of the court to grant a temporary recess, and refusal to set the verdicts aside. All these have been carefully considered and found to be without merit.

No error.

Chief Judge MALLARD and Judge HEDRICK concur.

STATE OF NORTH CAROLINA v. QUINZESTON WEST, ALIAS QUINCY WEST AND RAYMOND I. SAVAGE

No. 7212SC779

(Filed 20 December 1972)

1. **Criminal Law § 66— admission of in-court identification**

The trial court did not err in the admission of in-court identification testimony where the court determined upon supporting *voir dire* testimony that the witnesses' in-court identifications were based on their observations of defendants at the scene of the crime and were not tainted by any pretrial photographic identifications.

2. **Criminal Law § 88— recall of defendant for further cross-examination — discretion of court**

The trial court did not abuse its discretion in permitting the State to recall one defendant for further cross-examination after the defendants had presented their evidence.

ON *certiorari* to review judgment of *Clark, Judge,* entered 16 June 1972 Superior Court, CUMBERLAND County.

Defendants were tried for and convicted of armed robbery, breaking into an automobile, and larceny. They gave notice of appeal. Upon a determination of indigency counsel was appointed to perfect their appeal. Record on appeal was not filed within the time prescribed by the rules of this Court, and defendants filed a petition for a writ of certiorari, which was granted.

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

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

MORRIS, Judge.

Evidence for the State tends to show that Joseph Nelson (Joseph) and Gary Remiszewski (Gary), both residents of New Jersey, came to Fayetteville, N. C., driving a 1970 Volkswagen van owned by Joseph. They picked up a girl who was hitchhiking on the street coming into Fayetteville. Her name was Betty Johnson Wellard (Betty) and she told Joseph and Gary that she had a house where they could "wash up" and change clothes. They proceeded to Hay Street to see someone she knew. They stopped in front of a club and Betty talked to

her friend, who was Raymond Savage, defendant in this case. After a few minutes Joseph and Gary got out of the van and went into the club for a "quick beer." When they returned Betty was still talking to Savage and defendant West began pushing her and slapping her and calling her a "white pig." They got in the van and were introduced to Savage, who asked if they wanted any dope. West came over to the van and was introduced and informed Joseph and Gary that he had some "good New York dimes," a dime bag meaning that, although referring to no particular amount, a bag of heroin is $10 per bag. Savage and West walked away. Joseph, Gary, Betty and another couple went to a house located at 1312 Summit Avenue. Joseph locked the van, and he and Gary went upstairs to "wash up" and change clothes. When they came back downstairs, several people were in the living room, including Betty. In a few minutes Savage and West came in from the kitchen. Both had pistols. Savage made Joseph roll over on his stomach and tied his hands behind his back. The lighting was clear and he recognized Savage. West was with Gary and said he would like to shoot Gary in the eye and asked Savage to let him go ahead and shoot. Savage hit Joseph one time with his pistol. Savage took two rings, $260, and his identification from Joseph. One of the bills, a $50 bill was marked with the letters "DR" circled on the right hand side of the picture. A small amount of marijuana was taken from Joseph's shaving mug. West took $80 and a Seiko watch from Gary. After tying up Joseph and Gary, Savage went out to the van. He was there about 10 minutes when West yelled to him to hurry up and get the suitcase. Savage returned to the house carrying a box of tapes. Both left the house. Betty and another girl untied Joseph and Gary who ran outside. A person there told them he had seen "most of it." The police were called and were told what had happened. Inspection of the van revealed that one window had been broken and others pried open; the curtains were torn down, the glove compartment torn out, and the rug pushed out. Joseph's suede jacket was missing. Joseph and Gary left the area but, as result of information obtained on Hay Street, returned and parked across the street from the house where they had been robbed. They talked with the two men who lived across the street and then spent the night in the van. The next morning, one of the men across the street awakened them and told them one of the men who robbed them had gone in the house and the taxi cab which had brought him was waiting. Joseph grabbed a pistol and went to the cab. As he was getting

the cab driver's card, he saw Savage and another come out of the house. Savage was wearing Joseph's jacket. He made them walk across the street where he searched them. He found in Savage's pocket the marked $50 bill. The police were notified and came and all of them were taken to the police station. The men who lived across the street saw the robbing of the van and saw the two men running down the street, one carrying a suitcase and the other carrying a tape box and pistol. They were picked up by a man driving a green Charger, which the two men had seen many times at 1312 Summit Avenue. One of them tried to follow the car but was not able to catch it. They did not take action sooner because "this activity looked natural for 1312 Summit Avenue."

[1] Defendant complains that the court committed error in its findings of fact, conclusions of law, and ruling at the close of the voir dire examination and in failing to suppress the identification testimony. The court made full findings of fact which were supported by competent evidence and concluded that the in-court identification was based on their observance of defendants on Hay Street and at 1312 Summit Avenue rather than on photographic identifications and that it was not tainted by the photographic identification, if any. It is well established in this jurisdiction that findings of fact made by the trial judge and conclusions drawn therefrom on the voir dire examination are binding on the appellate courts if supported by competent evidence. *State v. Accor* and *State v. Moore,* 281 N.C. 287, 188 S.E. 2d 332 (1972). There was no error in the admission of identification testimony.

There was plenary evidence to withstand defendants' motions for nonsuit, and the court did not commit error in denying the motions.

[2] After the defendants presented their evidence, the court allowed the solicitor to recall Savage for further cross-examination. Defendants objected, and their exception to the court's overruling their objection is the basis for their only other assignment of error. Neither defendant has shown any prejudice resulting from this procedure. The evidence elicited concerned matters to which Savage had testified on direct examination. No objection was made by either defendant at any time during this additional cross-examination. Defendants have shown no abuse of discretion nor do we perceive any.

Defendants had a fair trial, free from prejudicial error. They were represented both at trial and on appeal by able counsel.

No error.

Chief Judge MALLARD and Judge HEDRICK concur.

STATE OF NORTH CAROLINA v. EARNEST RAY THOMAS

No. 728SC665

(Filed 20 December 1972)

Automobiles § 112; Criminal Law § 34— involuntary manslaughter case — evidence of other offenses involving operation of automobile — prejudicial error

In this prosecution for involuntary manslaughter arising from an automobile accident, the trial court committed prejudicial error in permitting a State's witness to testify prior to the time defendant took the stand that defendant had previously been convicted of reckless driving while his driver's license was suspended and for driving while his license was suspended, since evidence of other offenses is inadmissible if its only relevancy is to show the character of the accused or his disposition to commit an offense of the nature of the one charged; such error was not cured when defendant was thereafter properly cross-examined as to his prior convictions for the purpose of impeaching his credibility as a witness.

APPEAL by defendant from *Cowper, Judge,* February 1972 Session of Superior Court held in GREENE County for the trial of criminal cases.

The defendant was tried on three bills of indictment, each charging him with the felony of involuntary manslaughter.

The evidence for the State tended to show that the defendant was operating an automobile on Highway 264 at about 6:25 p.m. on 5 February 1971 in Greene County. He was traveling east at a speed of about 80 miles per hour, pulling in and out of traffic. As defendant pulled out into the left lane to pass a vehicle in front of him, he crashed head-on into an automobile going west on Highway 264, said automobile being operated by one Linda Arrington. It was stipulated that as a result of this accident and collision, Linda Arrington and Ann Tart, who was riding with the Arrington girl, and Jeffrey Fogel, who was

riding with the defendant, were killed. The posted speed limit in that area was 50 miles per hour for trucks and 60 miles per hour for automobiles. After the collision the defendant, while still pinned in his automobile under the steering wheel, had the odor of alcohol on his breath but the evidence did not reveal that he was under the influence of intoxicating liquor.

Defendant offered evidence which in substance tended to show that on this date he and his brother were riding in his, the defendant's automobile which was at that time being operated by Jeffrey Fogel and that the defendant's brother was riding in the middle of the front seat and the defendant was riding on the right side of the front seat.

From verdicts of guilty as to each count and judgment of imprisonment, the defendant appealed, assigning error.

Attorney General Morgan and Assistant Attorneys General Melvin and Ray for the State.

Turner & Harrison by Fred W. Harrison for defendant appellant.

MALLARD, Chief Judge.

The defendant contends that the trial court erred in failing to grant his motion for judgment as of nonsuit. We hold that there was sufficient evidence to require submission of the case to the jury.

Defendant also contends that the trial court committed error when it allowed evidence to be admitted of other crimes committed by defendant while operating an automobile. The defendant contends that although he later took the witness stand and testified, this does not make such evidence competent because he may not have testified or offered any evidence, except for this error.

State's witness Whitehurst, who testified that he was a member of the State Highway Patrol, was permitted to testify, over objection, as follows:

> "Q. Trooper, in reference to that license check, will you please tell us the status of the defendant's driving license on the date of the accident?
>
> A. His license were in a state of suspension.

Q. How long were they suspended for?

A. The license were taken on February 20, 1970, and his license were suspended on March 8, 1970, and were suspended until May 8, 1971.

Q. Now, during that suspension was there another conviction?

A. Yes, sir.

Q. What was that conviction for?

A. Reckless Driving.

Q. Is there a suspension for driving while license were suspended?

A. Yes, sir. That was November 9, 1970.

Q. And did that result in the further suspension of his driver's license?

A. Yes, sir.

Q. What further period of suspension did that result in?

A. His license were suspended for a further period of until May 7, 1973.

Q. Would you please repeat the dates of license suspension conviction?

A. That was in New Bern District Court, November 9, 1970."

In Stansbury, N. C. Evidence 2d, § 91, it is said: "Evidence of other offenses is inadmissible if its only relevancy is to show the character of the accused or his disposition to commit an offense of the nature of the one charged; but if it tends to prove any other relevant fact, it will not be excluded merely because it also shows him to have been guilty of an independent crime."

The defendant contends, and we agree, that when the solicitor continued to ask this witness questions as to other crimes the defendant had been convicted of prior to the time that the defendant testified, such was prejudicial error. It violated the rule that evidence of other offenses is inadmissible if its

only relevancy is to show the character of the accused or his disposition to commit an offense of the nature of the one charged. While the fact that the defendant's driver's license was in a state of suspension was competent as evidence in the case, the reasons for the suspension were incompetent and their admission into evidence amounted to prejudicial error. The fact that the defendant may have been convicted of reckless driving on another occasion while his driver's license was suspended and for driving while his driver's license was suspended does not come within any of the exceptions to the general rule excluding evidence of the commission of other offenses as set out in *State v. McClain,* 240 N.C. 171, 81 S.E. 2d 364 (1954). Moreover, we are of the opinion that the fact that defendant was later properly cross-examined concerning his prior convictions for the purpose of impeaching his credibility did not cure the error. If we were to hold otherwise, it would amount to a condonation of a practice which the rules of evidence forbid.

Defendant has other assignments of error, some of which have merit but which may not recur on a new trial, and we have not considered them.

We are of the opinion and so hold that the defendant is entitled to a new trial.

New trial.

Judges BROCK and BRITT concur.

STATE OF NORTH CAROLINA v. JULIA MAE COLEMAN

No. 7212SC730

(Filed 20 December 1972)

Abortion § 3; Criminal Law § 162— abortion case — evidence defendant committed prior abortion — failure to object — belated motion to strike

In a prosecution of defendant for performing an abortion, the trial court did not err in allowing the State's rebuttal witness to testify that defendant had performed an abortion on her in 1968 where defendant failed to object to the questions asked the witness; nor did the court abuse its discretion in denying defendant's motion to strike such testimony made after the witness had been extensively cross-examined by defense counsel.

State v. Coleman

APPEAL by defendant from *Clark, Judge,* 1 June 1972 Session of Superior Court held in CUMBERLAND County for the trial of criminal cases.

Defendant was prosecuted under a bill of indictment charging that " . . . Julia Mae Coleman . . . on or about the 11th day of March, 1972, with force and arms at and in the County aforesaid did unlawfully, wilfully, and feloniously use and employ a certain instrument, to wit: a coat hanger and tube on the body of June Asta Evans with intent thereby to procure the miscarriage of June Asta Evans, known to the said Julia Mae Coleman to be a pregnant woman . . . . "

The State's evidence tended to show that June Asta Evans (June), prosecutrix, was pregnant; that Barbara Jean Melvin (Barbara) procured the defendant to perform an abortion on prosecutrix; that the defendant performed the abortion operation at Barbara's home on Saturday, 11 March 1972; that June paid the defendant $75.00; that June thereafter became ill and was treated by Dr. David Bingham at Womack Army Hospital; and that the personnel at that hospital reported the abortion to the authorities.

The defendant offered the testimony of three witnesses who stated that on Saturday, 11 March 1972, the defendant had been with them most of the day shopping at various stores. The defendant also testified that on Saturday, 11 March 1972, she had been shopping with the three ladies who had testified in her behalf; that she did not perform an abortion on the prosecutrix or any other person; that she did not know how to perform an abortion; that she did not know either the prosecutrix or Barbara; and that she did not go with either the prosecutrix or Barbara to Barbara's house on Saturday, 11 March 1972.

In rebuttal, the State recalled Barbara to the stand, and she testified, *without objection,* that she had first met the defendant in 1968 when she was in high school and that at that time the defendant had performed an abortion upon her body. After cross-examination, defendant moved to strike the testimony concerning the prior abortion, and the court denied the motion.

The jury returned a verdict of guilty as charged, and a judgment of imprisonment for a term of three-to-five years was

entered. Defendant appealed to the Court of Appeals, assigning error.

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

Assistant Public Defender Kenneth Glusman for defendant appellant.

MALLARD, Chief Judge.

The only questions argued and attempted to be raised by the defendant on this appeal are whether the trial judge committed error in allowing the State's rebuttal witness, Barbara Jean Melvin, to testify as to an abortion which she said was performed on her by the defendant in 1968 and in refusing to allow the defendant's motion to strike the testimony relating to the 1968 abortion, and in denying the defense motion for mistrial.

The State's rebuttal witness, Barbara Jean Melvin, testified, without objection, that:

> "I first recall meeting Mrs. Coleman in 1968. In 1968, I had occasion to become pregnant while still in school. I was a senior at E. E. Smith. I was not married at the time. I was living at home with my mother and sisters and brothers.
>
> At that time I had an abortion. The abortion was performed by Mrs. Coleman."

The rule is that an objection must be made to an improper question without waiting for the answer in order to present the contention that the answer was incompetent. *State v. Jones,* 280 N.C. 322, 185 S.E. 2d 858 (1972); *State v. Stepney,* 280 N.C. 306, 185 S.E. 2d 844 (1972); *State v. Blackwell,* 276 N.C. 714, 174 S.E. 2d 534 (1970), *cert. denied,* 400 U.S. 946 (1970); *State v. Perry,* 275 N.C. 565, 169 S.E. 2d 839 (1969); *State v. Williams,* 274 N.C. 328, 163 S.E. 2d 353 (1968); *Johnson v. Lamb,* 273 N.C. 701, 161 S.E. 2d 131 (1968); *State v. Powell,* 11 N.C. App. 465, 181 S.E. 2d 754 (1971), *cert. denied,* 279 N.C. 396 (1971); *State v. Wingard,* 10 N.C. App. 101, 177 S.E. 2d 765 (1970), *appeal dismissed,* 277 N.C. 727 (1971); *State v. Barrow,* 6 N.C. App. 475, 170 S.E. 2d 563 (1969); 3 Strong, N. C. Index 2d, Criminal Law, § 162. In the case at bar, due to the failure of the defendant to object to the questions asked,

the trial judge did not commit error in allowing the State's rebuttal witness, Barbara Jean Melvin, to testify as to an abortion which she said was performed on her by the defendant in 1968.

After Barbara had testified on direct examination, the defendant cross-examined her as to where, when, and how the 1968 abortion was performed and how she felt while it was being performed. Thereafter the following appears in the record:

> "At this point, defense counsel moved to strike that part of the witness' testimony relating to her having had an abortion at the hands of the defendant in 1968, on the grounds that this was impeachment of a collateral matter and not competent.
>
> Motion denied. Defendant excepts.
>
> EXCEPTION NO. 9.
>
> The defendant then moved for a mistrial. Motion denied.
>
> EXCEPTION NO. 10."

The rule is that when there is no objection to the question or answer, the allowance of the motion to strike is discretionary with the court unless the evidence is forbidden by statute or results from questions asked by the trial judge or a juror. *State v. Blackwell, supra; State v. Perry, supra; State v. Williams, supra; State v. Powell, supra;* 3 Strong, N. C. Index 2d, Criminal Law, § 162. Moreover, in the case at bar the motion to strike the testimony as to the prior abortion was not made in apt time. It was made after the witness had completed her direct testimony on rebuttal and after she had been extensively cross-examined. A motion to strike, not made in apt time, is also directed to the discretion of the trial judge. In this case we have found no statute forbidding evidence of a prior abortion on the trial of a defendant for performing an abortion. Neither does it appear that the evidence of the 1968 abortion was the result of questions asked by the trial judge or a juror. As was stated in *State v. Blackwell, supra:*

> "It is apparent that defendant's able and experienced trial lawyer chose to waive the right to interpose objection

for the purpose of high-lighting and accentuating his skillful attack by cross-examination on the veracity and credibility of the prosecuting witness' testimony."

We hold that under the circumstances of this case, the trial judge did not abuse his discretion in failing to allow the defendant's motion to strike the evidence relating to the 1968 abortion or in failing to allow the defendant's motion for a mistrial.

In the trial we find no prejudicial error.

No error.

Judges MORRIS and HEDRICK concur.

STATE OF NORTH CAROLINA v. LYMAN GRANT

No. 728SC699

(Filed 20 December 1972)

Receiving Stolen Goods § 6— instructions on guilty knowledge — reasonable belief that goods were stolen

In this prosecution for feloniously receiving stolen goods, the trial court erred in instructing the jury that defendant had guilty knowledge if he "had good reason to believe" that the property was stolen.

APPEAL by defendant from *Cowper, Judge,* at the 13 March 1972 Session of LENOIR Superior Court.

Defendant was charged in ten bills of indictment with feloniously receiving stolen property knowing that said property had been feloniously stolen as a result of felonious breaking and entering. Without objection by defendant the cases were consolidated for trial. A jury found defendant guilty as charged in all cases and from prison sentences imposed, defendant appealed.

Attorney General Robert Morgan by Benjamin H. Baxter, Jr., Associate Attorney, for the State.

Turner and Harrison by J. Harvey Turner for defendant appellant.

BRITT, Judge.

Defendant assigns as error numerous portions of the court's charge to the jury. Proper consideration of the instructions challenged requires a review of applicable authorities.

G.S. 14-71 provides in pertinent part: "If any person shall receive any chattel, property, money, valuable security or other thing whatsoever, the stealing or taking whereof amounts to larceny or a felony, either at common law or by virtue of any statute made or hereafter to be made, such person *knowing the same* to have been feloniously stolen or taken, he shall be guilty of a criminal offense . . . . " (Emphasis added.)

In *State v. Brady,* 237 N.C. 675, 75 S.E. 2d 791 (1953), the court declared that the essential elements of the crime of receiving stolen goods which must be proven are as follows: (a) The stealing of the goods by someone other than the accused; (b) that the accused, *knowing them to be stolen,* received or aided in concealing the goods; and (c) continued such possession or concealment with a dishonest purpose. Our Supreme Court restated these elements in the recent case of *State v. Muse,* 280 N.C. 31, 185 S.E. 2d 214 (1971).

Among the jury instructions challenged in the instant case are the following:

> "Members of the Jury, Lyman Grant has been charged in ten separate warrants with the felonious receiving of goods of another knowing *or having reason to believe* that said property has been stolen by feloniously breaking and entering the building of another." (Emphasis added.)
>
> * * *
>
> "Guilty knowledge may be inferred from incriminating circumstances, however, it is necessary that the defendant have such knowledge expressed and implied at the time and circumstances sufficient to put a reasonable, prudent man on inquiry which would have exposed the fact or cause the defendant to *reasonably believe* or know that the property had been stolen and stolen by means of breaking and entering. A *reasonable belief* or an implied knowledge." (Emphasis added.)
>
> * * *
>
> "I charge you that to find the defendant guilty of feloniously receiving stolen goods the State must prove

five things beyond a reasonable doubt. (1) That the property named in each bill of indictment was stolen by someone other than the defendant. (2) That the defendant received the property. (3) That at the time he received it he knew *or had good reason to believe* that it was stolen and that it was stolen by means of breaking and entering. (4) That the defendant received the property with a dishonest purpose, and a dishonest purpose is a purpose to permanently deprive the owner of the property." (Emphasis added.)

In charging on each of the cases separately, the trial court included an instruction substantially as follows: " . . . and if the State has further satisfied you beyond a reasonable doubt that the defendant, Grant, knew *or had good reason to believe* that the property had theretofore been feloniously stolen . . . . " (Emphasis added.)

In *State v. Stathos,* 208 N.C. 456, 181 S.E. 273 (1935), the trial court charged the jury as follows: "If the State has convinced you beyond a reasonable doubt from the evidence that at the time he bought the violin the circumstances, facts, and the knowledge of the defendant were such as to let him know *or* to cause an honest man who intended to be reasonably prudent in his business transactions to inquire further before he received the violin, and he failed to do so and took the violin without making inquiry, although in possession of such facts, then, gentlemen of the jury, if you should find those facts, and find them beyond a reasonable doubt, it would be your duty to render a verdict of guilty." In declaring the instruction erroneous, the court said:

"C.S., 4250, (now G.S. 14-71) under which the bill of indictment was drawn, makes guilty knowledge one of the essential elements of the offense of receiving stolen goods. This knowledge may be actual, or it may be implied when the circumstances under which the goods were received were sufficient to lead the party charged to believe they were stolen. However, while it is true that it is not necessary that the person from whom the goods are received shall state to the person charged that the goods were stolen, and while the guilty knowledge of the person charged may be inferred from the circumstances of the receipt of the goods, still it is necessary to establish either actual or implied knowledge on the part of the person charged of

the facts that the goods were stolen. The question involved is whether the person charged had knowledge of the fact that the goods had been stolen at the time he received them, and not whether a reasonably prudent man in the transaction of his business would have gained such knowledge under the circumstances. The test is as to the knowledge, actual or implied, of the defendant, and not what some other person would have believed from the facts attending the receipt of the goods."

In *Stathos,* the court gave this further reason for the disapproval of the instruction: "Although it may be the rule in civil actions that knowledge of such facts as are sufficient to put a reasonably prudent man on inquiry is equivalent to notice, and that a defendant may be held to know that which he would have known had he exercised that degree of care which a reasonably prudent man would have exercised under similar circumstances, such has never been declared to be the rule with us in criminal cases."

In *State v. Miller,* 212 N.C. 361, 362, 193 S.E. 388 (1937), the court declared erroneous the following instruction: "The term 'knowledge,' gentlemen of the jury, is not so limited in its scope as to mean that a defendant must know to the extent of actually having seen the property stolen, but it means, gentlemen of the jury, that if the facts, the circumstances and the surroundings of the transactions at the time the property is received are such as to cause the *defendant to reasonably believe or know* that the property was stolen, then, gentlemen of the jury, that would constitute knowledge within the purview and intent of the statute."

In *State v. Scott,* 11 N.C. App. 642, 182 S.E. 2d 256 (1971) and *State v. Roberts,* 11 N.C. App. 686, 182 S.E. 2d 277 (1971), this court declared erroneous the following instruction: "The existence of guilty knowledge is to be regarded as established when the circumstances surrounding the receipt of the property were such as would charge a reasonable man with notice or knowledge or would put a reasonable man upon inquiry which, if pursued, would disclose that conclusion." See also *State v. Watson,* 13 N.C. App. 189, 185 S.E. 2d 33 (1971).

In view of the authorities cited, we hold that in the instant case the trial court erred in its jury instructions when it equated "a reasonable belief" with guilty knowledge. We repeat a state-

ment from *Stathos,* that "while the guilty knowledge of the person charged may be inferred from the circumstances of the receipt of the goods, still it is necessary to establish either actual or implied knowledge on the part of the person charged of the facts that the goods were stolen." However, "reasonable belief" and "implied knowledge" are not synonymous terms. *State v. Miller, supra.*

Defendant assigns other errors in the trial but we find it unnecessary to discuss them as a new trial will be necessary because of errors in the jury charge.

New trial.

Chief Judge MALLARD and Judge BROCK concur.

NORMAN EARL BRANTLEY v. FORREST V. DUNSTAN AND WALLACE R. GRAY

No. 721SC658

(Filed 20 December 1972)

Attorney and Client § 5; Fraud § 9— action against attorneys based on fraud — sufficiency of complaint

Complaint was sufficient to state a claim for relief against two attorneys based on fraud where it alleged that plaintiff retained defendant attorneys to represent him in connection with a claim arising from an automobile accident on 26 November 1962, that defendants falsely represented to plaintiff on various occasions that they were negotiating a settlement with the adverse party's insurer, that defendants filed suit for plaintiff on 26 November 1965, that the adverse party moved to dismiss on the ground that he had been summonsed to appear in the wrong county, that defendants did not cause the motion to come on for hearing until the spring of 1967 and at that time the presiding judge refused to rule on the motion and forwarded it to the Grievance Committee of the State Bar, that defendants continued to assure plaintiff that a settlement with the adverse party's insurer was in the offing and that the case would be tried if settlement was insufficient, that defendants knew these representations were false at the time they were made, that they were made to deceive plaintiff and that they did deceive plaintiff in that he refrained from obtaining other counsel and otherwise protecting his interests and that he received no compensation for his injuries.

APPEAL by plaintiff from *Tillery, Judge,* 10 April 1972 Civil Session of Superior Court held in DARE County.

On 26 July 1970, plaintiff filed an action against defendants, attorneys at law, seeking damages on the grounds defendants were negligent in failing to properly file a lawsuit for plaintiff against one Lester Sawyer. He alleged in substance the following: Plaintiff employed defendants to represent him in connection with a claim against Sawyer for personal injuries and property damage arising out of an automobile accident on 26 November 1962. Defendants waited until 26 November 1965, and on that date, filed the action in the Superior Court of Dare County. The summons filed by defendants was fatally defective in that it required Sawyer to answer in Pasquotank County rather than in Dare County. Sawyer filed a special appearance and motion to dismiss. The motion remained pending for several years and in September of 1968, plaintiff dismissed defendants as his attorneys and obtained other counsel. The summons was amended upon motion filed by the new counsel; however, the order allowing the amendment was reversed on appeal *(Brantley v. Sawyer,* 5 N.C. App. 557, 169 S.E. 2d 55), and the case was thereafter dismissed. Defendants' motion for summary judgment was allowed and upon appeal this Court affirmed, holding that the claim asserted by plaintiff accrued, if at all, when defendants filed the fatally defective summons on 26 November 1965, and that the claim was barred by the running of the statute of limitations. *Brantley v. Dunstan,* 10 N.C. App. 706, 179 S.E. 2d 878.

On 11 January 1972, plaintiff instituted this action against defendants. He seeks here to recover for the alleged fraud of defendants in making certain misrepresentations which he contends caused him to delay seeking other legal counsel, or otherwise protecting his rights until it was too late to do so.

Defendants' motions to dismiss the action for the reason that it failed to state a claim on which relief could be granted were allowed and plaintiff appealed.

Winston, Coleman & Bernholz by Barry T. Winston for plaintiff appellant.

Smith, Anderson, Blount & Mitchell by John L. Jernigan for defendant appellee Forrest V. Dunstan.

Maupin, Taylor & Ellis by Thomas F. Ellis for defendant appellee Wallace R. Gray.

GRAHAM, Judge.

The only question presented is whether the complaint is sufficient to withstand defendants' motions to dismiss, made pursuant to G.S. 1A-1, Rule 12(b)(6). We hold that it is and reverse the judgment dismissing the action.

Allegations in the complaint, when construed liberally, are sufficient to show the following: Defendants, practicing attorneys, were retained by plaintiff to represent him in connection with a claim for personal injuries and property damage arising from an automobile accident with Lester Sawyer on 26 November 1962. Defendants falsely represented to plaintiff on various occasions prior to 26 November 1965 that they were negotiating a settlement with Sawyer's insurance company. On 26 November 1965, defendants filed suit for plaintiff against Sawyer, and Sawyer responded with a motion to dismiss on the grounds that the court never acquired jurisdiction over his person in that he was summonsed to appear in the wrong county. Defendants did not cause the motion to come on for hearing until the spring of 1967 and at that time, the presiding judge refused to rule on the motion and forwarded it to the Grievance Committee of the North Carolina State Bar. Defendants continued to assure plaintiff that negotiations were taking place with Sawyer's insurance carrier; that a settlement was in the offing, and that if the settlement was not sufficient, the case would come on for trial. These representations were false, and were known by defendants to be false at the time they were made. Further, the false representations were made by defendants for the purpose of deceiving plaintiff and they did deceive plaintiff in that, relying upon the representations, plaintiff refrained from obtaining other counsel or otherwise protecting his interests, and that as a consequence of said reliance, plaintiff received no compensation for his injuries and incurred other damages. The complaint also alleges that plaintiff did not learn that the representations made by defendants were false until 20 January 1969.

The complaint is certainly no model. However, when construed liberally, we are of the opinion that it sufficiently meets the requirements of G.S. 1A-1, Rule 8(a). See *Roberts v. Memorial Park*, 281 N.C. 48, 187 S.E. 2d 721; *Sutton v. Duke*, 277 N.C. 94, 176 S.E. 2d 161; *Cassels v. Motor Co.*, 10 N.C. App. 51, 178 S.E. 2d 12; *Lewis v. Air Service, Inc.*, 16 N.C. App. 317, 192 S.E. 2d 6.

Defendants' principal position is that the complaint does not contain any allegations of facts from which fraudulent intent on the part of defendants may be inferred. While circumstances constituting fraud must be alleged with particularity, intent or other condition of mind of a person may be averred generally. G.S. 1A-1, Rule 9(b). The misrepresentations which defendants allegedly made to plaintiff are set forth in the complaint with particularity, as are the circumstances under which the misrepresentations were made. It is alleged that defendants made the representations knowing them to be false and for the purpose of deceiving plaintiff; also, that plaintiff was deceived to his detriment and suffered damages as a result.

Reversed.

Judges HEDRICK and VAUGHN concur.

STATE OF NORTH CAROLINA v. LARRY ST. CLAIR

No. 7222SC724

(Filed 20 December 1972)

1. **Receiving Stolen Goods § 2— sufficiency of indictment**

The indictment in this prosecution for feloniously receiving stolen property was sufficient in form.

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

In this prosecution for feloniously receiving stolen wire, the State's evidence was sufficient to support a finding that defendant knew when he received the wire that it had been stolen where it tended to show that defendant went to a farm for the wire thirty to forty-five minutes after he was called and advised by the thieves that they had "the wire," that this took place in the early morning hours when legitimate sales of such material do not normally occur, and that defendant then disposed of the wire in the early morning hours and shared in proceeds that were considerably less than the wire's actual value.

3. **Receiving Stolen Goods § 6— instructions on guilty knowledge — "belief" that goods were stolen**

In this prosecution for feloniously receiving stolen goods, the trial court erred in instructing the jury that defendant had guilty knowledge if he knew "or believed" someone else had stolen the property.

State v. St. Clair

APPEAL by defendant from *Kivett, Judge,* 22 May 1972 Criminal Session of Superior Court held in IREDELL County.

Defendant was arraigned under a bill of indictment charging him with feloniously receiving specified quantities of barbed wire, valued at $1305.00, knowing that the property had been feloniously stolen.

Only the State offered evidence and its evidence tends to show the following: Between midnight and 2:00 a.m. in the latter part of July 1971, David Johnson and William Tucker stole two truckloads of barbed wire, valued in excess of $1300.00, from Robertsons Farm Store. They dumped the first load by the side of the road at William Tucker's farm. Johnson testified for the State and stated: ". . . [A]fter we got the loads, we called Larry St. Clair and told him we had the wire. We were down at Tucker's barn and we waited for St. Clair to show up. About 30 or 45 minutes after we called him, St. Clair showed up at Tucker's barn, talked with Tucker, took the barbed wire and left, and I waited at the house. Tucker and Larry St. Clair took the barbed wire. When they came back, Larry St. Clair had some money which was split three ways and I received right at $100.00. These were even splits but I did not see Tucker receive his money. Larry St. Clair gave me the money."

The jury returned a verdict of guilty and defendant appeals from judgment entered upon the verdict imposing an active prison sentence.

Attorney General Morgan by Associate Attorney Ricks for the State.

McElwee & Hall and Collier, Harris & Homesley by John E. Hall for defendant appellant.

GRAHAM, Judge.

[1] Defendant contends that the court erred in denying his motion to quash the bill of indictment for the reason that it is insufficient in form. The bill of indictment is modeled after the one that was challenged and found sufficient in *State v. Matthews,* 267 N.C. 244, 148 S.E. 2d 38. This assignment of error is overruled.

[2] Defendant also contends that the evidence was insufficient to show that he received the barbed wire, knowing that it had

been stolen. Possession of recently stolen property, without more, raises no presumption that the possessor received it with knowledge that it had been feloniously stolen, *State v. Hoskins,* 236 N.C. 412, 72 S.E. 2d 876; and whether the State presented sufficient evidence in this case of defendant's guilty knowledge is a close question. However, guilty knowledge may be inferred from incriminating circumstances, *State v. Miller,* 212 N.C. 361, 193 S.E. 388, and we are of the opinion that when the evidence here is considered in the light most favorable to the State, it will support a legitimate inference that defendant knew when he received the property that it had been stolen. The evidence tends to show that defendant went to William Tucker's farm for the wire within thirty to forty-five minutes from the time he was called and advised by the thieves that they had "the wire." This took place in early morning hours when legitimate sales of materials of this sort do not normally occur. Defendant then disposed of the wire, also in the early morning hours, and shared in proceeds that were considerably less than the wire's actual value. This evidence is quite similar to evidence found sufficient in the case of *State v. Hart,* 14 N.C. App. 120, 187 S.E. 2d 351, and we hold that it made out a case for the jury.

[3] Defendant challenges the court's instructions to the jury through various assignments of error, one of which must be sustained. The court instructed: "I charge you that if you find from the evidence and beyond a reasonable doubt that on or about July 26, 1971, the defendant Larry St. Clair with dishonest purpose received the property in question and that it was worth more than $200.00, which he knew *or believed* someone else had stolen, it would be your duty to return a verdict of guilty of feloniously receiving stolen goods. . . . " (Emphasis added.)

A similar instruction was found prejudicial in the case of *State v. Miller, supra.* In that case the court stated as follows:

> " ' . . . [W]hen the circumstances under which the goods were received were sufficient to lead the party charged to believe they were stolen,' the jury may find that he received the goods 'knowing the same to have been feloniously stolen,' but it is not mandatory that the jury so find under such circumstances. *S. v. Spaulding,* 211 N.C., 63. 'To reasonably believe' and 'to know' are not interchangeable terms. While the latter may be implied or

inferred from circumstances establishing the former, it does not follow that reasonable belief and implied knowledge are synonymous. The State must establish that the defendant received the goods 'knowing the same to have been feloniously stolen or taken,' and this is not necessarily accomplished by establishing the existence of circumstances 'such as to cause the defendant to reasonably believe' the goods were stolen. Knowledge connotes a more certain and definite mental attitude than reasonable belief, and whether knowledge is implied from circumstances sufficient to establish reasonable belief is a question for the jury."

Defendant is entitled to a new trial for the error assigned, and it is so ordered.

New trial.

Judges HEDRICK and VAUGHN concur.

STATE OF NORTH CAROLINA v. PAUL T. HINSON

No. 725SC827

(Filed 20 December 1972)

1. False Pretense § 2— failure to allege prosecuting witness actually deceived — sufficiency of indictment

In a case charging defendant with obtaining money by false pretense, defendant's contention that the indictment failed to allege that the prosecuting witness was actually deceived by the alleged representation of the defendant was untenable where the facts alleged in the indictment relating to the misrepresentation were sufficient to imply causation.

2. False Pretense § 2— obtaining money by false pretense — sufficiency of indictment

The indictment charging defendant with obtaining money by false pretense was sufficient to give defendant plenary information of the offense with which he was charged, to protect him from again being put in jeopardy for the same offense, to enable him to prepare for trial and to enable the court to proceed to judgment. G.S. 15-153.

3. False Pretense § 3— sufficiency of evidence to withstand nonsuit

There was sufficient evidence to withstand defendant's motion for nonsuit in a case for obtaining money by false pretense where such evidence tended to show that defendant represented to the prosecuting witness Johnson that he had $360,000 in certificates of

deposit in a Charlotte bank which he would lend to Johnson to enable Johnson to buy real property, that defendant demanded and received from Johnson a broker's fee of $3500 for the loan and that defendant at no time had certificates of deposit in the bank or otherwise available to him the $360,000 he had promised to Johnson.

APPEAL from *Wells, Judge,* 24 July 1972 Session of Superior Court, NEW HANOVER County.

Defendant was charged in a bill of indictment with having obtained money by false pretense from R. R. Johnson on 25 November 1971. He was convicted and appeals from judgment of imprisonment entered on the verdict. After trial, and upon the court's adjudication of defendant's indigency, defendant's trial counsel was appointed to prosecute this appeal.

Facts necessary for decision are stated in the opinion.

Attorney General Morgan, by Associate Attorney Maddox, for the State.

Charles E. Rice III for defendant appellant.

MORRIS, Judge.

[1] Defendant first assigns as error the court's denial of defendant's motion to quash the indictment for failure to allege an essential element of the crime charged. Defendant contends that the indictment fails to allege that the prosecuting witness, R. R. Johnson, was in fact deceived by defendant's actions and that this omission is fatal. The indictment is as follows:

"The Jurors For The State Upon Their Oath Present: That Paul T. Hinson, late of the County of New Hanover wickedly and feloniously devising and intending to cheat and defraud R. R. Johnson on the 25th day of November, A.D. 1971 with force and arms at and in the county aforesaid, unlawfully, knowingly, designedly and feloniously did unto R. R. Johnson falsely pretend that he had the sum of $360,000.00 in certificates of deposit in the N. C. National Bank in Charlotte, N. C. available to loan the said R. R. Johnson to purchase some property and that the money was available to be loaned to the said R. R. Johnson if he paid defendant a brokers fee of $3500.00.

Whereas, in truth and in fact he did not have the $360,000.00 in certificates of deposit at all and had no intentions

of loaning the money to the said R. R. Johnson but only wanted to get the brokers fee of $3500.00 from the said R. R. Johnson by means of said false pretense.

By means of which said false pretense, he, the said Paul T. Hinson, knowingly, designedly and feloniously, did then and there unlawfully obtain from the said R. R. Johnson, the following goods and things of value, the property of R. R. Johnson, to wit: in the amount of money of $3500.00 with intent then and there to defraud, against the statute in such case made and provided and against the peace and dignity of the State."

Defendant contends that the indictment fails to allege that Johnson was actually deceived by the alleged representation of the defendant. In *State v. Dale,* 218 N.C. 625, 12 S.E. 2d 556 (1940), defendant was charged with obtaining money by false pretense. The defendant there moved to quash on the ground that the charge relating to false pretense did not show any causation between the representation alleged to have been made by defendant and the obtaining of the money. The court found the objection to be without merit stating that the principle applied in *State v. Whedbee,* 152 N.C. 770, 67 S.E. 60 (1910), is not applicable where the surrender by the victim of the money or other thing of value is the natural and probable result of the false pretense. It is applicable where the indictment fails to bring the conduct of the victim into such relationship with the false pretense as to suggest a reasonable motivation for his act. However, in the case *sub judice,* we are of the opinion that the facts alleged in the indictment relating to the misrepresentation are, *ex proprio vigore,* sufficient to imply causation, since they are obviously calculated to produce the result. See also *State v. Claudius,* 164 N.C. 521, 80 S.E. 261 (1913).

In *State v. Greer,* 238 N.C. 325, 327, 77 S.E. 2d 917 (1953), Justice Parker (later C.J.) said:

"The authorities are in unison that an indictment, whether at common law or under a statute, to be good must allege lucidly and accurately all the essential elements of the offense endeavored to be charged. The purpose of such constitutional provisions is: (1) such certainty in the statement of the accusation as will identify the offense with which the accused is sought to be charged; (2) to

protect the accused from being twice put in jeopardy for the same offense; (3) to enable the accused to prepare for trial, and (4) to enable the court, on conviction or plea of *nolo contendere* or guilty to pronounce sentence according to the rights of the case. (Citations omitted.)"

These purposes were quoted with approval in *State v. Sparrow*, 276 N.C. 499, 510, 173 S.E. 2d 897 (1970), cert. denied *In re Whichard*, 403 U.S. 940, 29 L.Ed. 2d 719, 91 S.Ct. 2258 (1971).

[2] The indictment here gave defendant plenary information of the offense with which he was charged, to protect him from again being put in jeopardy for the same offense, to enable him to prepare for trial, and to enable the court to proceed to judgment. G.S. 15-153. It is beyond credibility that defendant was not well advised of the offense with which he was charged.

This assignment of error is overruled as is assignment of error No. 3 directed to the refusal of the court to arrest judgment for alleged deficiency in the indictment.

[3] Defendant's only other assignment of error is to the court's denial of his motion for nonsuit made at the close of the State's evidence and renewed at the close of all the evidence. The evidence for the State tended to show the following: R. R. Johnson met defendant on 25 or 26 of November 1971 as the result of a telephone call from Johnson's brother. Johnson went to the fishing pier at Wrightsville Beach managed by him and his brother. Defendant introduced himself to Johnson and said he had something he wanted to show Johnson. Defendant had a brief case and some files and showed Johnson some maps of property at White Lake which he said he had purchased from Tildon Walker of Fayetteville and which he said he was in the process of developing. They talked until around midnight. When defendant left he told Johnson he had something he wanted to discuss with Johnson. The next day Johnson and defendant had another talk. Defendant told Johnson that he had some money for the development of the White Lake property, that he understood Johnson was looking for some money with which to buy a piece of property on the beach and that this money was available. He told Johnson that he had $360,000 on certificate of deposit in North Carolina National Bank in Charlotte and this was the money he had borrowed to develop the White Lake property, but he was not ready to go ahead with the project and would either have to return the money to the people from

whom he borrowed it or find a place for it. He further said that any transfer of the funds would have to be approved by one John Garcia. That night he again made the statement to Johnson in the presence of Johnson's brother. Johnson and defendant went to Johnson's auditor's office and discussed the matter. After that meeting defendant showed Johnson what he said was a certificate of deposit. Johnson was not certain what the paper was but saw the figure $360,000 on it. Johnson was in the process of borrowing money for the purpose of purchasing Newell's Shopping Center. Defendant told him that the $360,000 had been borrowed from a bank in Nassau and showed Johnson a letter from Nassau. Defendant told Johnson he would lend him the $360,000 at 8% interest over a ten-year period for a fee of $3500. The two made a second trip to the auditor's office where an agreement was prepared and signed by both parties. The agreement set out the terms of the loan and stated that Johnson had paid defendant $500 "as a good faith binder on this contract." The agreement was dated 1 December 1971. Upon leaving the auditor's office, Johnson went to his bank, wrote a check for $3500, cashed the check and gave the money in cash to defendant. Defendant gave him a receipt. Defendant told Johnson that the people who had to approve the transfer were coming to Wilmington but because of the weather he would meet them at Myrtle Beach and later told Johnson that he had met them. Defendant stayed in Johnson's apartment for the almost two weeks that the transaction continued and Johnson saw defendant almost every day. The funds were to be transferred by 20 December 1971. Johnson had a Dun and Bradstreet report run on defendant and this was in process at the time the $3500 was delivered. Other investigations were made, including one with the bank in Charlotte and the Consumer Protection Division of the Attorney General's Office. The result was that there was no money on certificate of deposit or in any other manner to the credit of defendant or his corporation, and defendant stipulated that "at no time has there been a certificate of deposit with the North Carolina National Bank in Charlotte, North Carolina, in the name of Paul T. Hinson or Lakeside Development Corporation in the amount of $360,000.00 or any other amount of money." Johnson went to the police department and had a warrant issued for defendant's arrest. When defendant was arrested, he was asked by the Chief of Police whether he would like to return Johnson's money. Defendant's only reply was "How much bond am I

under?" Johnson paid the $3500 "based on the fact that at this time he (the defendant) had a certificate of deposit or had the money in the North Carolina National Bank in Charlotte that he was to loan to our company, and we based it on the fact that he had this money, this money that could be loaned."

There was evidence that defendant had had an option for the White Lake property but the option had expired 31 March 1971, that no property had been conveyed to defendant, and that defendant had never developed any property in the White Lake area.

Johnson's auditor talked with defendant and Johnson on two occasions. He had a copy of a certificate of deposit with him and although the witness did not examine it carefully he did see that it was for $360,000 and on the North Carolina National Bank.

Johnson's brother was not present for the conferences in the auditor's office but did participate in other discussions. His interest was aroused when defendant showed him the "paper work" of the Lakeside Development over on White Lake, and he then called the prosecuting witness. Defendant said that he owned the land at White Lake and he had the money in Charlotte to develop it, but "that he decided not to develop it now and he had to get in touch with the boys in the Bahamas over there to get it turned loose so they could buy the piece of property for us." Defendant did not tell the witness where in Charlotte he had the $360,000 but he said he had some money on certificate of saving and it would be a few days before he could get it out.

In order to survive nonsuit the State must present evidence tending to show a false representation of a subsisting fact, whether in writing or in words or in acts, which is calculated to deceive and intended to deceive, and which does in fact deceive, by which one person obtains value from another without compensation. G.S. 14-100; *State v. Davenport,* 227 N.C. 475, 42 S.E. 2d 686 (1947). The evidence considered in the light most favorable to the State is plenary to warrant a reasonable inference of the fact in issue—defendant's guilt. It was for the jury to say whether they were convinced beyond a reasonable doubt of the fact of guilt.

We find no prejudicial error in defendant's trial.

No error.

Judges CAMPBELL and PARKER concur.

STATE OF NORTH CAROLINA v. ALICE BIGGS WILLIAMS

No. 722SC690

(Filed 20 December 1972)

1. **Criminal Law § 99— questions asked by trial judge — no expression of opinion**

Questions asked witnesses by the trial judge in a second degree murder case did not amount to an expression of opinion in violation of G.S. 1-180.

2. **Criminal Law § 163— failure to except to or assign error to charge**

Defendant's contention that the trial judge incorrectly defined the term "general malice" in his charge to the jury will not be considered on appeal where defendant did not except to that portion of the charge and did not assign that portion as error. Court of Appeals Rules 21 and 28.

APPEAL by defendant from *Cohoon, Judge,* 6 March 1972 Session of Superior Court held in MARTIN County for the trial of criminal cases.

Defendant was tried upon a bill of indictment, proper in form, charging the defendant, Alice Biggs Williams, with first degree murder. Defendant pleaded not guilty.

The evidence for the State tended to show that on or about 29 November 1971, at about 12:00 midnight, Eddie Wilson, the deceased, and the defendant left the defendant's residence on Susie Street in Williamston, North Carolina, where they had been watching television, defendant having told deceased that she would take deceased home in her car. Deceased and defendant, a widow, were friends. When they had driven to the vicinity of Andrew Street, near West Main Street, defendant stopped her car and told deceased to get out. After deceased had left the car, defendant walked around to the rear of the car, stated that she needed $52.00 to pay Roanoke Chevrolet Company, and then raised a small gun and shot deceased in the abdomen.

After having been shot, deceased ran toward the nearby Brown residence where he broke open the front door and entered the hall, calling for assistance. Mr. and Mrs. Brown, hearing the commotion, opened the hall door and observed the deceased lying on the floor. Deceased asked for a doctor, told the Browns he had been shot by the defendant and showed them the bullet hole in his abdomen. Mrs. Brown called the local police and Sergeant Melvin Lilley went to the Brown residence at 12:39 a.m. While waiting for an ambulance to arrive, deceased related to Sergeant Lilley the foregoing sequence of events leading up to the shooting.

J. G. Myers testified that he was an ambulance driver and that he had taken deceased from Martin General Hospital to Beaufort County Hospital at about 1:00 a.m. on 29 November 1971 and that at Beaufort Hospital, while waiting for a doctor to arrive, deceased had said, "I am dying, I am dying. I don't know why Bootie Gal shot me. Bootie Gal didn't have any reason for shooting me." Defendant Williams was also known by the name of "Bootie Gal."

The State also introduced medical evidence tending to show that deceased died as a result of complications from a gunshot wound in the abdomen.

Defendant offered evidence tending to show that on Sunday, 28 November 1971, at about 6:00 p.m. she drove by deceased's residence and gave deceased a ride to a house on Andrew Street. From there, defendant went to visit friends until about 10:30 when she drove back to her home. At about 12:25 a.m. on 29 November 1971, deceased, who had been admitted theretofore to defendant's house by defendant's nephew while the defendant was asleep, requested that she (defendant) drive him to his home. Defendant acquiesced and drove deceased toward his home. Near the intersection of Andrew Street and West Main Street, defendant stopped the car and got out in order to urinate. Deceased also got out and went around to the rear of the car, where he asked defendant to "go home and stay with him." She refused. Deceased grabbed defendant and told her she would go home with him and she was going to have sex with him out there. Defendant pushed him away; whereupon, deceased drew a knife and was coming toward her with the knife in his hand. Defendant became scared and shot deceased when he was about three feet from her. Thereafter, defendant called her brother and met him later that night.

Defendant also introduced evidence tending to show that her character and reputation in the community were good.

The defendant's motion for dismissal of the first degree murder charge was allowed, but a motion for nonsuit as to all charges was denied. Charges of murder in the second degree and manslaughter were submitted to the jury, and a verdict of guilty of murder in the second degree was returned. From judgment thereon sentencing defendant to 20-25 years in prison, defendant appealed, assigning error.

Attorney General Morgan and Associate Attorney Maddox for the State.

Milton E. Moore for defendant appellant.

MALLARD, Chief Judge.

Defendant sets forth 28 assignments of error based on 26 exceptions noted in the record and two exceptions not noted in the record.

[1] In her brief, defendant presents three questions on appeal. Her first contention is that the trial judge committed prejudicial error by questioning several witnesses at the trial in a manner which constituted an expression of opinion as to the weight and sufficiency of the evidence in violation of G.S. 1-180. While G.S. 1-180 prohibits the court from expressing an opinion as to what has or has not been shown by the testimony of a witness, it is not improper for the court to ask questions for the purpose of obtaining a proper clarification and understanding of the testimony. *State v. Freeman,* 280 N.C. 622, 187 S.E. 2d 59 (1972); *State v. Colson,* 274 N.C. 295, 163 S.E. 2d 376 (1968), *cert. denied,* 393 U.S. 1087; *State v. Perry,* 231 N.C. 467, 57 S.E. 2d 774 (1950); *State v. Case,* 11 N.C. App. 203, 180 S.E. 2d 460 (1971); *State v. Huffman,* 7 N.C. App. 92, 171 S.E. 2d 339 (1969), *cert. denied,* 276 N.C. 328.

Viewing each of the challenged questions and remarks of the trial court in the light of the circumstances under which it was made, as we are bound to do, we are of the opinion that none of the judge's questions or remarks in this case amounted to an expression of opinion and that they did not tend to be prejudicial to the defendant. See *State v. Carter,* 233 N.C. 581, 65 S.E. 2d 9 (1951); *State v. Byrd,* 10 N.C. App. 56, 177 S.E. 2d 738 (1970).

[2] Defendant's second question in her brief is to the charge of the judge to the jury. Defendant contends that the judge incorrectly defined the term "general malice." However, defendant did not except to that portion of the charge, nor has defendant assigned that portion of the charge as error. In the brief, the only authority cited for this contention is "235 NC 517." The case at that page of Volume 235 of the North Carolina Reports has no bearing whatsoever on the case at hand. For failure to comply with Rules of Practice in the Court of Appeals Nos. 21 and 28, this contention is not properly presented.

In her third question, defendant contends that the trial court committed error by requiring the defendant to answer, on cross-examination, the question excepted to under the following circumstances:

> "MR. GRIFFIN: You have been convicted of shooting a man before, haven't you?
>
> MRS. WILLIAMS: Yes in 1970.
>
> MR. GRIFFIN: Did you use this same gun to shoot him?
>
> Objection Overruled, EXCEPTION No. 21
>
> MRS. WILLIAMS: No, I found this gun in the house later."

Conceding without deciding that the question excepted to may have been improper, we hold that under the circumstances of this case, the judge, in overruling the objection to it, did not commit prejudicial error.

We have considered all of defendant's assignments of error properly presented and are of the opinion that the defendant has had a fair trial free from prejudicial error. The question of defendant's guilt or innocence was resolved by the jury against her, and the evidence of the State supported the verdict.

No error.

Judges BROCK and BRITT concur.

STATE OF NORTH CAROLINA v. ALLEN LASSITER

No. 7214SC766

(Filed 20 December 1972)

1. **Criminal Law § 89— witness's involvement in other robberies — inquiry for impeachment purposes**

The trial court in an armed robbery prosecution properly allowed the solicitor to question one of the defendant's witnesses as to whether he had been involved in armed robberies in the City of Durham at certain times in order to impeach the witness's credibility.

2. **Criminal Law § 34— commission of another robbery by defendant — admissibility to show identity**

Testimony by one witness that defendant had committed a robbery with that witness subsequent to the robbery with which defendant was charged was competent as proof of the identity of defendant and was properly admitted.

APPEAL by defendant from *Cooper, Judge,* 10 April 1972 Session of Superior Court held in DURHAM County.

Defendant was charged in a bill of indictment, proper in form, with the felony of armed robbery of United States currency of the value of two hundred and eighty dollars ($280.00) from the presence, person and place of business of Worth Goodwin, Goodwin Grocery, Highway 54, Durham. Defendant pleaded not guilty.

The evidence for the State tended to show that Worth Goodwin and his wife, Mary Goodwin, operated a grocery store known as "Goodwin Grocery Gas and Grill" located on Highway 54 outside the City of Durham. On 13 January 1972, at about 7:30 p.m., Mr. Goodwin and Mrs. Goodwin were in the store cleaning the grill area. Their daughter was watching the grocery portion of the store for customers. Sometime between 7:30 and 7:45 p.m., two black males entered the grocery part of the store, and Mr. Goodwin's daughter went to him and told him he had customers. Mr. Goodwin went into the grocery area, which was well-lighted, and asked the two men if he could help them. One of the men asked for some "Pall Mall's," but when Goodwin reached for them, the man (later identified as David H. Gilliard) pulled a pistol from his pocket and said, "This is a stickup." The second man (later identified as the defendant) went back to the grill area, pointed a pistol at Mrs. Goodwin and said, "Give me your money, give me your pocket-

book." Mrs. Goodwin put her hands in the air and said she had no money. At the same time, the young Goodwin girl went into the adjoining house and telephoned the sheriff's department. While the defendant was holding his gun on Mrs. Goodwin, Gilliard ordered Mr. Goodwin to open his cash register. When Goodwin refused, Gilliard hit him in the mouth; whereupon, Goodwin stepped back and in doing so, opened the hand-operated cash register. Gilliard told Goodwin to lie face down, but Goodwin lay on his back in order to protect some money he had in his wallet in his rear pants pocket. The defendant left Mrs. Goodwin and went to where Goodwin and Gilliard were located. After putting his gun in his pocket, the defendant reached into Goodwin's cash register drawer and took from it two hundred and eighty dollars ($280.00) in cash. Defendant then told Gilliard to shoot Mr. Goodwin. Gilliard went over to Mr. Goodwin, said "Boy" and shot him. The defendant and Gilliard ran off, and Goodwin, who was not seriously wounded, got his revolver and chased them a short distance exchanging shots with them until he gave out of ammunition.

The defendant offered in evidence the testimony of David H. Gilliard and George Husketh. Gilliard testified that he had been convicted of participating in the crime the defendant was charged with in the case at bar, but that the second participant in the crime was not the defendant; rather, it was a man named "LeRoy" whose last name or address he did not know. George Husketh testified that he was a friend of the defendant's; that he was with the defendant on 13 January 1972 from about 5:30 p.m. until 10:00 p.m.; that during that time he and the defendant visited "Elvira's Blue Dinette," "Papa Jack's," and two "bootleg houses"; that a man named "Bubba" served drinks to the defendant and Husketh at a "bootleg house" in the Logan Building; and that a man named "Sam" saw the defendant and Husketh at a "bootleg house" on Mount Vernon Street. The defendant did not testify.

The State offered the testimony of Roger Inges in rebuttal. Inges testified that he was also known as "Bubba"; that he knew Allen Lassiter, the defendant; that he "gives parties" at 418 East Pettigrew Street; that he saw the defendant and George Husketh at his place about once a week; and that on 13 January 1972, he did not see the defendant or George Husketh because he was in Philadelphia at the time.

The defendant offered the testimony of Elvira Watson in rebuttal. She testified that she operated a place of business known at Elvira's Blue Dinette and that the defendant and George Husketh went to her place of business often.

At the close of all the evidence, defendant made a motion for nonsuit which was denied. The jury returned a verdict of guilty of armed robbery and judgment of the court was pronounced thereon that defendant be imprisoned for a term of 15 years. The defendant appealed to the Court of Appeals, assigning error.

Attorney General Morgan and Associate Attorney Haskell for the State.

Felix B. Clayton for defendant appellant.

MALLARD, Chief Judge.

Defendant's assignment of error numbered 1 is directed to the court's denial of his motion for nonsuit at the close of all the evidence. Defendant contends that "the evidence is insufficient to place him at the scene on the date in question." We hold that viewed in the light most favorable to the State, there was sufficient evidence to identify the defendant as the perpetrator of the robbery in issue and sufficient evidence of all the material elements constituting armed robbery to require submission of the case to the jury. *State v. Hoffman,* 281 N.C. 727, 190 S.E. 2d 842 (1972); *State v. Morris,* 279 N.C. 477, 183 S.E. 2d 634 (1971); *State v. Primes,* 275 N.C. 61, 165 S.E. 2d 225 (1969). "It is noted that all *admitted* evidence is for consideration when passing upon a motion to dismiss as in case of nonsuit. *State v. Walker,* 266 N.C. 269, 272, 145 S.E. 2d 833, 835." *State v. Crump,* 277 N.C. 573, 178 S.E. 2d 366 (1971). See also, *State v. Blackwell,* 276 N.C. 714, 174 S.E. 2d 534 (1970), *cert. denied,* 400 U.S. 946. Questions raised by defendant as to the competency of portions of the State's evidence are hereinafter discussed.

[1] Defendant's assignment of error numbered 3 is directed to certain questions asked by the solicitor upon cross-examination of the defendant's witness, David H. Gilliard. Gilliard was permitted to testify, over defendant's objection, that he had committed four or five robberies prior to the one at bar, and that the defendant was involved in a robbery with Gilliard of

Elvira's Blue Dinette on 21 January 1972, eight days subsequent to the robbery for which defendant was being tried. For purposes of impeachment, a witness is subject to cross-examination as to his *convictions* for crime, as well as other *antecedent acts of misconduct. State v. Ernest Mack,* 282 N.C. 334, 193 S.E. 2d 71 (1972); *State v. Gainey,* 280 N.C. 366, 185 S.E. 2d 874 (1972); *State v. Williams,* 279 N.C. 663, 185 S.E. 2d 174 (1971); *State v. Dawson,* 278 N.C. 351, 180 S.E. 2d 140 (1971); *State v. Bell,* 249 N.C. 379, 106 S.E. 2d 495 (1959); *State v. Poolos,* 241 N.C. 382, 85 S.E. 2d 342 (1955); *State v. Hicks,* 233 N.C. 511, 64 S.E. 2d 871 (1951), *cert. denied,* 342 U.S. 831; *State v. King,* 224 N.C. 329, 30 S.E. 2d 230 (1944). We hold that it was proper for the solicitor to question the defendant's witness Gilliard as to whether he had "been involved in" armed robberies in the City of Durham at certain times in order to impeach Gilliard's credibility.

[2] We are also of the opinion that it was proper for the solicitor to inquire of Gilliard whether the defendant was involved in a robbery with Gilliard eight days after the crime defendant was charged with had been committed. "While it is undoubtedly the rule of law that evidence of a distinct substantive offense is inadmissible to prove another independent crime, this rule is subject to well-established exceptions where the two crimes are disconnected and not related to each other. Proof of the commission of other like offenses to show . . . the identity of the person charged is competent." *State v. Williams,* 276 N.C. 703, 174 S.E. 2d 503 (1970), *rev'd. on other grounds,* 403 U.S. 948; see also, *State v. Perry,* 275 N.C. 565, 169 S.E. 2d 839 (1969); *State v. McClain,* 240 N.C. 171, 81 S.E. 2d 364 (1954); Stansbury, N. C. Evidence 2d, §§ 91, 92. We hold that the testimony that defendant had committed a robbery with Gilliard subsequent to the one with which he was charged was competent as proof of the identity of defendant and properly admitted. See *State v. Biggs,* 224 N.C. 722, 32 S.E. 2d 352 (1944); *State v. Ferrell,* 205 N.C. 640, 172 S.E. 186 (1934).

Defendant's assignment of error numbered 7 is directed to the following questions asked of the defendant's witness George Husketh on cross-examination:

> "Q. When did you first know that your friend Allen Lassiter had been charged with robbing the Goodwin Grocery?

OBJECTION.

OVERRULED.

EXCEPTION NO. 26.

I found out about three or four days later.

Q. Three or four days after Elvira's was robbed on January 21, or what?

OBJECTION.

OVERRULED.

EXCEPTION NO. 27.

I don't keep up with the calendar."

Defendant contends that the solicitor's question concerning the robbery of Elvira's Blue Dinette was irrelevant and the court's failure to sustain his objection to the question was prejudicial error. We do not agree. In this instance, the question of the solicitor was for the purpose of clarifying the previous testimony of the witness. Assuming *arguendo* that the question was improper, there was no prejudicial error. The witness's answer to the question, that he did not "keep up with the calendar," was harmless to the defendant's cause. This assignment of error is without merit and is overruled.

We have examined all of defendant's assignments of error properly presented and find no prejudicial error.

No error.

Judges MORRIS and HEDRICK concur.

STATE OF NORTH CAROLINA v. MICHAEL BRYANT WILLIAMS

No. 7226SC824

(Filed 20 December 1972)

1. Criminal Law § 11— accessory after the fact to murder — sufficiency of evidence

In a case charging defendant with accessory after the fact to murder where the evidence tended to show that defendant was in the

victim's apartment while the victim was murdered by one Wright and that defendant aided Wright in disposing of the body and the gun used in the murder, the evidence was sufficient to show the commission of a murder and to withstand defendant's motion for nonsuit. G.S. 14-7.

2. **Criminal Law § 42— skin segment of murder victim — admissibility in accessory after the fact trial**

In a case charging defendant with accessory after the fact to murder where the identity of the person murdered and the identity of the body found were issues for determination, a segment of skin from the victim's right leg bearing a tattoo design of a Cobra was properly admitted into evidence.

APPEAL by defendant from *Snepp, Judge,* at the 8 May 1972 Schedule "A" Criminal Session of MECKLENBURG Superior Court.

Defendant was tried under a bill of indictment charging him with accessory after the fact to murder, as follows:

> THE JURORS FOR THE STATE UPON THEIR OATH PRESENT, That Michael Bryant Williams late of the County of Mecklenburg on the 31 day of July, 1971 with force and arms, at and in the County aforesaid, that Franklin Dewayne Wright did unlawfully, wilfully, and feloniously kill and murder Frederick Carlton Cunningham with malice, premeditation and deliberation and that on said date Michael Bryant Williams well knowing that the said Franklin Dewayne Wright to have done and committed the felonious murder in manner and form aforesaid then and there, afterwards unlawfully, wilfully and feloniously and with malice aforethought did him, the said Franklin Dewayne Wright receive, maintain, comfort, aid, and assist, by concealing the body of Frederick Carlton Cunningham and did accompany away from the scene of the felony, the said Franklin Dewayne Wright, for the purpose of enabling the said Franklin Dewayne Wright to avoid apprehension, arrest and punishment, against the form of the statute in such case made and provided and against the peace and dignity of the State.

Defendant pleaded not guilty, a jury found him guilty as charged and from judgment imposing prison sentence of ten years, defendant appealed.

Attorney General Robert Morgan by Ralph Moody, Special Counsel, for the State.

Lila Bellar for defendant appellant.

BRITT, Judge.

[1] Defendant assigns as error the denial of his motions for dismissal as in case of nonsuit and to set the verdict aside, contending that "the State failed to prove the murder, an essential element of accessory after the fact of murder."

Pertinent evidence most favorable to the State is summarized as follows:

Some time after 1:30 a.m. on Sunday, 1 August 1971, Franklin DeWayne Wright (Wright), Larry Shue (Shue), a person called Butch, and defendant went via automobile from the Corner Lounge on Tuckaseegee Road in or near Charlotte to an apartment in North Charlotte. Wright's stated purpose in going to the apartment was to beat up a person known as "Hippie." All four of the car occupants entered the apartment and found Hippie lying on a bed. Wright awakened Hippie and had "a hassle" with him concerning a gun evidently belonging to Wright which Hippie supposedly had in his possession. Hippie told Wright that he did not have the gun and Wright began beating him. The beating continued for some period of time and defendant struck Hippie in his chest three or four times "but not very hard." Wright continued to talk to Hippie about the gun and stated to him that "I told you if you did not have that gun here today that I was going to put you to sleep." Thereafter, Wright told Hippie to get a towel, wipe the blood off, and change clothes, that they were going to take him for a short ride. After Hippie wiped the blood off and changed clothes, Wright began fighting Hippie again, pushing him onto a bed. Wright had kept a pistol in his right hand during most of the time that he was beating Hippie and after knocking Hippie on the bed, Wright shot Hippie.

Wright then told his three companions to wrap the body in a blanket, that they had to dump it somewhere. Shue and defendant then rolled the body in a blanket and took it to the car, placing it on the rear floorboard. Wright and his three companions left in the car with defendant driving; Wright sat in the front seat next to defendant, Butch sat on the extreme right of the front seat and Shue was in the back seat with the

body. At Wright's direction defendant drove the car for several miles, eventually coming to the intersection of I-85 and Highway 29 where defendant drove the car to the side of the road and stopped. Defendant and Shue, at Wright's direction, got out of the car, removed the body from the car and threw it over the guardrail and down an embankment. The four of them then proceeded for several miles over various roads until they came to a bridge over the Rocky River; at that point they stopped and Wright threw the gun into the river.

Some ten days later, with directions from defendant, police officers located the body and an autopsy was performed by Dr. Wood, medical examiner for Mecklenburg County. Dr. Wood extracted the major portion of a .38 caliber bullet from the base of the skull; he testified that in his opinion the victim died very quickly because the bullet severed the spinal cord. He identified the body as that of Carlton Cunningham. Police officers located a .38 caliber pistol in the Rocky River at a place shown them by defendant. In Dr. Wood's opinion, the victim had been dead from one to two weeks at the time the body was located.

G.S. 14-7 provides in pertinent part as follows: "If any person shall become an accessory after the fact to any felony, whether the same be a felony at common law or by virtue of any statute made, or to be made, such person shall be guilty of a felony, and may be indicted and convicted together with the principal felon, or after the conviction of the principal felon, or may be indicted and convicted for such felony whether the principal felon shall or shall not have been previously convicted . . . ."

An accessory after the fact is one who, after a felony has been committed, with knowledge that the felony has been committed, renders personal assistance to the felon in any manner to aid him to escape arrest or punishment knowing, at the time, the person so aided has committed a felony. *State v. McIntosh,* 260 N.C. 749, 133 S.E. 2d 652 (1963), *State v. Potter,* 221 N.C. 153, 19 S.E. 2d 257 (1942).

We hold that the evidence in the case at bar was sufficient to show that a murder was committed by Wright, that defendant had knowledge of the murder, and possessing that knowledge he rendered personal assistance to Wright to aid him to escape arrest or punishment. The assignment of error is overruled.

[2] Defendant assigns as error the admission of certain evidence on the ground that the evidence was unnecessarily gruesome and repulsive.

The challenged evidence included a segment of skin from the victim's right leg bearing a tattoo design of a Cobra; Dr. Wood testified that he removed the segment and kept it in a container. The father of Carlton Cunningham had testified earlier: "My son had a blue Cobra snake, with a touch of red for the snake's tongue, tattooed on his right leg between his knee and ankle. The tattoo was on the right side of the leg." Defense counsel admits that the evidence was relevant and had probative value but insists that the segment of skin should have been photographed and the photograph used as evidence so as to minimize adverse effect on the jury.

Defendant's contention as to this evidence is without merit. While there appears to be no prior decision in this jurisdiction directly in point, we think the validity of the evidence is supported by analogous decisions.

In *State v. Frazier*, 280 N.C. 181, 199, 185 S.E. 2d 652, 663 (1972), the court, quoting from *State v. Atkinson*, 275 N.C. 288, 311, 167 S.E. 2d 241, 255 said: "The fact that a photograph depicts a horrible, gruesome and revolting scene, indicating a vicious, calculated act of cruelty, malice or lust, does not render the photograph incompetent in evidence . . . ." In *State v. Muse*, 280 N.C. 31, 185 S.E. 2d 214 (1971), the court held that any object which has a relevant connection with the case is admissible into evidence.

In the instant case the identity of the person murdered and the identity of the body found were issues for determination. We hold that under the facts presented the challenged evidence was properly admitted.

Under the same assignment of error defendant contends the court erred in admitting into evidence a purported dental chart made for the victim Cunningham while he was a member of the U. S. Army. We hold that the chart was properly authenticated and admitted pursuant to G.S. 8-35.

The assignment of error is overruled.

In the third assignment of error brought forward and argued in his brief, defendant contends the court erred (1) in that it expressed opinions to the jury in violation of G.S. 1-180

and (2) in its instructions to the jury. We have carefully reviewed the portions of the record challenged by this assignment of error but conclude that the assignment is without merit and the same is overruled.

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

No error.

Judges PARKER and VAUGHN concur.

STATE OF NORTH CAROLINA v. THOMAS P. MASON

No. 7215SC758

(Filed 20 December 1972)

1. **Criminal Law § 161— failure to object and except to order appealed from**

Question of whether the court erred in the denial of defendant's request to have an analytical chemist of his choice examine alleged narcotics was not before the appellate court where defendant failed to object and except to the entry of the court's order denying his request.

2. **Constitutional Law § 31; Criminal Law § 162— exhibits not furnished defendant in compliance with pretrial order**

The trial court did not err in permitting the State to introduce exhibits not furnished to defendant in compliance with a pretrial order where defendant failed to object to the exhibits; nor did the court err in permitting testimony of the existence of a search warrant not furnished to defendant in compliance with the pretrial order where the warrant was not introduced in evidence and was as available to defense counsel as it was to the solicitor.

3. **Constitutional Law § 31— pretrial examination of State's expert — State's failure to arrange — due process**

Defendant was not denied due process by the State's failure to arrange for a pretrial examination of an expert witness where the witness was listed on the State's report of compliance with a pretrial order as an "SBI Chemist," the solicitor was not requested to arrange an examination, and defendant failed to object to the witness's testimony.

4. **Criminal Law § 91— violation of pretrial order to furnish reports to defendant — denial of continuance**

The trial court did not abuse its discretion in denying defendant's motion for a continuance made on the ground that the State had

failed to furnish to defendant all the reports required by a pretrial order.

5. Narcotics § 4— possession and transportation of heroin — sufficiency of evidence

The State's evidence was sufficient to be submitted to the jury in a prosecution for possession and transportation of heroin where it tended to show that police officers were following a car driven by defendant, that the occupants of the car recognized the officers, that both defendant and a passenger began doing something on the front seat with their hands, and that the passenger then threw a package from the car containing ten packages of heroin, a bottle cap, a needle and a syringe.

APPEAL by defendant from *McKinnon, Judge,* 10 January 1972 Session, Superior Court, ORANGE County.

Defendant was tried on two separate bills of indictment—one charging illegal possession of heroin and the other charging illegal transportation of heroin—both proper in form. He was convicted of both charges. From judgment entered sentencing him to a term of two years in prison, defendant appealed.

Attorney General Morgan, by Associate Attorney Reed, for the State.

Winston, Coleman and Bernholz, by Barry T. Winston, for defendant appellant.

MORRIS, Judge.

Upon call of the case for trial, defendant moved to continue the cases on the ground that all reports required by a previous order had not been submitted. The court denied the motion and this is the basis of defendant's first assignment of error.

G.S. 15-155.4 provides in pertinent part as follows:

"In all criminal cases before the superior court judge . . . shall for good cause shown, direct the solicitor or other counsel for the State to produce for inspection, examination, copying and testing by the accused or his counsel any specifically identified exhibits to be used in the trial of the case sufficiently in advance of the trial to permit the accused to prepare his defense. . . . Prior to issuance of any order for the inspecting, examining, copying or testing of any exhibit . . . under this section the accused or his counsel shall have made a written request to the solicitor or other counsel for the State for such inspection, examination,

copying or testing of one or more specifically identified exhibits . . . and have had such request denied by the solicitor or other counsel for the State or have had such request remain unanswered for a period of more than 15 days."

Under this section, when an accused has shown good cause, he is entitled to the benefits of the statute when he has (1) made written request to State's counsel that the State produce for defendant's examination, copying and testing sufficiently in advance of the trial to permit him to prepare his defense, (2) a specifically identified exhibit to be used in the trial of the case, and (3) the request has been denied or has remained unanswered for more than 15 days. See *State v. Macon*, 276 N.C. 466, 173 S.E. 2d 286 (1970).

[1] The record is devoid of anything on behalf of defendant showing good cause. We are not advised in the record of a request for a specifically identified exhibit, nor is there indication that the State had failed to answer his request for a period of more than 15 days. In the order entered by Judge Hobgood it is stated. "It is noted by the Court that in each of the above listed cases the defendant *now* seeks to have an Analytical Chemist of his choice examine the alleged narcotic substance which the State intends to use as an exhibit . . . " The order denied this request. Defendant did not object and except to the entry of the order. The question is, therefore, not before us.

[2] Defendant further contends that although the State filed a compliance with the order, it introduced certain exhibits at trial which had not been shown to defendant. Certain photographs and a lab report were used by the State in examining witnesses and introduced into evidence. The record is devoid of any objection raised by defendant. The officers had obtained a search warrant to search defendant and his car. However, the substance which proved to be heroin was thrown from the car when defendant realized the officers were following him. The search warrant was not executed. Testimony of existence of the search warrant was elicited only to show why the officers were following defendant. Defendant's only objection came when the witness identified the search warrant and was based on the fact that "The instrument speaks for itself." The search warrant was not introduced in evidence, and we see no possible prejudice to defendant. Nor can we perceive why the search warrant, a part of the court papers, was not just as available to defendant's counsel as to the solicitor.

Defendant did object to the introduction into evidence of State's Exhibit No. 6—the contents of a small envelope which the witness had testified contained heroin. The basis for his objection was that the exhibit "contained contradictory testimony." Contradictions are, of course, for the jury.

[3] Defendant also contends that the State's failure to arrange for pretrial examination of Mr. Keaton, an expert witness, was equally a denial of due process since Mr. Keaton was allowed to testify at the trial. This witness was listed in the compliance report by the State as "SBI Chemist." Nothing in the record remotely indicates that the solicitor was ever requested to arrange an examination. Mr. Keaton's direct testimony covers 4½ pages of the record. Nowhere in his testimony does an objection by defendant appear. Counsel for defendant cross-examined him, albeit not extensively, obviously sufficiently for his own satisfaction. This contention is equally without merit.

[4] Defendant contends that denial of his motion for continuance on the grounds set out constitutes prejudicial error. We do not agree. We perceive no denial of a constitutional right, nor a prejudicial denial of a right guaranteed by statute. The motion is, therefore, addressed to the sound discretion of the court. No abuse of discretion has been shown. Assignment of error No. 1 is overruled.

[5] Defendant's only other assignment of error is based upon the court's denial of his motion for nonsuit. He urges that the State failed to produce any evidence of defendant's knowledge of or possession of narcotics. We disagree. The officers testified that they had had information upon which they obtained a search warrant for a red car operated by Thomas Mason and Johnnie Robinson, both of whom were known to both officers. They found the car which was being operated by defendant with Johnnie Robinson a passenger and got behind it. Before the car got to the place decided upon by the officers to stop it, the red car was required to stop in obedience to a traffic light. The officers' car was directly behind it. The red car turned right and the officers followed it. The officers realized that the occupants of the red car had recognized them. Both driver and passenger of the red car began "doing something on the front seat with their hands." "There was general motion in there." Mason looked at Robinson, Robinson leaned over, and "Mason was leaning a little bit towards" Robinson. Robinson threw a package out of the right side of the car. This

package, it was subsequently determined, contained heroin (ten packages), a bottle cap, a needle and syringe. This evidence is sufficient for submission to the jury on the question of possession. See *State v. Harvey,* 281 N.C. 1, 187 S.E. 2d 706 (1972).

No error.

Chief Judge MALLARD and Judge HEDRICK concur.

STATE OF NORTH CAROLINA v. GEORGE STREETER

No. 723SC676

(Filed 20 December 1972)

Criminal Law § 84; Searches and Seizures § 1— temporary detention — search for weapons — seizure of implements of housebreaking

When a police officer observed defendant standing beside a highway near some businesses at 2:45 a.m., he had the right to detain defendant temporarily to ascertain his name and purpose for being in the area; upon observing a bulge under defendant's shirt that appeared to be a weapon, the officer had the right to make a weapons search to protect himself from harm; and upon feeling a metal object he believed to be a weapon, he had the right to have defendant raise his shirttail for the purpose of seizing the suspected weapon and had the right to seize implements of housebreaking that were exposed when defendant raised his shirttail.

APPEAL by defendant from *Rouse, Judge,* 6 December 1971 Session of Superior Court held in PITT County.

Defendant was charged in a bill of indictment, proper in form, with the felony of possession of implements of housebreaking. G.S. 14-55. Upon his plea of not guilty he was tried by jury and found guilty as charged.

On 10 December 1971 Judge Rouse ordered that defendant be committed to the State Department of Correction Diagnostic Center for a presentence diagnostic study and report. G.S. 148-12. After completion of the diagnostic study, defendant was returned to Pitt County for sentencing. On 24 March 1972 Judge Peel entered final judgment ordering imprisonment for a period of not less than eighteen months nor more than six years, less time spent in jail awaiting trial and less time spent under the commitment to the diagnostic center. Defendant appealed.

The facts sufficient for an understanding of this appeal are set forth in the opinion.

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

William E. Grantmyre for defendant.

BROCK, Judge.

While on routine police patrol, Officer Bullock observed defendant standing beside N. C. Highway 43 in a deserted area in the City of Greenville at 2:45 a.m. on 26 October 1971. Defendant, whom the officer did not know, was wearing a blue shirt with long sleeves and a shirttail. The shirttail was hanging below defendant's waist and outside his trousers. Because of the hour and the proximity of defendant to some business offices, Officer Bullock stopped his police cruiser to inquire about defendant's identity and purpose for being in the area. Officer Bullock walked around his vehicle and engaged defendant in conversation. While he was talking with defendant, Officer Bullock noticed something bulging under his shirt on the right hand side about where a revolver in a holster would be. Bullock thought the bulging object was a revolver and he reached out and touched it through the cloth of defendant's shirt. He felt a metal object and the officer believed it was a weapon. Bullock told defendant to stand still, and he raised defendant's shirttail exposing an assortment of items: a prybar, hammer, screwdriver, flashlight, pair of gloves, and money bag. Defendant was then placed under arrest for possession of burglary tools.

The officer's testimony of what he found under defendant's shirttail was admitted in evidence over defense objections after an adequate voir dire and findings of fact by the trial judge. The items so found by the officer were also admitted in evidence as State's exhibits over defense objections.

Defendant contends that the search of his person was illegal because it was in violation of his Fourth Amendment rights, and that the fruits of the search should have been excluded from evidence.

Defendant does not argue that Officer Bullock could not legally or constitutionally momentarily stop and detain defendant for the purpose of determining his identity and purpose.

He is well advised upon this point. "[A] police officer may in appropriate circumstances and in an appropriate manner approach a person for puposes of investigating possible criminal behavior even though there is no probable cause to make an arrest." *Terry v. Ohio,* 392 U.S. 1, 20 L.Ed. 2d 889, 88 S.Ct. 1868 (1968); *accord, Adams v. Williams,* 407 U.S. 143, 32 L.Ed. 2d 612, 92 S.Ct. 1921 (1972). "The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape." *Adams v. Williams, supra.* "A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time." *Adams v. Williams, supra.*

Defendant argues strenuously that the officer had no probable cause to arrest defendant for possession of burglary tools and therefore no right to search for them. The argument that the officer had no probable cause, at the time he stopped defendant, to arrest defendant for anything appears to be sound. However, the argument begs the question. The State does not contend that the search was conducted as an incident of arrest. The search was a protective search, and the incriminating items were exposed when defendant's shirttail was raised by Officer Bullock for the purpose of seizing what appeared to be a weapon or weapons. "[W]e cannot blind ourselves to the need for law enforcement officers to protect themselves and other prospective victims of violence in situations where they may lack probable cause for an arrest. When an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others, it would appear to be clearly unreasonable to deny the officer the power to take necessary measures to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm." *Terry v. Ohio, supra.* When an officer temporarily detains a person because of suspicious circumstances and has reason to believe that the suspect is armed, he may conduct a weapons search which is limited to the protective purpose. *Terry v. Ohio, supra; Adams v. Williams, supra.* If, in the conduct of the limited weapons search, contraband or evidence of a crime is of necessity exposed, the officer is not required by the Fourth Amendment to disregard such contraband or evidence of crime.

Officer Bullock had the right, and we think he had the duty, to temporarily detain the defendant to ascertain his name and his purpose for being in this deserted area at 2:45 a.m. Upon observing a bulge under defendant's shirttail that appeared to be a pistol or other weapon, Officer Bullock had the right to make a weapons search to protect himself from harm. When he "patted" defendant's shirt and felt a metal object he clearly had the right, and we think he had the duty, to tell defendant to stand still and to raise his shirttail for the purpose of seizing the suspected weapon. The implements of housebreaking, which of necessity were exposed, gave probable cause for Officer Bullock to arrest defendant for possession of burglary tools.

We hold that the officer's testimony and the exhibits were properly admitted as evidence for the State.

No error.

Chief Judge MALLARD and Judge BRITT concur.

STATE OF NORTH CAROLINA v. DOUGLAS JUNIOR GREENE, MAX HENRY LEWIS, GARY DEAN WINTERS, AND DEXTER TERRY SHOOK

No. 7229SC838

(Filed 20 December 1972)

1. **Burglary and Unlawful Breakings § 5; Larceny § 7— breaking and entering and larceny — sufficiency of evidence**

The State's evidence was sufficient for the jury in a prosecution for felonious breaking and entering and felonious larceny where it tended to show that a house was broken into and ten guns were taken therefrom, that the guns were found later that day hidden in woods 100 yards from the victim's house, that two officers hid nearby and within a few hours after the guns were stolen observed four of the defendants leave their car and walk directly through the woods to the stolen property, that one defendant picked up one of the guns and then threw it away when the officers made their presence known, and that the fifth defendant promptly drove away in the dark without lights and ignored an officer's command to stop.

2. **Criminal Law § 112— reasonable doubt — possibility of innocence**

The trial court did not commit prejudicial error in defining "reasonable doubt" as a "possibility of innocence," though such instruction is not approved.

State v. Greene

ON *Certiorari* to review judgments of *Wood, Judge,* entered at the 10 April 1972 Session of Superior Court held in McDOWELL County.

The defendants, together with one Kelly, were jointly tried on their pleas of not guilty to separate indictments charging each with felonious breaking and entering, felonious larceny, and receiving. The State's evidence in substance showed the following: At some time between 2:30 p.m. and 5:00 p.m. on 1 November 1971 the residence of William K. Gill, Jr. at Pleasant Gardens was broken into and approximately ten firearms were removed from a gun cabinet therein without the owner's permission. Upon investigation, a deputy sheriff and Mr. Gill noticed some tracks in the yard. These led down the bank and into the woods. Gill and the deputy searched through the woods and about 7:00 p.m. found the guns hidden in leaves right across the creek from Hawkins Lumber Company at a point about 100 yards from the Gill residence. Two officers hid nearby under an overhanging rock to get out from a hard shower. A little after 8:00 p.m. they saw a Pontiac car pull into Hawkins Lumber Company about 150 feet from where the officers were hidden. Four persons, later identified as the defendants Winters, Lewis, Shook and Kelly, left the car and, with Winters in the lead, walked across a little bridge and directly up to where the guns were hidden. There they stopped and "looked for just a second." Then defendant Winters "just moved right in and as he moved in he reached down and picked up the silver gun (a pistol) and stuck it in his belt." One of the officers testified that at that moment he thought the defendants saw him and "they made a step down the path like they might be going to run." On orders of the officers the four defendants stopped. As soon as the officers spoke, defendant Winters threw away the pistol which he had picked up, and it was found in the leaves about six feet from him. When the officers made themselves known, the Pontiac cranked up and pulled out from Hawkins Lumber Company. One of the officers ordered it to stop, but it kept going and the officer shot at the back end of the car with a 12-gauge shotgun. Mrs. Gill testified that she was driving home when she heard the shot and that she saw the defendant, Greene, whom she knew, driving away in the Pontiac with its lights off. She testified that her lights "shined right in his face and he almost ran into me." On the following day, 2 November 1971, the officers observed a Pontiac automobile, which they had on previous occasions seen being driven by

the defendant Greene, at a body shop. This car had bullet holes in the back which were being patched. The defendants did not offer any evidence.

The jury found all defendants guilty of felonious breaking and entering and of felonious larceny. From judgments imposing prison sentences, defendants Greene, Lewis, Winters and Shook gave notice of appeal. Defendant Kelly did not appeal. Subsequently, this Court granted the appealing defendants' petitions for a writ of certiorari in order to permit them to perfect a late appeal.

Attorney General Robert Morgan by Assistant Attorney General Robert G. Webb for the State.

I. C. Crawford for defendant appellants.

PARKER, Judge.

[1] Defendants' motions for nonsuit were properly denied. There was direct evidence that the crimes for which defendants were tried had been committed by someone. There was sufficient evidence, when viewed in the light most favorable to the State, to support a jury finding that defendants were the guilty parties. Within a few hours after the guns were stolen, defendants drove to a place they had no apparent legitimate reason to be. They stopped their car within 150 feet of the cache of stolen property. Four of them got out in the rain and walked through the dark woods directly to the stolen property. There they stopped, and defendant Winters reached down and retrieved one of the stolen guns. The officers made their presence known, and thereupon Winters threw away the pistol which he had just picked up. Defendant Greene promptly drove away, leaving his companions in the rain. He ignored the officer's command to stop and drove in the dark without lights. A logical and legitimate inference may be drawn that defendants knew where the stolen property had been hidden because they were the persons who had stolen and hidden it there. In our opinion there was here substantial evidence to support a jury verdict finding each defendant guilty of the offenses for which he was tried. This is all that was required to withstand nonsuit. *State v. Stephens*, 244 N.C. 380, 93 S.E. 2d 431. Whether guilt was proved beyond a reasonable doubt was for the jury to determine.

[2] In charging the jury the trial judge defined "reasonable doubt" as a "possibility of innocence." While this definition is not approved, the error was in favor of defendants rather than against them. *State v. Bryant,* 282 N.C. 92, 191 S.E. 2d 745; *State v. Chaney,* 15 N.C. App. 166, 189 S.E. 2d 594.

We have carefully examined all of appellants' remaining assignments of error, all of which relate to the court's charge to the jury, and find no prejudicial error such as to warrant a new trial.

No error.

Judges CAMPBELL and MORRIS concur.

STATE OF NORTH CAROLINA v. RONNIE JONES

No. 728SC815

(Filed 20 December 1972)

1. **Arrest and Bail § 3— warrantless arrest for misdemeanor — probable cause**

Arrest of defendant without a warrant for misdemeanor larceny was lawful where police officers observed defendant leave a department store carrying his overcoat folded over his arm, the officers saw a white object under the coat which looked to be a package of bed sheets, the officers saw defendant and a companion put several packages into a box hidden under a hedge, and the officers examined the box and discovered it contained seven sheets each enclosed within a plastic cover, on the outside of which was a price sticker bearing the name of the department store. G.S. 15-41.

2. **Indictment and Warrant § 14— illegal arrest — motion to quash warrant**

A defendant is not entitled to have the warrant on which he is tried quashed on the ground it was issued after an illegal arrest unless the offense charged arose out of the illegal arrest.

APPEAL by defendant from *Copeland, Special Judge,* 10 July 1972 Criminal Session of WAYNE Superior Court.

Defendant was tried de novo in superior court on a warrant charging him with misdemeanor larceny of bed sheets, valued at $75.13, the property of Weil's, Inc., a department store in

Goldsboro, North Carolina. He entered a plea of not guilty, was found guilty by the jury and from a sentence of imprisonment for two years, he appeals.

The State's evidence tended to show that on 26 February 1972 Officer Lott of the Goldsboro Police Department stationed himself inside a camper trailer located in a parking lot behind Weil's, Inc., about 60 yards from the back door of the store. By use of binoculars he was watching the store for possible shoplifters.

Officer Lott testified that 26 February was an unseasonably warm day, and that he saw the defendant several times that morning in the vicinity of Weil's, Inc., dressed in a long gold overcoat. Officer Lott saw defendant enter the store about 12:00 p.m., and he exited between five and ten minutes later carrying his overcoat folded over his right arm. Under the coat Officer Lott saw a white object which looked to him to be a package of bed sheets. Defendant was adjusting the coat to cover the package, and it was soon completely concealed under the coat. Lt. Harvell, also of the Goldsboro Police Department, continued watching defendant through the binoculars while Officer Lott left the trailer and followed the defendant.

Officer Lott saw the defendant and a companion cross the street and enter a path alongside the library. Near a hedge behind the library he saw defendant and his companion put several packages into a pasteboard box hidden under the hedge.

The police officers watched Jones and his companion leave the area and enter the Belk-Tyler store. The officers then examined the pasteboard box and discovered that it contained three (3) Fieldcrest king size bed sheets and four (4) Fieldcrest queen size bed sheets each enclosed within a plastic cover, on the outside of which was a self-adhesive price sticker bearing the name of Weil's, Inc.

Jones' companion returned to the box alone from the Belk-Tyler store and placed a pair of trousers in the box. Upon seeing the police officers he ran and was not apprehended. The officers found Jones and arrested him; a warrant was prepared after the arrest.

On cross-examination Officer Lott testified that he did not arrest Jones when he saw Jones leave the Weil's store because he "wasn't sure that larceny had been committed" at that

time. After he saw the Weil's merchandise in the box he followed Jones and saw him enter the Belk-Tyler store. It was decided to let the defendant return for the merchandise. When Jones' companion saw Officer Lott and escaped, the officers decided to find Jones and arrest him.

Other evidence tends to show that no inventory of the sheets was taken before the alleged theft, but that the store usually kept eight of each type of sheet on display. After defendant was arrested, the store manager noticed that the supply of sheets was less than eight of each. The store manager testified that Weil's, Inc., was the exclusive seller of Fieldcrest sheets in the area.

The manager also testified that the sales records (cash register tapes) for 26 February did not show any sale of items from the store's linen department in the amount of $9.79 (price of each queen size sheet), or $11.99 (price of each king size sheet), or any combination thereof. According to his testimony there was no sale recorded that day for those sheets. No sales receipt was ever found. The defendant denied even being in Weil's, Inc., that day.

Attorney General Robert Morgan by Assistant Attorney General Rafford E. Jones for the State.

Cecil P. Merritt for defendant appellant.

CAMPBELL, Judge.

[1, 2] The defendant, prior to pleading, made a motion to quash the warrant because it was issued pursuant to an alleged illegal arrest. The defendant strenuously argues this exception. G.S. 15-41 provides that a peace officer may arrest without a warrant in the case of a misdemeanor when it has been committed in his presence or he has reasonable grounds to believe that such misdemeanor has been committed in his presence. We think the evidence in this case sufficient to justify the arrest. It is immaterial, however, for the purpose of this case whether the arrest was or was not valid. It is an essential of jurisdiction that a criminal offense shall be sufficiently charged in a warrant or indictment. But it is not an essential of jurisdiction that such warrant be issued prior to the arrest and that the defendant be initially arrested thereunder. The law does not discharge a defendant from criminal liability merely because his arrest is not lawful, unless the offense charged stems from such arrest.

The instant case does not present a charge in the warrant which stems from the arrest itself. As stated above, we think the evidence in this case justified the arrest, but even though it did not, it would be immaterial to the merits of this case. *State v. Green,* 251 N.C. 40, 110 S.E. 2d 609 (1959) ; *State v. Sutton,* 244 N.C. 679, 94 S.E. 2d 797 (1956).

There was ample evidence when taken in the light most favorable to the State to justify submission of the case to the jury. The charge of the court was ample, particularly with regard to that portion to which the defendant excepted. This was the portion in which the court instructed the jury concerning the doctrine of possession of recently stolen merchandise.

We have carefully reviewed all of the exceptions and assignments of error brought forward by the defendant, and we find the defendant had a fair and impartial trial free of any prejudicial error.

No error.

Judges MORRIS and PARKER concur.

STATE OF NORTH CAROLINA v. ROOSEVELT KINSEY

No. 728SC713

(Filed 20 December 1972)

1. **Robbery § 4— indictment for armed robbery — evidence showing attempted robbery — no fatal variance**

There was no fatal variance between an indictment charging armed robbery and evidence showing only an attempt at armed robbery, the offense being complete whether the taking is successful or amounts only to an attempt to take personalty from the victim.

2. **Assault and Battery § 14— serious injury — jury question**

In a prosecution for felonious assault, the State's evidence was sufficient for the jury on the question of serious injury where it tended to show that the victim was cut across the neck with a knife and that thirty stitches were required to treat the wound.

3. **Assault and Battery § 5; Criminal Law § 26; Robbery § 6— armed robbery — felonious assault — continuous course of conduct — conviction of both crimes**

Defendant could be convicted of both the offense of felonious assault and the offense of armed robbery based on separate features of one continuous course of conduct.

State v. Kinsey

APPEAL by defendant from *Cowper, Judge,* 5 June 1972 Criminal Session of LENOIR Superior Court.

Defendant was tried on two bills of indictment to which he entered pleas of not guilty; the jury found him guilty of both offenses.

In case number 72Cr2409 defendant was charged with assault with a deadly weapon with intent to kill, inflicting serious injury not resulting in death. (G.S. 14-32(a)). The jury found defendant guilty of violation of G.S. 14-32(b): assault with a deadly weapon, inflicting serious injury, not resulting in death.

In case number 72Cr2410 defendant was charged with robbery with a dangerous weapon, a butcher knife, in violation of G.S. 14-87. The jury found defendant guilty although the robbery resulted in no spoils.

In case number 72Cr2409 judgment was entered on 5 June 1972 reciting that the offense was of the grade of misdemeanor and sentencing defendant to five years' imprisonment. On 7 June 1972 the judgment was corrected to recite that the crime was a felony. Judgment was entered in case number 72Cr2410 sentencing defendant to ten years' imprisonment for robbery with a deadly weapon, the sentences to run consecutively.

The State's evidence tended to show that about 11:15 or 11:30 p.m. on 9 March 1972 defendant and his brother went to the home of Sam Lard Thompson and his wife, Carrie Mae Sutton (Thompson). The brother went to the living room with Mrs. Thompson, and defendant went to the kitchen with Mr. Thompson.

Thompson turned to the refrigerator and defendant came up behind him and put a knife around his neck. According to Thompson defendant said:

> " '[T]his is a stick-up.' I said, 'What are you talking about? Sticking me up?' I told him I did not have anything to be stuck up for and he said that he was not joking and that he meant it and at this time he started pulling the knife across my throat. I felt the blood running down my neck and I knew I had to do something right then in a hurry. He said give me the money. He was trying to get the money out of my pocket but he did not get any money and I hauled back and hit him in the midsection. That knocked him back

on the table and I hollered for my wife to bring me my shotgun. My wife brought the shotgun into the room but he jumped up and ran out the door."

When defendant fell after being hit by Thompson, the knife blade broke from the handle; the blade was found on the kitchen floor, and was introduced into evidence at the trial. Thompson had a long cut across his neck. He went to the hospital at about 12:00 midnight, and returned home about 1:00 a.m. Thirty stitches were required to treat the wound.

Defendant testified that he had previously "pawned" a .22 pistol to Thompson, that he went to the Thompson home on the night of 9 March 1972 to get back the gun, that an argument resulted, and that he picked up the knife and hit Thompson with it. He testified that he did not make any attempt to rob Thompson, which charge defendant attributed to ill will toward him on the part of Thompson. Defendant said that he did not know that Thompson had been cut.

Attorney General Robert Morgan by Assistant Attorney General H. A. Cole, Jr., for the State.

Perry, Perry & Perry by Warren S. Perry for defendant appellant.

CAMPBELL, Judge.

Defendant contends that there were many errors committed during the trial and sets out nine questions. We do not find it necessary to discuss in detail each of the questions presented.

[1] With regard to the armed robbery charge, the defendant contends that there was insufficient evidence to convict him of this charge and that there was fatal variance in the bill of indictment, as he was charged with armed robbery, and the evidence only showed an attempt at armed robbery. There is no merit in this contention. "If all of the elements are present, the offense is complete whether the taking is successful or amounts only to an attempt to take personalty from the victim." *State v. Parker*, 262 N.C. 679, 138 S.E. 2d 496 (1964); *State v. Jenkins*, 8 N.C. App. 532, 174 S.E. 2d 690 (1970).

[2] With regard to the assault charge the defendant contends that there was error in not submitting to the jury a lesser offense as there was no evidence sufficient to establish seri-

ous injury. Whether the injury is "serious" depends upon the facts in each case. We find no error in the instant case, and the ruling is controlled by the principles enunciated in *State v. Parker,* 7 N.C. App. 191, 171 S.E. 2d 665 (1970).

[3] Still another contention of the defendant is to the effect that he was tried and convicted of two separate offenses whereas in truth and in fact there was only one offense, and thus error was committed. The defendant says that since an assault with a deadly weapon is a part of and necessary for the commission of armed robbery, he could not be convicted of the assault as a separate offense. This question was presented and thoroughly discussed in *State v. Richardson,* 279 N.C. 621, 185 S.E. 2d 102 (1971). Nothing would be gained by a further discussion; and since in this case serious injury was done in the assault, we hold that the *Richardson* case controls.

We have considered all of the other questions presented by the defendant and find them to be without merit.

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

No error.

Judges MORRIS and PARKER concur.

STATE OF NORTH CAROLINA v. GREG CONNORS

No. 724SC767

(Filed 20 December 1972)

Burglary and Unlawful Breakings § 5; Safecracking— breaking and entering — safecracking — acting as lookout — sufficiency of evidence

The evidence was sufficient for submission to the jury on issues of defendant's guilt of felonious breaking and entering and safecracking where it tended to show that defendant was asked if he wanted to "make some easy money," that defendant and three companions went to a grocery store, that defendant and one companion were told to go to the back corners of the store to serve as lookouts, that one companion went to the back and defendant went "to the other side of the store," that a second companion entered the store from the roof and attempted to open the safe while the third companion remained in the car, that the first companion was discovered by the owner outside the store at 4:00 a.m., that the owner took him inside

the store, where the owner was struck and rendered unconscious by the second companion, and that defendant later told the first companion that he had "got scared and left" the scene of the crimes, notwithstanding defendant testified that he had walked on past the corner of the store, hitchhiked away from the crime scene, and did not take part in the crimes.

APPEAL by defendant from *Rouse, Judge,* 1 May 1972 Session of SAMPSON Superior Court.

In two separate bills of indictment, proper in form, defendant was charged with (1) felonious breaking and entering and (2) safecracking. He entered a plea of not guilty as to each count, was found guilty as charged, and from judgment imposing prison term of not less than four nor more than five years, he appealed.

Attorney General Robert Morgan by Assistant Attorney General Claude W. Harris, for the State.

Nance, Collier, Singleton, Kirkman & Herndon by Charles H. Kirkman for the defendant.

BRITT, Judge.

Defendant's primary assignment of error is to the court's failure to grant his motions for nonsuit made at the close of the State's evidence and renewed at the conclusion of all the evidence.

It is elementary that upon a motion for nonsuit, all the evidence must be considered in the light most favorable to the State with every reasonable intendment thereon and every reasonable inference therefrom being resolved in the State's favor. *State v. Greene,* 278 N.C. 649, 180 S.E. 2d 789 (1971); *State v. Vincent,* 278 N.C. 63, 178 S.E. 2d 608 (1971); *State v. Bronson,* 10 N.C. App. 638, 179 S.E. 2d 823 (1971). Evidence in the instant case, considered in the light most favorable to the State tended to show:

At about 4 a.m. on 4 January 1971, one Joseph R. Nunnery, owner and operator of a grocery store in Clinton, North Carolina, drove up beside his store. As he sat in his car, Nunnery saw a man who later identified himself to Nunnery as Richard W. Bullock run from behind the store. Nunnery got out of his car, ran around to the front of the store and found Bullock hidden in some bushes. Nunnery had his hands in his

topcoat to give the impression that he had a gun. Threatening to "drop" Bullock if he ran, Nunnery took him through the back door into the store. In the front of the store Nunnery saw a hole in the ceiling where an air conditioning duct had been torn down. Nunnery entered his office to get a gun kept in his desk and there saw that someone had tried to break open the safe and had torn it up; the knobs, handle and combination were broken off. Crowbars, hammers and tools were lying in front of the safe. Nunnery got his gun and held it pointed at Bullock while he (Nunnery) telephoned the police. Before he could hang up the telephone, Nunnery was struck on his head from behind. Repeated blows were struck to his body and he passed out.

Richard Bullock, a witness for the State testified: On the night of 3 January 1971, he and defendant were playing pool in a poolroom in Fayetteville. Bullock and defendant had not entered the poolroom together and were playing at separate tables. Bullock was approached in the poolroom by one Raymond McGill and one Jerome Faircloth who asked Bullock if he wanted to go to Clinton and "make some easy money." Bullock approached defendant with the same inquiry. McGill and Faircloth did not tell Bullock how the money was to be made. The four men drove to Clinton and after riding around Clinton for several hours went to the grocery store later identified as belonging to Nunnery. Faircloth told defendant and Bullock to go to the back of the store, one man to each corner. (In his own behalf defendant testified, "I was supposed to go to one corner and Bullock to the other.") Faircloth went to a ladder at the back of the store and climbed up on the roof. Bullock went to the back and defendant went to "the other side of the store." McGill remained in the car as a lookout man. Bullock saw Faircloth hit Nunnery on the back of the head; he (Bullock) did not see either McGill or defendant again at the scene after Nunnery took him (Bullock) into the store. Bullock saw defendant the next day at the poolroom in Fayetteville and defendant told him that he (defendant) "got scared and left" the scene of the crimes.

We hold that the evidence was sufficient to withstand the motions for nonsuit. It is true that defendant testified that he thought they were going to Clinton to play pool; that although he was told to go to the "far corner" of the building and "holler" if he saw anybody go into the building, that he walked on past

the "far corner" of the building and on to the road where he hitchhiked back to Fayetteville; that he took no part in the crimes with which he was charged. However, if there is any evidence which tends to prove guilt or which reasonably conduces to this conclusion as a fairly logical and honest deduction and not such as merely arouses a suspicion of guilt, the jury must determine if they are convinced beyond a reasonable doubt of the fact of guilt. 2 Strong's N. C. Index 2d, Criminal Law, § 106, p. 654; *State v. Mabry,* 269 N.C. 293, 152 S.E. 2d 112 (1967); *State v. Powell,* 6 N.C. App. 8, 169 S.E. 2d 210 (1969). Certainly, the evidence (even from defendant himself) tending to establish defendant's presence at the scene of the crimes charged and the failure to establish conclusively that he left the scene prior to the commission of said crimes serves to arouse more than a mere suspicion of guilt. Contradictions and discrepancies, even in evidence presented by the State, are for the jury to resolve and will not warrant nonsuit. *State v. Watson,* 10 N. C. App. 168, 177 S.E. 2d 771 (1970).

Defendant contends that the evidence against him in this case was no stronger than the evidence against defendants in *State v. Gaines,* 260 N.C. 228, 132 S.E. 2d 485 (1963) and *State v. Aycoth,* 272 N.C. 48, 157 S.E. 2d 655 (1967) in which cases the Supreme Court held that motions for nonsuit should have been granted. We disagree with this contention and conclude that the instant case is clearly distinguishable from the cited cases.

We have carefully considered the other assignments of error brought forward and argued in defendant's brief but find them to be without merit.

No error.

Chief Judge MALLARD and Judge BROCK concur.

Tripp v. Tripp

ROY L. TRIPP, JR., AND WIFE, SANDRA V. TRIPP, PATRICIA TRIPP LANCASTER AND HUSBAND, D. L. LANCASTER, ROBERT E. TRIPP AND WIFE, SHERI S. TRIPP; NORTH CAROLINA NATIONAL BANK, N.A. (SUCCESSOR TO STATE BANK & TRUST COMPANY), J. R. CULLIFER, WILLIAM T. SMITH, FRANK T. WHITEHURST, JR., AS EXECUTORS OF THE WILL OF ROY L. TRIPP; DAVID E. OGLESBY, JR., D. C. TRIPP, WILLIAM T. SMITH, FRANK T. WHITEHURST, JR., B. B. SUGG, JR., TRUSTEES U/A AND SUPPLEMENTAL AGREEMENT WITH ROY L. TRIPP AND WIFE, ELSIE P. TRIPP, DATED DECEMBER 31, 1950; NORTH CAROLINA NATIONAL BANK, N.A. (SUCCESSOR TO STATE BANK & TRUST COMPANY), J. R. CULLIFER, WILLIAM T. SMITH, ROSALIE T. SMITH, D. C. TRIPP, FRANK T. WHITEHURST, JR., T. G. JOHNSTON, TRUSTEES UNDER THE WILL OF ROY L. TRIPP; AND NORTH CAROLINA NATIONAL BANK, N.A. (SUCCESSOR TO STATE BANK & TRUST COMPANY), TRUSTEE U/A ELSIE P. TRIPP, DATED SEPTEMBER 17, 1966, PETITIONERS v. D. C. TRIPP, T. G. JOHNSTON, AND FRANK T. WHITEHURST, JR., INDIVIDUALLY RESPONDENTS

No. 723SC573

(Filed 20 December 1972)

1. **Attorney and Client § 9; Trusts § 12— legal assistance in management of trust — expense of trust estate**

A reasonable fee for legal advice and assistance in the management of a trust estate is allowable as a necessary expense of the trust estate. G. S. 28-170; G.S. 7A-103(11).

2. **Attorney and Client § 9; Costs § 4— declaratory judgment involving trust — attorney's fee taxable as costs**

The trial court had authority to tax a reasonable attorney's fee as part of the costs and to apportion it among the parties in an action for a declaratory judgment and for instructions to the trustees in connection with the sale of certain trust property. G.S. 6-21(2).

3. **Costs § 4— hearing on attorney's fees — hearsay evidence**

The trial court did not err in the admission of hearsay evidence in a hearing upon a motion that a reasonable attorney's fee be taxed as part of the costs.

4. **Appeal and Error § 28— broadside assignment of error to findings — review of face of record**

Broadside assignment of error to the findings of fact and conclusions of law presents for review only the face of the record, and review is limited to the question of whether error of law appears on the face of the record, which includes whether the facts found or admitted support the conclusions of law and the judgment.

5. **Appeal and Error § 57; Costs § 4— order setting attorney's fee — court's opinion as to attorney's competence**

While it was improper for the court to recite as a fact its own opinion of the competence and skill of petitioner-attorney in its order

setting an attorney's fee in an action involving the sale of trust property tried before another judge, the other facts found from the evidence support the court's conclusion that petitioner is entitled to a reasonable fee for his services and the amount of the fee set by the court.

APPEAL by Roy L. Tripp, Jr., and wife, Patricia Tripp Lancaster and husband, Robert E. Tripp and wife, and William T. Smith and wife, some of the plaintiffs, from a judgment entered 15 March 1972 by *Rouse, Judge,* following a hearing in chambers on 14 January 1972.

Attorney Sam B. Underwood, Jr., and the beneficiaries of several trust estates were unable to agree upon a fee for legal services rendered in connection with the preparation, prosecution, and conclusion of the above entitled action. Mr. Underwood filed a motion in the cause in the Superior Court requesting the judge to determine the amount of a reasonable fee and order payment of the same. Judge Rouse, Resident Judge of the Third Judicial District, which includes Pitt County, heard the parties in chambers and examined the pertinent records in the clerk's office. Judge Rouse made extensive findings of fact, covering eleven pages of the printed record, and concluded that a total fee of $10,000.00 was reasonable. From this amount he deducted $5,500.00 which had already been paid, and ordered payment of the balance.

As noted above, some of the plaintiffs appealed.

Everett and Cheatham, by C. W. Everett, for movant, and Sam B. Underwood, Jr.

Ragsdale & Liggett, by George R. Ragsdale, for appellants.

BROCK, Judge.

[1] It has long been established in this jurisdiction that a reasonable fee for legal advice and assistance in the management of a trust estate is allowable as a necessary expense of the trust estate. *Lightner v. Boone,* 221 N.C. 78, 19 S.E. 2d 144; *Young v. Kennedy,* 95 N.C. 265. Our statutes permit the allowance of reasonable sums for necessary charges and disbursements incurred in the management of a trust estate. G.S. 28-170; G.S. 7A-103(11). Also, our statutes authorize the judge to tax the costs, including reasonable attorney fees, in applicable cases. G.S. 6-21.

[2] The instant action was for a declaratory judgment and for instructions to the fiduciaries in connection with the sale of certain trust property. It therefore falls clearly within the category of actions described in G.S. 6-21(2), and the judge was thereby authorized to tax a reasonable attorney fee in the costs of the action and apportion it among the parties. The fixing of reasonable attorney fees in applicable cases is a matter within the sound discretion of the trial court. *Godwin v. Trust Co.*, 259 N.C. 520, 131 S.E. 2d 456. "A discretionary order of the trial court is conclusive on appeal in the absence of abuse or arbitrariness, or some imputed error of law or legal inference." 1 Strong, N. C. Index 2d, Appeal and Error, § 54, p. 213.

Appellants' exceptions and assignments of error numbers 1 and 4 are addressed to the refusal of the judge to grant summary judgment for appellants, or, alternatively, to dismiss the petition for allowance of attorney fees; exceptions and assignments of error numbers 2 and 3 are addressed to the refusal of the judge to exclude certain hearsay evidence. Appellants argue that petitioner's evidence failed to show (1) that his services were for the estate, (2) that they were reasonably necessary, and (3) the amount charged is not excessive. Appellants cite *Lightner v. Boone, supra.*

At the hearing it was stipulated that the judge might examine all pertinent documents in the hands of the Clerk of Superior Court of Pitt County including the case file of this declaratory judgment action together with other documents, instruments, and letters. The items included under this stipulation clearly show (1) that petitioner's services were rendered to the estate, and (2) that legal services to the estate were reasonably necessary. The determination of a reasonable fee was the purpose of the petition. This argument by appellants cannot be sustained.

[3] With respect to appellants' objection to the admission of hearsay evidence, it is clear that the rules of evidence are relaxed at a hearing before the judge without a jury. Stansbury, N. C. Evidence 2d, § 4a. This argument by appellants cannot be sustained.

Appellants' assignments of error numbers 1, 2, 3, and 4 are overruled.

[4] Exception and assignment of error number 5 is as follows:

> "To the order of the Court dated March 14, the findings of fact and conclusions of law therein and to the signing and entry thereof."

This constitutes a broadside exception and assignment of error as it relates to the findings of fact and the conclusions of law. Such an assignment of error presents for review the face of the record, and review is limited to the question of whether error of law appears on the face of the record, which includes whether the facts found, or admitted, support the conclusions of law and the judgment. *Lamb v. McKibbon,* 15 N.C. App. 229, 189 S.E. 2d 547. Whether the evidence supports the findings of fact is not presented.

[5] Appellants strenuously argue that finding of fact number 28 is improper and cannot support the conclusions of law. In finding of fact number 28, Judge Rouse undertakes to "take judicial notice" of his own opinion of the special competence and skill of Mr. Underwood, the petitioner. Judge Rouse was not the trial judge before whom the declaratory judgment action was tried. The trial judge was Honorable William J. Bundy, now deceased. Therefore, Judge Rouse could not have observed the manner in which petitioner represented his clients in the trial. We agree with appellants that it was improper for Judge Rouse to recite as a fact his general opinion of petitioner gathered from unknown quarters.

Nevertheless, the improper "judicial notice" taken by Judge Rouse does not detract from the other facts found. The other facts found from the evidence on this hearing clearly support the conclusion that petitioner is entitled to a reasonable fee for his services, and Judge Rouse has determined the amount in his discretion. Appellants have failed to show an abuse of discretion. Assignment of error number 5 is overruled.

Affirmed.

Chief Judge MALLARD and Judge BRITT concur.

STATE OF NORTH CAROLINA v. JOE CALVIN KIRK

No. 7220SC830

(Filed 20 December 1972)

1. **Criminal Law § 66— in-court identification of defendant — photographic identification of defendant — independent origins**

The trial court properly admitted an in-court identification of defendant where the evidence on *voir dire* showed that the witness had a good opportunity to observe the person who robbed him, that the witness had previously selected defendant's photograph from among nine shown him by police and that the witness's in-court identification of defendant was based "on the way he looks here" and not on the photograph.

2. **Robbery §§ 4, 5— common law robbery — insufficiency of evidence — submission of lesser degree of crime proper**

The evidence failed to support the charge of common law robbery where such evidence tended to show that the driver of a vehicle snatched the victim's wallet while the victim pumped gas into the vehicle, that the purse snatcher ran away unpursued by the victim and that an occupant of the vehicle then drove it away, stopped and picked up the purse snatcher and drove on; however, the trial court properly submitted the case to the jury on the lesser included offense of larceny from the person. G.S. 15-170.

APPEAL by defendant from *Falls, Judge,* at the 31 July 1972 Session of STANLY Superior Court.

By indictment proper in form defendant was charged with the common law robbery of one Tony Stamper. At trial, defendant pleaded not guilty and the evidence presented by the State is summarized as follows:

On the night of 4 July 1972 Stamper, 17, was working at a service station on East Main Street in Albemarle. Around 12:25 a.m. a 1968 green Pontiac with several people in it drove up to the station and the male driver ordered a dollar's worth of gasoline. While Stamper was putting the gasoline in the car, the driver got out of the car, went up behind Stamper, removed a billfold containing approximately $165.00 from Stamper's left hip pocket, and ran east on Main Street. Stamper did not run after the purse snatcher but hollered for him to stop. An occupant of the Pontiac proceeded to drive it off in an easterly direction, stopped and picked up the culprit and drove on. The area around the service station was well lighted. Stamper got a good look at the purse snatcher when he alighted from and walked around the car. As the car drove off Stamper took note

of the license number and called police. Stamper did not know defendant personally but made an in-court identification of defendant as the person who drove the Pontiac up to the station and the person who took the billfold.

The court submitted the case on larceny from the person, the jury returned a verdict of guilty of that charge, and from judgment imposing prison sentence of nine years, defendant appealed.

Attorney General Robert Morgan by Donald A. Davis, Staff Attorney, for the State.

Hopkins and Hudson by Elton S. Hudson for defendant appellant.

BRITT, Judge.

[1] By his first assignment of error brought forward and argued in his brief, defendant contends that the court erred in finding as a fact and concluding as a matter of law that the in-court identification of defendant by Stamper was admissible into evidence.

On direct examination by the solicitor, when Stamper was first asked to identify the person who took the billfold and money from him, defendant's attorney objected after which the jury was excused and the court conducted a voir dire at which Stamper and two police officers testified. Stamper testified that some three or four days after the alleged crime, police officers showed him nine photographs of Black male subjects; the photographs were in a book, with all subjects similarly dressed and the only writing or notations on the photographs were numbers below each picture; without any suggestion from police and after examining the photographs for some five or ten minutes, Stamper identified the photograph of defendant as a photograph of the person who committed the offense; Stamper based his in-court identification of defendant "on the way he looks here" and not on the photograph.

Stanly County Sheriff McSwain testified on voir dire that the photograph of defendant which Stamper examined was taken some 18 months prior to that time when defendant was under arrest for armed robbery.

Following the voir dire the trial court made findings of fact as contended by the State and concluded that the in-court

identification of defendant by Stamper was not tainted by any outside origin, that the photographs which were used for the purpose of identifying defendant were lawfully obtained by the Stanly County Sheriff's Department and that the out-of-court identification of defendant by Stamper was lawful. The court admitted into evidence Stamper's testimony identifying defendant.

We hold that the findings of fact by the trial court are fully supported by the evidence, the conclusions of law are amply supported by the findings of fact, and the admissibility of the testimony identifying defendant is fully authorized. *Simmons v. United States,* 390 U.S. 377, 19 L.Ed. 2d 1247 (1968); *State v. Morris,* 279 N.C. 477, 183 S.E. 2d 634 (1971); *State v. Accor and Moore,* 277 N.C. 65, 175 S.E. 2d 583 (1970).

We find no merit in defendant's contention that the court erred in placing the burden of proving the inadmissibility of the identification on defendant. Although the record reveals that on voir dire Stamper and two police officers were examined by defense counsel and cross-examined by the solicitor, the only statement by the court as to burden of proof was "I think the burden is on you (defendant) to show . . . that the photographs were obtained illegally." Assuming, *arguendo,* that the burden of proof on the question was on the State, we can perceive no prejudice to defendant here. Whether defendant offered Stamper and the two police officers as witnesses on voir dire, or whether the State offered them, we can assume that their testimony would have been the same and no evidence was presented to contradict them.

[2] Defendant assigns as error the failure of the trial court to grant his motion for nonsuit, contending that the evidence failed to support the charge of common law robbery.

It is true that the evidence was not sufficient to make out a case of common law robbery but the court properly submitted the case on larceny from the person. "Upon the trial of any indictment the prisoner may be convicted of the crime charged therein or of a less degree of the same crime, ..." G.S. 15-170. Larceny from the person is a lesser included offense of common law robbery. *State v. Swaney,* 277 N.C. 602, 178 S.E. 2d 399 (1971); *State v. Wenrich,* 251 N.C. 460, 111 S.E. 2d 582 (1959); *State v. Bell,* 228 N.C. 659, 46 S.E. 2d 834 (1948). The assignment of error is without merit and is overruled.

Defendant had a fair trial, free from prejudicial error, and the sentence imposed was within the limits provided by statute.

No error.

Judges PARKER and VAUGHN concur.

STATE OF NORTH CAROLINA v. KENNETH LEA

No. 7215SC828

(Filed 20 December 1972)

1. **Criminal Law §§ 86, 88— cross-examination of defendant — inquiries concerning prior conduct — impeachment**

An inquiry put to defendant on cross-examination in a first degree murder trial as to whether he had cut a named individual on a given date and defendant's answer thereto were admissible for purposes of impeachment.

2. **Criminal Law § 88— cross-examination of defendant — inquiry about potential witness proper**

Where defendant in a murder trial testified that his brother accompanied him to a dance where the murder later took place, it was not error to allow the solicitor to cross-examine defendant as to the whereabouts at the time of the trial of his brother, a potential witness.

3. **Homicide § 30— first degree murder trial — failure to submit lesser degrees of crime — no error**

The trial court in a first degree murder case properly refused to submit to the jury the issue of manslaughter where State's evidence tended to show that defendant, carrying a gun in his right hand, walked to within a few feet of the deceased, fired one shot into the floor, then pointed the weapon straight ahead at deceased and shot him in the forehead, while defendant's evidence was to the effect that he did not possess any firearm on the occasion and that he did not shoot the victim.

APPEAL by defendant from *Bailey, Judge,* 15 May 1972 Session of Superior Court held in ORANGE County.

Defendant was charged in a valid indictment with murder in the first degree and, upon his plea of not guilty, was tried and convicted of murder in the second degree.

The State's evidence tended to show that defendant attended a dance at the community center in Efland on 27 November

1971. While at the dance, defendant was seen talking with Bobby Johnson. At one point during the talk, defendant walked away from Johnson toward a crowd of boys, "huddled" with them, and returned to within several feet of Johnson carrying a pistol in his right hand. The defendant fired a shot into the dance floor, then, pointing the pistol straight ahead at Johnson, shot Johnson in the forehead. Johnson staggered backward several steps and fell to the floor. None of the witnesses observed any weapon in the possession of deceased at any time. The defendant left the scene and, later that same night, turned himself in to the police. No pistol was found.

Defendant stipulated that Bobby Johnson died as a result of a gunshot wound inflicted upon him on 27 November 1971. Defendant's evidence tended to show that he attended the dance in the company of his brother, Hesakiah Lea, Jr., and two other men. Defendant denied knowing or talking to the deceased. He denied possessing a pistol and he denied shooting Johnson. His witnesses testified that they either heard or saw the shots fired from a location some distance away from where they had observed the defendant standing. Defendant stated that when he learned the police were looking for him, he turned himself in.

Defendant was sentenced to serve twenty-five years imprisonment and appealed.

Attorney General Robert Morgan by Thomas B. Wood, Assistant Attorney General for the State.

Winston, Coleman and Bernholz by Charles E. Vickery for defendant appellant.

VAUGHN, Judge.

[1] Defendant's first and second assignments of error concern the overruling of his objections to certain questions asked of defendant on cross-examination. A person charged with the commission of a crime is, at his own request, a competent witness in North Carolina, but, if he is examined as a witness, he is subject to cross-examination as are other witnesses. G.S. 8-54. The limits of legitimate cross-examination are largely within the discretion of the trial judge and, absent a showing that the verdict was improperly influenced by his rulings on the scope of that cross-examination, those rulings will not be held for error. *State v. McPherson,* 276 N.C. 482, 172 S.E. 2d 50. In order to impeach a defendant's credibility as a witness, the

solicitor is permitted to cross-examine the defendant as to collateral matters, including other criminal offenses, if the questions are based upon information and are asked in good faith. *State v. Haith* and *State v. Miles,* 7 N.C. App. 552, 172 S.E. 2d 912. Defendant objected to a question asking him if he had cut a "James Poteat with a pocketknife on the 14th day of August 1971. . . ." After his objection was overruled, defendant answered: "No, I didn't cut him. I took a plea of guilty but I didn't cut him. I didn't cut him, it was a fight." We hold this question and answer were within the rule stated above and defendant's contention in that regard is without merit.

[2] Defendant, during direct examination, testified that he went to the dance where the alleged shooting later took place accompanied by his brother, Hesakiah Lea, Jr., and two others whom he named. None of these men appeared as witnesses at the trial. During cross-examination of the defendant, the solicitor asked, "Where is Hesakiah Lea, Jr., now?" Defendant's objections were overruled and the defendant testified that his brother was in a prison camp at Yanceyville. The defendant first gave evidence that his brother had been present at the scene of the crime. It was not error to allow the solicitor to cross-examine defendant as to the whereabouts of his brother, a potential witness.

[3] In his fourth assignment of error defendant contends that the trial judge erred in that he failed to instruct the jury that they could consider a verdict of manslaughter. The jury was told they might find the defendant guilty of murder in the first degree or guilty of murder in the first degree with a recommendation of punishment of life imprisonment or guilty of murder in the second degree or not guilty of any crime. The intentional use of a deadly weapon as a weapon, when death proximately results from such use, gives rise to the presumptions that (1) the killing was unlawful and (2) done with malice, and an unlawful killing with malice is murder in the second degree. *State v. Duboise,* 279 N.C. 73, 181 S.E. 2d 393; *State v. Gordon,* 241 N.C. 356, 85 S.E. 2d 322. Defense counsel cites *State v. McNeill,* 229 N.C. 377, 49 S.E. 2d 733, which is not authoritative on the question presented. *State v. Duboise, supra.* It was stipulated that the victim died as a result of a gunshot wound inflicted upon him on 27 November 1971. Evidence presented by the State tended to show that defendant, carrying a gun in his right hand, walked to within a few feet of the de-

ceased, fired one shot into the floor then pointed the weapon straight ahead at Bobby Johnson and shot him in the forehead. Defendant's evidence was to the effect that he did not possess any firearm on this occasion and that he did not shoot the victim. Defendant testified that he did not know the deceased, had never seen him and did not see him on that night. On these facts it was not error to refuse to submit the issue of manslaughter.

Defendant's other assignments of error have been considered. We hold that defendant has failed to show prejudicial error in the trial from which he appealed.

No error.

Judges BRITT and PARKER concur.

JOSEPH B. CHESHIRE, JR., ANCILLIARY ADMINISTRATOR OF THE ESTATE OF WENDELL EUGENE MALIN, JR., DECEASED v. BENSEN AIRCRAFT CORPORATION, A NORTH CAROLINA CORPORATION, AND IGOR B. BENSEN

No. 7210SC668

(Filed 20 December 1972)

1. **Judgments § 40; Limitation of Actions § 12; Rules of Civil Procedure § 41— voluntary dismissal of action — institution of new action — failure to pay costs of first action**

   Where an order of voluntary dismissal without prejudice was entered in plaintiff's original action against defendant, a second action filed by plaintiff based on the same claim was properly dismissed where it was instituted before the costs in the original action were paid and after the statute of limitations had run. G.S. 1A-1, Rule 41(d).

2. **Judgments § 40; Limitation of Actions § 12; Rules of Civil Procedure §§ 6, 60— voluntary dismissal — commencement of new action — payment of costs of first action**

   Neither Rule 6(b) nor Rule 60(b) gives the court authority to amend an order of voluntary dismissal to allow plaintiff to pay the costs of the action after a second action based on the same claim has been commenced.

APPEAL by plaintiff from *Braswell, Judge,* 15 May 1972 Session, Superior Court, WAKE County.

On 16 June 1970, plaintiff instituted a wrongful death action in Superior Court against the defendant. That action was

designated as 70CVS3617. The action came on for trial at the 10 April 1972 Civil Session of Superior Court. During the course of the trial and before plaintiff rested his case, he elected to take a voluntary dismissal. An order granting plaintiff's motion was entered on 17 April 1972 taxing the costs against plaintiff and permitting plaintiff to file a new action at any time on or before 21 April 1972. The order was consented to by plaintiff and his counsel of record. On 18 April 1972, plaintiff commenced a new action against defendant based upon the same claim. The costs in the amount of $435.40 in case No. 70CVS3617 were not paid by plaintiff at the time the new action was begun. On 26 April 1972, defendants in writing moved for dismissal of the second action (designated as 72CVS3230) because the costs had not been paid in the first action. On 8 May 1972, plaintiff in writing moved (a) "[t]hat the Court find that this matter comes within the doctrine of mistake, inadvertence or excusable neglect" and (b) "[t]hat the Court enter an order *nunc pro tunc* amending the 'Voluntary Dismissal Without Prejudice' entered under date of April 17, 1972, by changing the last line of said 'Voluntary Dismissal Without Prejudice' to read as follows: 'The costs of this action shall be taxed against the plaintiff and shall be paid by the plaintiff on or before the ____ day of _____, 1972,' inserting such date as the Court may deem to be appropriate." The costs were paid by plaintiff on 27 April 1972.

The court heard the matter on the motions filed by the respective parties, the written responses to the motions, the affidavits, exhibits, briefs, and arguments of counsel. The order entered found the facts and contained the following conclusions of law:

"(1) That the order of voluntary dismissal without prejudice entered by the court in the claim designated as 70 CVS 3617 on April 17, 1972, contained no mistake, was not erroneous, and therefore is not subject to modification, correction or to be set aside.

(2) That the language of Rule 41(d) of the North Carolina Rules of Civil Procedure is mandatory, and that the court has no discretionary authority to relieve the plaintiff of the obligation imposed by said rule.

(3) That the motion of the defendants for dismissal filed in 70 CVS 3617 on April 26, 1972, is proper and should be allowed.

(4) That the court has no discretionary authority to modify or amend the consent order of voluntary dismissal without prejudice entered by the court in 70 CVS 3617 on April 17, 1972.

(5) That Rule 6(B) of the North Carolina Rules of Civil Procedure is not applicable to this fact situation.

(6) That Rule 60(b) of the North Carolina Rules of Civil Procedure is not applicable to this fact situation.

(7) That the new action, designated 72 CVS 3230, should be dismissed.

No finding of fact or conclusion of law is made by the court as to excusable neglect inasmuch as the court is of the opinion that Rule 41(d) is mandatory, and that it has no discretion to allow plaintiff's motion regardless of whether the neglect was excusable."

Defendant's motion was granted and plaintiff's motion was denied. Plaintiff excepted to each of the conclusions of law and to the entry of the judgment and appealed.

Harris, Poe, Cheshire and Leager, by Charles A. Poe, and Paulson and Humphreys, by Richard S. Paulson, for plaintiff appellant.

Smith, Anderson, Blount and Mitchell, by James D. Blount, Jr., and Samuel G. Thompson, for defendant appellees.

Purrington and Purrington, by A. L. Purrington, Jr., for defendant appellee Igor B. Bensen.

MORRIS, Judge.

[1] Defendants based their motion to dismiss on G.S. 1A-1, Rule 41(d) which provides:

"(d) *Costs.*—A plaintiff who dismisses an action or claim under section (a) of this rule shall be taxed with the costs of the action unless the action was brought in forma pauperis. If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant before the payment of the costs of the action previously dismissed, unless such previous action was brought in forma pauperis, the court, upon motion of the defendant, shall dismiss the action."

Plaintiff on the other hand urges that, as set out in his motion, G.S. 1A-1, Rule 41(d) must be read and considered *in pari materia* with G.S. 1A-1, Rule 6(b) which provides:

> "(b) *Enlargement.*—When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order. Upon motion made after the expiration of the specified period, the judge may permit the act to be done where the failure to act was the result of excusable neglect. Notwithstanding any other provisions of this rule, the parties may enter into binding stipulations without approval of the court enlarging the time, not to exceed in the aggregate 30 days, within which an act is required or allowed to be done under these rules, provided, however, that neither the court nor the parties may extend the time for taking any action under Rules 50(b), 52, 59(b), (d), (e), 60(b), except to the extent and under the conditions stated in them."

Counsel for plaintiff filed an affidavit in support of plaintiff's motion in which he stated that until defendants' motion for dismissal was filed he was "not advertent to the fact that subsection (d) of Rule 41 requires payment of the costs of the former action prior to the filing of the new complaint." He also stated that shortly before the trial of the action, he had been seriously ill and had undergone major surgery and that he was, at the time of the trial and at the time of the preparation of the order of voluntary dismissal and the complaint in the new action, taking medication prescribed by his physician which he now realizes gave him a false sense of well-being and actually made it difficult for him to concentrate, to think clearly, or to pay careful attention to details. This effect of the medication was attested to by his physician. Counsel further stated that although other members of his firm and associate counsel took a more active part in the trial than he, because of his illness, he did assume the responsibility of preparing the order and the new complaint.

Prior to the adoption of the new Rules of Civil Procedure, N.C.G.S. 1-25 applied to this situation. It provided:

"If an action is commenced within the time prescribed therefor, and the plaintiff is nonsuited, or a judgment therein reversed on appeal, or is arrested, the plaintiff or, if he dies and the cause of action survives, his heir or representative may commence a new action within one year after such nonsuit, reversal, or arrest of judgment, if the costs in the original action have been paid by the plaintiff before the commencement of the new suit, unless the original suit was brought in forma pauperis."

In *Nowell v. Hamilton,* 249 N.C. 523, 107 S.E. 2d 112 (1959), plaintiff was nonsuited in her first action and brought a new action under the provisions of G.S. 1-25. She failed, however, to pay the costs in the first action. Except for the provisions of the statute, the second action would have been barred by the statute of limitations. The Court noted that even though the cause of action might be otherwise barred, G.S. 1-25 permitted a plaintiff who has been nonsuited to bring another action upon the same claim. However, the Court also pointed out that the statute annexed two conditions to the right to bring the second action: (1) The new suit must be brought within one year from the nonsuit, and (2) plaintiff *must* pay the costs awarded against her in the prior action if she did not sue as a pauper. This the plaintiff had admittedly failed to do. The Court held that since plaintiff had not complied with the conditions, she could not claim the protection of the statute, citing several prior cases.

See also *Bradshaw v. Bank,* 172 N.C. 632, 90 S.E. 789 (1916). There the Court said that the payment of costs was a condition precedent to the bringing of the second action only where the statute of limitation had run before the institution of the second action. The Court was construing the 1915 amendment to Revisal, § 370, which added the proviso *"Provided,* that the costs in such action shall have been paid by the plaintiff before the commencement of the new suit, unless said first suit shall have been brought in *forma pauperis."* Chief Justice Clark concurred in the result but wrote a separate opinion in which he stated that unless the proviso had the effect of restricting the right to bring a new action within one year after nonsuit there was no purpose in its passage. He was of the opinion that payment of costs in the first action was a mandatory condition precedent to maintaining the second action. The majority was followed in *Summers v. R. R.,* 173 N.C. 398, 92 S.E. 160 (1917),

where the Supreme Court reversed the judgment of the trial court dismissing the second action brought within the time limited by the statute of limitations because plaintiff had failed to pay the costs; and *Rankin v. Oates,* 183 N.C. 517, 112 S.E. 32 (1922), where dismissal was affirmed in a situation where the costs had not been paid and the statute of limitations had run.

Plaintiff could not come within this construction of G.S. 1-25 because at the time of the institution of the new action, the causes of action had been barred by applicable statutes of limitation. G.S. 1-25 was repealed by the General Assembly in 1967 effective 1 January 1970. G.S. 1A-1, Rule 41, became effective 1 January 1970. The provision for dismissal upon failure to pay costs has no counterpart in the Federal Rules. The provision in our rules is couched in unambiguous mandatory language: ". . . If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant *before the payment of the costs of the action previously dismissed,* unless such previous action was brought in forma pauperis, *the court, upon motion of the defendant,* shall *dismiss the action.*" (Emphasis supplied.) The rule was discussed and applied in *Galligan v. Smith,* 14 N.C. App. 220, 188 S.E. 2d 31 (1972). The question of whether the second action was barred by the statute of limitations was not raised. The costs in the first action had not been paid. Plaintiff contended that diligent effort had been made to ascertain the costs. The Court concluded that the plaintiff did not make any reasonable diligent effort to pay the costs of the first action prior to institution of the second. This Court held that there were sufficient facts found (based on competent evidence) to support the conclusion and that the court properly dismissed the second action on defendant's motion.

In the case before us, the clerk sent plaintiff's counsel the bill of costs on the date the judgment of voluntary dismissal was entered.

In our view the language of the rule constitutes a mandatory directive to the court.

[2] Nor do we find any help for plaintiff in G.S. 1A-1, Rule 6(b). G.S. 1-152, in effect until the new rules became effective on 1 January 1970, provided: "The judge may likewise, in his discretion, and upon such terms as may be just, allow an answer or reply to be made, or other act to be done, after the time limited, or by an order may enlarge the time." New Rule 6(b)

replaced old G.S. 1-152. We are of the opinion that Rule 6(b) is applicable to enlargement of time for filing pleadings, motions, interrogatories, the taking of depositions, etc. It was not intended to have the effect of giving the court the discretion to amend a final order entered under the mandatory directive of statute. That the rule was not intended to be applied as plaintiff suggests is, we think, apparent from the rule itself. It gives the court discretionary authority to enlarge the time required for something to be done by the rules or a notice given under the rules or order of court. This discretion can be exercised upon request prior to expiration of the time or upon motion after expiration of the time where the failure to act within the time prescribed was the result of excusable neglect. The rule, however, specifically provides that "neither the court nor the parties may extend the time for taking any action under Rules 50(b), 52, 59(b), (d), (e), 60(b) except to the extent and under the conditions stated in them." All of these rules have to do with the time within which a motion can be made for action which would affect a judgment entered or findings of fact in a judgment entered. Obviously the intent was to proscribe the very thing plaintiff wishes done. The rule was not intended to be applied for the purpose of amending a judgment entered.

Plaintiff further urges that G.S. 1A-1, Rule 60(b), is applicable. That rule is entitled "Relief From Judgment or Order." It provides for the correction of clerical mistakes and for relief from judgments on the grounds of mistake, surprise, inadvertence, or excusable neglect; newly discovered evidence; fraud; a void judgment; a judgment which has been satisfied, released, or discharged; or any other reason justifying relief from the operation of the judgment. Here the judgment was entered as drafted by plaintiff's counsel and permitted plaintiff to file a new action on or before 21 April. This plaintiff did. Obviously the relief plaintiff seeks is relief from the operation of G.S. 1A-1, Rule 41(d). Although our sympathies may be with plaintiff and his thoroughly competent and reputable counsel, we are unable to find the relief he seeks in the rules.

We find no error in the judgment entered.

Affirmed.

Judges CAMPBELL and PARKER concur.

GRAYBAR ELECTRIC COMPANY v. HAROLD E. SHOOK, TRADING AND DOING BUSINESS AS MID-SOUTH CONTRACTING COMPANY

No. 7228SC720

(Filed 20 December 1972)

1. **Sales § 10; Uniform Commercial Code §§ 19, 20, 22— nonconforming goods — rejection of goods by buyer — duties of buyer**

Where defendant buyer ordered burial cable from plaintiff but received aerial as well as burial cable, defendant was entitled to inspect the goods delivered to him and to accept the conforming and reject the nonconforming parts of the shipment within a reasonable time; however, defendant was also under a duty to notify plaintiff seller of the rejection and hold the rejected goods with reasonable care at the seller's disposition for a time sufficient to permit the seller to remove them. G.S. 25-2-513(1); G.S. 25-2-601(c); G.S. 25-2-602.

2. **Appeal and Error § 57— findings of fact supported by competent evidence — court on appeal bound by findings**

Though there may be evidence in the record to support plaintiff seller's contentions that defendant buyer failed to return nonconforming goods as he had agreed to do, failed to exercise reasonable care for safe-keeping of the goods and was liable for the fair market value of the goods, findings to the contrary made by the trial judge which were supported by competent evidence will not be disturbed on appeal.

APPEAL by plaintiff from *Thornburg, Judge,* 1 May 1972 Session of Superior Court held in BUNCOMBE County.

Action to recover the fair market value of certain cable delivered to defendant.

The following facts, among others, were established by admissions in the pleadings: (1) plaintiff is engaged in the electrical supply business and defendant is in the construction business; (2) during the month of March or April 1970, defendant ordered "burial cable" from plaintiff for a construction project then in progress; (3) by mistake, plaintiff delivered one reel of burial cable and two reels of "aerial cable" to the address indicated by defendant; (4) defendant paid plaintiff for the burial cable and; (5) defendant advised plaintiff of the mistake in the shipment.

Plaintiff alleged that after defendant advised plaintiff of the mistake, defendant agreed to ship the cable back to the plaintiff. Defendant denied this allegation. Plaintiff further alleged that by reason of defendant's failure to return the

aerial cable to plaintiff, defendant is indebted to the plaintiff in the amount of $9,989.85, which allegation was also denied by defendant.

The case was tried by the court without a jury. The court made findings of fact and conclusions of law which may be summarized in essential part as follows: (1) defendant ordered a quantity of burial cable from plaintiff; (2) one reel of burial cable was delivered for which plaintiff has been paid; (3) two reels of aerial cable, rather than burial cable as ordered, were delivered; (4) the containers in which the two reels of aerial cable were shipped were marked "burial cable;" (5) upon opening the cartons, defendant noted that it was not what had been ordered and so notified the plaintiff; (6) defendant advised plaintiff that he did not want the aerial cable; (7) plaintiff requested that defendant attempt to have the cable shipped back to the supplier; (8) defendant stated that he would attempt to do so; (9) defendant contacted three trucking firms in an effort to have the cable shipped back but was unable to procure a truck because of a strike in the trucking industry; (10) defendant advised plaintiff that he had been unable to procure a truck; (11) defendant stored the non-conforming cable in an area adjacent to his construction site; (12) defendant kept an agent at the storage site during the time he was engaged in the project; (13) on or about 20 July 1970 defendant discovered that one reel of the aerial cable had been taken from the site and notified plaintiff's agent; (14) defendant told the agent that the remaining cable had been moved to a garage, defendant having contacted the owner of the garage and having been told that the cable would be moved; (15) the remaining cable was not moved to the garage; (16) on or about 4 August 1970 it was discovered that the remaining cable had been stolen.

From the foregoing the court concluded, in substance: that the cable did not conform to the contract; defendant notified plaintiff within a reasonable time after delivery that he was rejecting the non-conforming goods; after rejection, defendant held the goods with reasonable care at the plaintiff's disposition for time sufficent to permit the plaintiff to remove them and; that defendant had no further obligation with regard to the rejected goods. The court made an alternative finding that if defendant was a bailee of the aerial cable delivered, he was not liable for the loss of the cable because plaintiff was duly notified

that the cable was being held and that part of the cable had been taken. The court also found that plaintiff had sufficient notice and opportunity to take the necessary steps to protect his property, which he did not do.

Judgment was entered denying recovery to the plaintiff.

Bennett, Kelly & Long, P.A. by Robert B. Long, Jr., for plaintiff appellant.

Bruce A. Elmore by George W. Moore for defendant appellee.

VAUGHN, Judge.

[1] Defendant-buyer was entitled to inspect the goods after their arrival. G.S. 25-2-513(1). Since part of the goods failed to conform to the contract, the buyer could accept any commercial unit and reject the rest. G.S. 25-2-601(c). Such rejection must have been made within a reasonable time after delivery and the plaintiff-seller seasonably notified. Defendant was also under a duty after rejection to hold the rejected goods with reasonable care at the seller's disposition for a time sufficient to permit the seller to remove them. Nothing else appearing, the buyer had no further obligation with respect to the rejected goods. G.S. 25-2-602. The court's findings are in accord with the foregoing and support the judgment dismissing the action.

[2] Plaintiff tendered requests for findings of fact which were substantially rejected by the court. Among other things, plaintiff contends that the court should have found facts showing the existence of an agreement between plaintiff and defendant whereby defendant agreed to ship the goods back to plaintiff. Plaintiff contends that the court should have found that defendant failed to return the goods as he agreed to do, failed to exercise reasonable care for safe-keeping of the goods and is liable for the fair market value of the same. It may well be that there is evidence in the record which would support such findings. The burden, however, was on the plaintiff to satisfy the trier of the facts as to the existence of the agreement and the breach thereof by the defendant. "A jury trial being waived, the findings of fact by the judge are as conclusive as the verdict of a jury, when there is evidence to support them *(Matthews v. Frye,* 143 N.C., 385); and in this case it cannot be said that there was no evidence to support the findings, because the burden of proof was on the plaintiff to establish negligence and

his Honor had the right which a jury could have exercised, to say that the evidence of the plaintiff did not satisfy him that the defendant was negligent." *Eley v. Railroad,* 165 N.C. 78, 80 S.E. 1064.

In *Mitchell v. Barfield,* 232 N.C. 325, 59 S.E. 2d 810, the trial judge failed to find facts requested by the appellant. The court, in an opinion written by Justice Ervin, held that assignments of error based on the court's failure to so find were untenable. The court said, "When he passed on the requests for findings, the judge necessarily weighed the evidence in his capacity as trier of the facts, and his refusal was tantamount to an affirmative finding that the matters and things embodied in the requests for findings did not exist."

The weight to be given the evidence and the resolution of reasonable inferences arising thereon are for the trier of the facts. Where, as here, the court's findings are supported by competent evidence, they will not be disturbed on appeal. The material facts so found support the judgment, which we affirm.

Affirmed.

Judges HEDRICK and GRAHAM concur.

STATE OF NORTH CAROLINA v. LAWRENCE DAVIS

No. 7214SC798

(Filed 20 December 1972)

Homicide § 21— second degree murder charge — sufficiency of evidence to withstand nonsuit

Evidence in a murder case was sufficient to withstand defendant's motion for nonsuit where it tended to show that deceased approached the door of a store where defendant was, that deceased turned away from the door and put his hand in his pocket, that deceased turned back toward the door and defendant shot him, that there was enmity between deceased and defendant, deceased having threatened "to get" defendant, and that after the shooting police found defendant standing on the sidewalk beside deceased, defendant with a gun in his hand and deceased with a gun at his feet.

APPEAL by defendant from *Cooper, Judge,* 29 May 1972 Session of DURHAM Superior Court.

Defendant was charged in a bill of indictment, proper in form, with the murder of George Willard Andrews (Andrews) and was placed on trial for second-degree murder. He pleaded not guilty, the jury returned a verdict of guilty of involuntary manslaughter, and the court entered judgment that defendant be imprisoned for ten years, sentence suspended and defendant be placed on probation for five years under terms and conditions set forth in the judgment. Defendant appealed.

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

Daniel K. Edwards and William Y. Manson for the defendant appellant.

BRITT, Judge.

Defendant first assigns as error the court's failure to grant his timely made motion for nonsuit on the ground that "there was no competent evidence from which a jury could find that the Andrews named in the bill of indictment was dead or that the alleged act of the defendant was a proximate cause of any death of the man named in the bill of indictment."

The evidence presented by the State tended to show: On the morning of 21 November 1971 at around 8:30 or 9:00 a.m., Andrews in the company of one Billy Lee Phillips and one William Davis went to Allison's Grocery Store at 416 Walker Street in the City of Durham. The three men went to the store in a vehicle driven by William Davis. When they got there, they parked behind a truck which they recognized as belonging to Lawrence Davis, the defendant. Andrews, William Davis and Phillips approached the store together. As William Davis opened the door, Andrews turned, walked away from the door and put his hand in the pocket of his coat and as he turned back around Andrews was shot by defendant. State's witness Phillips testified: "Willard (Andrews) turned from there (there being in reference to the doorway of Allison's Grocery Store) and walked away from the door and put his hand in his pocket; and as soon as he turned back, bam; that was it. He was shot; that was it. Lawrence (defendant) was speaking to him and said, 'You still looking for me, you M.F.?' " Andrews made no response to defendant. Andrews was shot with a .38 Cobra Colt pistol. Phillips further testified that although he saw a gun in defendant's hand, he (Phillips) could not say whether when

Andrews turned in front of the door and put his hand in his pocket and then "came around" if he (Andrews) had a pistol or not. Andrews had shown a .25 caliber chrome-plated automatic pistol to Phillips earlier on the morning of the shooting and at that time Andrews told Phillips that he was "going to get Lawrence Davis and Bill Swain with the .25 caliber pistol."

Durham Police Officer W. Y. Poole, called to investigate the shooting at Allison's Grocery Store, testified: As he (Poole) arrived at the scene, he saw defendant standing on the sidewalk with a .38 Cobra Colt pistol in his hand. "Andrews was lying flat of his back; he (Andrews) had a bullet hole over his left eye, and he was bleeding out of his nose and from the hole. There was a .25 automatic lying between his feet." "In regard to the way the body was lying and placement of the gun, the way the person was shot, it was kinda hard to see how a gun could be laying at his feet."

The State introduced Dr. Daly, a pathologist at Duke Hospital, who testified to the following: He examined a body identified to him as George Willard Andrews on the afternoon of 22 November 1971 in the morgue at Duke Hospital. Cause of death was attributed to a gunshot wound to the brain; a bullet was found in the right occipital region. The doctor's examination disclosed that brain surgery had been performed on deceased who had lived between 12 and 48 hours after he was shot.

On cross-examination of Dr. Daly, defense counsel asked: "Doctor, you do not know of your own knowledge when Andrews was admitted to the hospital, do you?" The witness stated that he was admitted on the 21st but then conceded that he was not present when Andrews was admitted. On questioning from counsel, the witness gave detailed testimony as to his findings and opinions. Counsel then asked, "Now, was there any way you could tell from your examination how long Andrews lived after the passage of the bullet through his head, the track that you observed?" The witness answered, "Again I would say 12 to 48 hours." Later on counsel asked Dr. Daly, "Did Willard Andrews have various scars about him and on his—?" The witness then described certain scars found on the corpse and gave his opinion as to how long those scars had been there.

Considering the evidence in the light most favorable to the State, and with every reasonable inference thereon being

resolved in the State's favor, as we are required to do, *State v. Greene,* 278 N.C. 649, 180 S.E. 2d 789 (1971), *State v. Bronson,* 10 N.C. App. 638, 179 S.E. 2d 823 (1971), we hold that the evidence was more than sufficient to survive the motion for nonsuit.

In the second assignment of error brought forward and discussed in his brief, defendant contends that the court's jury charge as it pertained to involuntary manslaughter was erroneous. Suffice to say, we have carefully reviewed the charge and when considered as a whole, as every charge must be, we are of the opinion and so hold that it was free from prejudicial error. *State v. Munday,* 5 N.C. App. 649, 169 S.E. 2d 34 (1969). The assignment of error is overruled.

No error.

Judges PARKER and VAUGHN concur.

HARRY F. McARVER v. POUND & MOORE, INC., AND SARAH WILSON TATE

No. 7226SC762

(Filed 20 December 1972)

Negligence § 57— fall on ice behind store — insufficiency of evidence of negligence

Plaintiff's evidence was insufficient to show actionable negligence on the part of defendant in an action to recover for injuries sustained when plaintiff slipped on a small patch of ice located at the base of a concrete pillar in the garage area behind defendant's store after exiting through the rear entrance of the store.

APPEAL from *McLean, Judge,* at the 1 May 1972 Special Civil Session of Superior Court held in MECKLENBURG County.

Plaintiff instituted this civil action to recover damages for injuries allegedly caused by the negligence of defendants. On 9 January 1970 plaintiff sustained serious injuries to his elbow when he slipped on a small patch of ice after exiting through the rear entrance of Pound & Moore, Inc., a furniture and supply business located at 304 South Tryon Street in Charlotte, North Carolina. The office building was leased by defendant Pound & Moore, Inc., from defendant Tate.

Plaintiff alleged that his injuries were caused by and resulted from the negligence of defendants in that they: failed to correct a condition of the property which permitted the formation of ice in small areas in the entrance to the building; failed to correct the icy condition of the premises which they knew or should have known existed; and failed to give any warning of the dangerous and hazardous conditions then and there existing.

The following evidence in this case is not disputed: that the front entrance to Pound & Moore, Inc., faces east onto South Tryon Street, and that the rear entrance faces west; that the rear entrance door to Pound & Moore, Inc., is located in the southernmost corner of a raised loading platform in a garage area, 20 by 20 feet, recessed into the ground level of the building; that this garage area is used to accommodate Pound & Moore's delivery trucks, and opens onto a 12 foot wide alley owned and maintained by defendant Sarah Wilson Tate; that there are two signs painted on the building in this garage area designating it to be an entrance to Pound & Moore, Inc.; that the ice spot in question was about 12 by 24 inches in size and was located at the base of a concrete pillar at the northern extremity of the garage area where the alley surface and garage pavement met; that at the time of the fall, a delivery truck was parked in the southern half of the garage in front of the entrance door.

The evidence offered by the plaintiff tended to show the following: that on the afternoon of 9 January 1970, plaintiff went to Pound & Moore, Inc., to purchase certain supplies from them; that he parked his car in the alley behind Pound & Moore, Inc., and entered through the rear entrance; that the rear entrance is commonly used by customers of Pound & Moore, Inc., to go into the building and purchase merchandise; that after making his purchase, plaintiff exited through the same rear entrance and slipped on some ice that had formed at the northern extremity of the garage area; that he did not see the ice before slipping on it; that the ice was dirty, dusty and gray, looking "just like the alley to me"; that he sustained serious injuries to his elbow as a result of his fall.

Defendant's evidence tended to show: that there was no other ice in the 20 foot wide entrance except next to the pillar at the northern extremity of the garage area; that plaintiff had parked in the alley in a place designated for Pound & Moore

trucks only; that the ice patch was clearly visible to anyone who looked where they were walking; that plaintiff was in a hurry as he left Pound & Moore, Inc., and that he did not look at the ice before he fell; that there was other ice out in the alley on that day; that plaintiff was familiar with the rear entrance, and had already used it once that same day, prior to his fall.

At the close of plaintiff's evidence and again at the close of all the evidence, defendants moved for directed verdict in accordance with G.S. 1A-1, Rule 50. These motions were denied and the issues of the negligence of the defendants and the contributory negligence of the plaintiff were submitted to the jury. The jury answered all issues in favor of the plaintiff and awarded money damages. Thereafter, in accordance with G.S. 1A-1, Rule 50(b)(1), defendants moved that the verdict be set aside and that judgment be entered in accordance with their motions for directed verdicts. These motions were allowed and the trial judge entered judgments for defendants notwithstanding the verdict of the jury. Plaintiff appealed.

Fairley, Hamrick, Monteith & Cobb, by S. Dean Hamrick, for plaintiff.

Jones, Hewson & Woolard, by Harry C. Hewson, for defendant Pound & Moore, Inc.

BROCK, Judge.

Subsequent to the docketing of the record on appeal, plaintiff and defendant Sarah Wilson Tate entered into a settlement agreement under G.S. 1B-4. Therefore, plaintiff asserts only his assignment of error to the entry of judgment in favor of defendant Pound & Moore, Inc.

We hold that plaintiff's evidence fails to show actionable negligence on the part of Pound & Moore, Inc. The action of the trial court in rendering judgment in favor of Pound & Moore, Inc., notwithstanding the verdict is

Affirmed.

Chief Judge MALLARD and Judge BRITT concur.

RICHARD EUGENE FOSTER II, BY HIS GUARDIAN AD LITEM, RICHARD EUGENE FOSTER v. EUGENE WEITZEL, JR., AND WIFE, NOVELLA WEITZEL

No. 7228SC708

(Filed 20 December 1972)

1. **Negligence § 5.1— laundromat — child as implied invitee**

Plaintiff child, accompanying his mother to defendants' laundromat, occupied the relationship of at least an implied invitee on the premises.

2. **Negligence § 5.1— hidden defect in laundromat dryer — duty of proprietor to child of patron**

The proprietor of a laundromat owes the duty to exercise ordinary care to maintain in a reasonably safe condition the premises and to give warning of hidden perils or unsafe conditions insofar as these can be ascertained by reasonable inspection and supervision; therefore, evidence presented a jury question where such evidence tended to show that there were two dryers placed five feet apart and two feet from the wall in defendants' laundromat, that one of the dryers did not have a back on it but had moving parts exposed, that defendants knew of this condition while plaintiff child's mother did not, that the mother had loaded the dryer and started it and was loading the second dryer when her two year old son stuck his hand into the machinery and that the son suffered injury to three fingers as a result.

APPEAL by defendants from *Thornburg, Judge,* 8 May 1972 Session of BUNCOMBE Superior Court.

On 4 June 1970 at about 4:00 p.m. Mrs. Mary Foster, minor plaintiff's mother, went to defendants' laundromat accompanied by the minor plaintiff, then less than two years of age. At one end of the laundromat were two automatic clothes dryers, about five feet apart and located, according to Mrs. Foster, about two feet from the wall. On the back of one of the dryers the pulleys and belts that operated the machine were exposed, there being no cover over them and no guard between the dryer and the wall.

Mrs. Foster loaded clothing in one dryer and started it. She then went to the other dryer and was loading it when she heard her son scream, and saw that his right hand was covered with blood and the tips of three fingers had been cut off. He was standing beside the first dryer toward its back. Mrs. Foster saw blood on the floor behind the dryer.

Defendant Eugene V. Weitzel, Jr. testified that the dryers had been installed in the building in 1961 or 1962, that they

had been in use since that time, and that he had done nothing to them since they were installed. The dryers were not bolted to the wall or affixed to the floor of the building. He testified that neither he nor anyone else had ever taken a back off the dryers, but he also testified that he had seen the pulleys and belts before. He testified there was a space from two to six inches between the dryers and the wall.

At the close of plaintiff's evidence, and again at the close of all the evidence, defendants moved for directed verdict, which motions were denied. Defendants excepted to denial of the motions for directed verdict and the entry of the judgment on the jury verdict against them.

Brock and Howell by Floyd D. Brock for plaintiff appellee.

Clarence N. Gilbert for defendant appellants.

CAMPBELL, Judge.

The question presented by this appeal is whether the evidence taken in the light most favorable to the plaintiff was sufficient to be submitted to the jury. The evidence, when so considered, reveals that a mother took her toddling baby, less than two years of age, into a laundromat provided by the defendants for the use of patrons desiring such a service. There were two automatic clothes dryers located in one end of the building. One of these dryers had no back on it and was positioned so that the wall did not form a back as the dryer itself was at least two feet from the wall. This dryer had pulleys and a belt which operated the machinery when the dryer was in use. The dryer was not affixed to the floor; and while it may have been customarily close to the wall so that the wall acted as a back, nevertheless, on this occasion, it was some two feet removed from the wall and the open moving machinery was not obvious to the mother and had not been called to her attention before the injury to her son.

[1, 2] The child on this occasion occupied the relationship of at least an implied invitee on the premises. *Fortune v. Southern Railway Co.*, 150 N.C. 695, 64 S.E. 759 (1909); *Thacker v. J. C. Penney Company*, 254 F. 2d 672 (5th Cir. 1958). Persons engaged in operating laundromats in this day and time should anticipate that mothers using the laundromat facilities will be accompanied by their children in order to make use of the

facilities provided by the business proprietor. Under such circumstances, the proprietor is not an insurer, but such a proprietor is bound to exercise ordinary care for the safety of such children. The proprietor owes the duty to exercise ordinary care to maintain in a reasonably safe condition the premises and to give warning of hidden perils or unsafe conditions insofar as these can be ascertained by reasonable inspection and supervision.

The defendants placed considerable reliance upon the case of *Freeze v. Congleton,* 276 N.C. 178, 171 S.E. 2d 424 (1969). We think the instant case distinguishable from the *Freeze* case in that in the instant case the child's mother had no knowledge that the dryer was not equipped with a back and had exposed machinery which would entice a toddling baby to investigate. On the other hand, the proprietor knew, or should have known, that small children would accompany their parents on the premises. Under these circumstances, it was incumbent upon the proprietor to take reasonable precautions to keep the premises in a reasonably safe condition and not have exposed moving machinery. We think the facts in this case, when viewed in the light most favorable to the plaintiff, presented a question for the jury.

No error.

Judges MORRIS and PARKER concur.

STATE OF NORTH CAROLINA v. WALTER BELTON

No. 7214SC822

(Filed 20 December 1972)

1. **Criminal Law § 113; Robbery § 5— instruction on alibi — failure to use word alibi — no error**

The trial court's instructions in a robbery case on defendant's evidence tending to establish an alibi and on the State's burden of proof were adequate, even though the trial court did not use the word "alibi."

2. **Criminal Law § 66— pretrial photographic identification — in-court identification — independent origin**

Where the two victims of a robbery had an opportunity to observe defendant at the time of the crime for about fifteen minutes, their

selection of defendant's photograph from among those shown them by police several days later would not render an in-court identification of defendant improper.

APPEAL by defendant from *Cooper, Judge,* 10 April 1972 Session of DURHAM County Superior Court.

Defendant was tried on a proper bill of indictment charging him with armed robbery. The case was submitted to the jury on common law robbery, and after a jury verdict of guilty and a sentence of imprisonment for a term of eight years, the defendant appealed.

The State's witnesses testified that defendant entered the motel, where the male witness was in charge and his wife was looking at television, at about 8:45 p.m. on 2 January 1972. The defendant carried on a conversation for a few minutes, and then with his hand in his pocket, as though he had a weapon, and with threats of killing both of them if they gave any alarm, he took $123.90 from the cash register. The room was lighted, the defendant's face was not masked, and the witnesses observed him for about 15 minutes.

Within several days after the incident police officers showed the witnesses several photographs (about 10 or 15) of persons fitting the general description of the defendant. Neither of the witnesses identified any of these persons as the assailant; the defendant's picture was not included in that group. Approximately a week later the witnesses were shown two additional pictures of Negro males; one of them, the defendant's picture. The witnesses identified this as a photograph of their assailant. Upon a proper voir dire examination of the witnesses the trial judge found that the in-court identification was based upon the witnesses' observation of the defendant at the time of the crime, and not upon any impermissibly suggestive photographic identification.

The defendant testified in his own behalf, and offered several witnesses, all of whom testified that the defendant had watched a television football game on the evening in question at a friend's home a considerable distance from the scene of the crime.

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

Paul, Keenan and Rowan by Jerry Paul for defendant appellant.

CAMPBELL, Judge.

[1] The defendant neither served the case on appeal nor docketed the record with this Court within the time required. After the case was heard in this Court the defendant filed a petition for certiorari with insufficient reasons for allowing same; nevertheless, we have elected to consider the merits of the case. We have reviewed each assignment of error and find no merit in any of them. The trial court thoroughly reviewed the evidence of defendant tending to establish an alibi and placed the burden of proof upon the State in a proper manner. We think the charge of the court was adequate, even though the trial court did not use the word "alibi." While an instruction in the form approved by the Supreme Court in *State v. Bridgers*, 233 N.C. 577, 64 S.E. 2d 867 (1951) might have been preferable; nevertheless, we do not find that the defendant was prejudiced by the charge in this instance.

[2] The in-trial identification of the defendant was not tainted by impermissibly suggestive photographic pretrial identification. The finding of the trial court in this regard, after a properly conducted voir dire, was adequately supported by the evidence on the voir dire.

We find that the defendant had a fair and impartial trial free from prejudicial error.

Appeal dismissed.

Judges BROCK and GRAHAM concur.

STATE OF NORTH CAROLINA v. VERNON R. WALTERS

No. 7213SC780

(Filed 20 December 1972)

1. **Criminal Law § 166— failure to file brief**

Failure of defendant to file a brief with the Court of Appeals works an abandonment of his assignments of error except those appearing upon the face of the record proper.

2. **Escape § 1— conviction date alleged in indictment and date shown at trial different — immaterial variance**

Allegation in the indictment that defendant's original conviction was at the 8 January 1968 term of court while the evidence showed

that the conviction was rendered on 2 January 1968 did not constitute material variance.

3. **Escape § 1— felony escape — sufficiency of indictment**

The indictment in a felony escape case was proper where it alleged the time and place of defendant's prior escape conviction and where it alleged the time and place of defendant's original conviction for which he was in lawful custody.

4. **Escape § 1— felony escape — admissibility of records to show confinement and prior escape**

In a felony escape case, proof that defendant was lawfully confined and that he had previously been convicted of escape may be made by the submission into evidence of a certified copy of the superior court records, or a commitment issued under the hand and seal of the clerk of superior court.

APPEAL by defendant from *Bailey, Judge,* 17 April 1972 Session of BLADEN Superior Court.

Defendant was tried on a bill of indictment charging that on 3 March 1972 he escaped from State Correctional Unit #4510 while being lawfully confined subject to a sentence imposed upon conviction for felony escape at the 8 January 1968 Session of Pender County Superior Court. The indictment further alleged that defendant had previously been convicted of escape at the 2 March 1972 Term of Sampson County District Court. The indictment charged a second escape, and therefore a felony escape.

Upon a verdict of guilty, defendant was sentenced to three years' imprisonment.

Joseph B. Chandler, Jr. for defendant appellant.

CAMPBELL, Judge.

Defendant obtained an order extending the time to docket the appeal with this Court up to and including 20 September 1972, on which date the case was docketed. Since judgment was entered on 20 April 1972, the case was not docketed until 153 days after the date of judgment, which time does not comply with Rule 5 of the rules of this Court.

[1] In addition, defendant appellant did not file a brief with the Court as required by Rule 27. Failure by appellant to file a brief works an abandonment of his assignments of error, except those appearing upon the face of the record proper,

which are cognizable *ex mero motu*. *Land v. Land*, 4 N.C. App. 115, 165 S.E. 2d 692 (1969).

Under G.S. 148-45 a second escape is a felony, punishable by imprisonment for not less than six months nor more than three years, regardless of whether the original sentence was imposed upon conviction of a misdemeanor or a felony. *State v. Worley*, 268 N.C. 687, 151 S.E. 2d 618 (1966).

[2] The indictment in the instant case properly charges that defendant escaped from lawful custody while serving a sentence imposed by judgment pronounced in the Superior Court of Pender County for a felony; it is necessary only to identify the term of court by month and year. *State v. Stallings*, 267 N.C. 405, 148 S.E. 2d 252 (1966). Although the indictment stated that defendant had been convicted at the 8 January 1968 term of court, and the evidence showed that the conviction was rendered on 2 January 1968, such variance is immaterial.

[3] The indictment properly alleges a felony escape (second offense), the defendant having been convicted of escape from the State Department of Corrections at the 2 March 1972 Term of Sampson County District Court. *State v. Revis*, 267 N.C. 255, 147 S.E. 2d 892 (1966). It properly alleges the time and place of the prior escape conviction. *State v. Lawrence*, 264 N.C. 220, 141 S.E. 2d 264 (1965).

[4] Proof that defendant was lawfully confined and that he had previously been convicted of escape may be made by the submission into evidence of a certified copy of the superior court records, or a commitment issued under the hand and seal of the clerk of superior court. *State v. Ledford*, 9 N.C. App. 245, 175 S.E. 2d 605 (1970).

Defendant's conviction of felony escape was based upon a proper verdict supported by competent evidence. The sentence was within that allowed by statute.

No error.

Judges BROCK and GRAHAM concur.

STATE OF NORTH CAROLINA v. WALTER HOUSE, JR. AND EUGENE ROGERS

No. 728SC837

(Filed 20 December 1972)

1. **Criminal Law § 87— leading question — no prejudicial error**

A single leading question by the solicitor put to an accomplice who was testifying against defendants did not constitute prejudicial error sufficient to require a new trial.

2. **Criminal Law § 116— instruction on failure of defendant to testify**

The trial court's instruction on defendant's failure to take the stand that the jury must be very careful not to allow defendant's silence to influence their verdict in any way was not prejudicial, though an instruction more nearly in the language of G.S. 8-54 would be preferred.

3. **Criminal Law § 122— verdict of undecided — request for further instructions — no error**

No prejudice arose out of the exchange between judge and jury when, upon a jury question as to whether one defendant could be found "undecided," the judge suggested that the jury go back and work on that verdict.

APPEAL by defendants from *Cowper, Judge,* 31 July 1972 Criminal Session of Superior Court held in LENOIR County.

Defendants were tried and convicted under separate bills of indictment, proper in form, charging them with the armed robbery of Morris Mobley. They appeal from judgments of imprisonment for terms of twenty years.

Attorney General Morgan by Assistant Attorney General Lester V. Chalmers, Jr., for the State.

Harvey W. Marcus for defendant appellant Walter House, Jr.

Perry, Perry and Perry by Dan E. Perry for defendant appellant Eugene Rogers.

GRAHAM, Judge.

[1] The State relied principally upon testimony of two accomplices who pleaded guilty to charges arising out of the robbery and then testified against defendants. The solicitor asked one of these witnesses on direct examination: " . . . [Y]ou say the purpose of you all going there the two or three times was

to rob Mr. Morris Mobley, is that right?" Defendants' objections were overruled and the witness answered, "Yes sir." Defendants assert on appeal that permitting this single leading question constitutes prejudicial error sufficient to require a new trial. We disagree. "The allowance of leading questions is a matter entirely within the discretion of the trial judge, and his rulings will not be reviewed on appeal, at least in the absence of a showing of abuse of discretion." Stansbury, N. C. Evidence 2d, § 31 at 59; *State v. Staten,* 271 N.C. 600, 157 S.E. 2d 225; *State v. Painter,* 265 N.C. 277, 144 S.E. 2d 6. We find no abuse of discretion here; moreover, defendants have not been harmed because a more properly phrased question would undoubtedly have brought forth the same information. See *State v. Johnson,* 272 N.C. 239, 158 S.E. 2d 95.

[2] Defendant House assigns as error the form of the court's instruction concerning his failure to testify. The court instructed:

> "He is presumed to be innocent and in this connection I instruct you that the Defendant House chose not to testify in this case, and the law gives him this privilege. The same law also assures him that his decision not to testify will not be used against him. Therefore, you must be very careful not to allow his silence to influence your decision in any way."

It is noted that the instruction given was taken almost verbatim from the pattern jury instructions suggested by the Conference of Superior Court Judges. While an instruction more nearly in the language of G.S. 8-54 is preferred, *State v. McNeill,* 229 N.C. 377, 49 S.E. 2d 733, and *State v. Powell,* 11 N.C. App. 465, 181 S.E. 2d 754, *cert. denied,* 279 N.C. 396, we do not view the instructions given as prejudicial and overrule this assignment of error.

[3] Finally, both defendants contend that prejudicial error arises from a colloquy that occurred when the jury returned to the courtroom after deliberating about forty minutes and asked the trial judge if they could find one defendant guilty or not guilty and the other one undecided. The judge properly instructed them that they could find one defendant guilty and one not guilty. When asked specifically if one could be found "undecided," the judge replied: "Undecided now but I want you to stay in there and work on that."

There is no indication in the record that the jury was deadlocked over a verdict as to either defendant at the time they requested the additional instructions. On the contrary, it appears they simply wanted the court to clarify the alternative verdicts available to them. When they first returned to the courtroom, one of the jurors informed the court that, " . . . we would like to know some of the alternatives as far as passing judgment. . . . " The court's response was in no way coercive and perhaps it was as appropriate under the circumstances as any that could have been made. We hold that no prejudice arose out of the colloquy assigned as error.

A review of the entire record indicates that both defendants received a fair trial free from prejudicial error.

No error.

Judges HEDRICK and VAUGHN concur.

STATE OF NORTH CAROLINA v. FRANK ATLAS, RAYMOND L. RIDGE, AND GERTRUDE HUARD

No. 7212SC811

(Filed 20 December 1972)

1. **Constitutional Law § 14; Sundays and Holidays— validity of Sunday observance law — denial of motion to quash warrant**

The trial court properly overruled defendants' motions to quash warrants against them made on the ground that the ordinance under which they were charged requiring observance of Sunday as a uniform day of rest in the county was unconstitutional.

2. **Constitutional Law § 14; Sundays and Holidays— sale of clothing on Sunday — evidence of other Sunday sales properly excluded**

In a trial where defendants were charged with selling items of clothing on Sunday in violation of an ordinance prohibiting such sales on that day, publications purportedly purchased on a Sunday from a bookstand in the county were properly excluded from evidence, as the ordinance itself specifically provided that newsstands could remain open on Sunday.

Judge CAMPBELL dissents.

APPEAL by defendants from *Godwin, Special Judge,* 17 July 1972 Criminal Session of Superior Court held in CUMBERLAND County.

State v. Atlas

Defendants were convicted in the District Court of Cumberland County of violating a county ordinance, adopted pursuant to authority conferred by G.S. 153-9(55), and entitled *"An Ordinance Concerning the Observance of Sunday as a Uniform Day of Rest in Cumberland County."* Defendants appealed to the Superior Court where they were again convicted. They appeal here from judgments entered in the Superior Court.

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

C. Eugene McCartha of Ervin, Horack & McCartha and J. Duane Gilliam by C. Eugene McCartha for defendant appellants.

GRAHAM, Judge.

The facts are not in dispute: On Sunday, 5 March 1972, defendants sold various items of clothing and wearing apparel while employed at Treasure City, a place of business owned by Whitney Stores, Inc. and located in Cumberland County outside the corporate limits and jurisdiction of any municipality. Section IA of the ordinance in question provides that it shall be unlawful for any person to sell, or offer or expose for sale on a Sunday, any clothing and wearing apparel, clothing accessories, and other enumerated items.

[1] The principal question presented on this appeal is whether the court erred in overruling defendants' motions to quash the warrants, made on the ground that the ordinance under which defendants were charged is unconstitutional. The constitutionality of this ordinance was considered by the Supreme Court in an action brought in 1970 by defendants' employer and other parties. *Whitney Stores v. Clark,* 277 N.C. 322, 177 S.E. 2d 418. In that case, the Supreme Court affirmed a judgment of the Superior Court which had " 'adjudged and declared' the ordinance 'to be constitutional and in all respects valid,' " and noted that the ordinance was essentially the same as ordinances upheld in *Kresge v. Tomlinson,* and *Arlan's Dept. Store v. Tomlinson,* 275 N.C. 1, 165 S.E. 2d 236; *Clark's v. West,* 268 N.C. 527, 151 S.E. 2d 5; and *Charles Stores v. Tucker,* 263 N.C. 710, 140 S.E. 2d 370.

Under the authority of *Whitney Stores v. Clark, supra,* we overrule defendants' contention that they were charged under an unconstitutional ordinance.

[2] In support of their motions to quash the warrant, defendants attempted to introduce several publications which were purportedly purchased on a Sunday from a bookstand in Cumberland County. Defendants' assignments of error challenging the exclusion of this evidence are overruled. The ordinance itself provides that newsstands may remain open on Sunday for the sale of papers, publications and other enumerated items; and also, that nothing in the ordinance "shall be construed to prohibit the publication or the sale of newspapers or magazines by newsstands or newsboys." Consequently, the fact publications of any description could be purchased in Cumberland County on a Sunday was not in issue and the evidence tendered was immaterial.

Affirmed.

Judge BROCK concurs.

Judge CAMPBELL dissents.

STATE OF NORTH CAROLINA v. CLYDE PHIFER

No. 7220SC751

(Filed 20 December 1972)

1. **Criminal Law § 66— in-court identification of defendant based on observation at crime scene — admissibility**

There was competent, clear and convincing evidence in a non-felonious breaking and entering case to support the trial court's findings that an in-court identification of the defendant by a home-owner witness was of independent origin, based exclusively on what the witness observed during and immediately after the housebreaking, and did not result from any out-of-court confrontation or from any pretrial identification procedure suggestive of and conducive to mistaken identification.

2. **Criminal Law § 116— instruction on failure of defendant to testify**

Trial court's instruction that the jury must be very careful not to allow defendant's silence to influence their decision in any way did not constitute prejudicial error, though an instruction more nearly in the language of G.S. 8-54 would have been preferable.

APPEAL by defendant from *Collier, Judge,* 5 June 1972 Session of Superior Court held in ANSON County.

Criminal prosecution on a bill of indictment, proper in form, charging defendant, Clyde Phifer, with felonious breaking

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

At about 7:00 a.m. on 25 May 1971, Lee Thomas Little (Little) returned to his home after working the third shift at Hornwood and went to bed. Between 9:00 and 10:00 a.m., Little was awakened by a knock on the back door. He heard a car door slam, looked through the window and saw a white, 1965 Ford pull away. Little went back to sleep and was awakened about 11:00 a.m. by a noise emanating from the back of the house. Little got out of bed, walked down the hall into the den where he saw the defendant, a man he had never seen before, leaning over. Little testified: "[H]e straightened up and looked me directly in the face and asked me what in the hell I was doing there. And I stared at him and told him to wait a minute. . . ." Little went to the bedroom to get a gun and when he returned he found that the defendant had failed "to wait a minute" and had left the premises. Little saw two people running into the woods behind his home. He followed the men through the woods and saw a white, 1965 Ford stuck in a ditch. One man was in the car and the other man was "standing on the car." Little went back and "stopped someone to call the law." When deputy sheriff Harward responded to the call, Little gave him the following description: "[T]he man . . . was about 190 pounds, had a gut hanging . . . was in his late forties or fifties. He was wearing a pair of brown khakis, wearing a cap."

Defendant offered no evidence. The case was submitted to the jury on the charge of non-felonious breaking and entering.

The defendant was found guilty of the misdemeanor. From a judgment imposing a jail sentence of from 18 to 24 months, defendant appealed.

Attorney General Robert Morgan and Assistant Attorney General Raymond W. Dew, Jr., for the State.

Jones & Drake by Henry T. Drake for defendant appellant.

HEDRICK, Judge.

[1] Defendant's first, second and third assignments of error challenge Little's in-court identification of defendant as the perpetrator of the crime charged.

When the defendant objected to the testimony of Little's identification of the defendant as the person he saw and spoke

to in his den, the trial judge followed the procedure prescribed by Chief Justice Bobbitt in *State v. Accor* and *State v. Moore,* 277 N.C. 65, 175 S.E. 2d 583 (1970) by conducting a *voir dire* hearing in the absence of the jury, where, after hearing the testimony of Little, Deputy Sheriff Harward, and the defendant, the court made findings of fact as to any out of court confrontation between the witness and the defendant, and as to what the witness observed during and immediately after the housebreaking. There was competent, clear and convincing evidence to support the court's findings that the in-court identification of the defendant by Little was of independent origin, based exclusively on what he observed during and immediately after the housebreaking, and did not result from any out of court confrontation or from any pretrial identification procedure suggestive of and conducive to mistaken identification. Such findings when supported by competent evidence are conclusive on appellate courts, both State and Federal. *State v. McVay* and *State v. Simmons,* 279 N.C. 428, 183 S.E. 2d 652 (1971); *State v. Blackwell,* 276 N.C. 714, 174 S.E. 2d 534 (1970), cert. denied 400 U.S. 946, 27 L.Ed. 2d 252, 91 S.Ct. 253 (1970); *State v. Sneed,* 14 N.C. App. 468, 188 S.E. 2d 537 (1972).

By his fourth assignment of error, defendant contends the court erred in denying his motion for judgment as of nonsuit. There was plenary, competent evidence to require submission of the case to the jury and to support the verdict.

[2] Defendant assigns as error the form of the court's instruction concerning his failure to testify when the court stated: "Therefore, you must be very careful not to allow his silence to influence your decision in any way." While an instruction more nearly in the language of G.S. 8-54 is preferable, *State v. McNeill,* 229 N.C. 377, 49 S.E. 2d 733 (1948), and *State v. Powell,* 11 N.C. App. 465, 181 S.E. 2d 754 (1971), cert. denied 279 N.C. 396 (1971), we do not consider the instructions given to be prejudicial and therefore overrule this assignment of error.

Finally, by his sixth assignment of error, the defendant contends "the court erred in commenting upon the evidence in the court's charge to the jury" in violation of G.S. 1-180. We have examined the four exceptions upon which this assignment of error is based and find them to be without merit.

The defendant had a fair trial free from prejudicial error.

No error.

Chief Judge MALLARD and Judge MORRIS concur.

IN THE MATTER OF ROBERT LEE MOSES, JUVENILE

No. 7226DC821

(Filed 20 December 1972)

Criminal Law § 150— substitution of commitment of juvenile for probation — infringement of right to appeal

It was error for the court to strike a judgment in which prayer for judgment was continued and a juvenile was placed on probation and to substitute therefor a judgment committing the juvenile to the custody of the Board of Youth Development for an indeterminate time where it appears from the record that the order of commitment was induced by defendant's expression, through counsel, of his intention to appeal an order of the court that he shave and cut his hair, the court's action being an infringement of defendant's right to appeal.

APPEAL by respondent from *Beachum, District Judge,* 10 August 1972 Session of District Court held in Mecklenburg County.

On 19 June 1972, Thomas F. McCall, III filed a juvenile petition in Mecklenburg County District Court alleging that on 31 May 1972 he was assaulted in the hallway of Smith Junior High School by respondent, a child under the age of sixteen. A hearing on the petition was held before Judge Clifton Johnson on 20 July 1972. Judge Johnson adjudged respondent a delinquent child and ordered the case continued for judgment.

On the morning of 10 August 1972 defendant and his counsel appeared before Judge Beachum for judgment. The proceedings before Judge Beachum were not recorded; however, stipulations appearing in the record tend to show that after the evidence that had been presented in the previous hearing was summarized, Judge Beachum instructed the clerk that prayer for judgment was continued and that respondent was to be placed on probation without report for an indeterminate period of time. The judge then ordered respondent to return to court that afternoon ". . . with your hair cut not longer than

one-half inch and your face shaved," or words to that effect. The juvenile's counsel moved that this order be stricken, and when the court refused to strike the order, gave notice of appeal "insofar as the juvenile is ordered to shave and cut his hair." Following this notice of appeal, the court instructed the clerk to enter a new order committing respondent to the custody of the Board of Youth Development for an indeterminate period of time. Respondent appeals from judgment containing this order.

Attorney General Morgan by Associate Attorney Silverstein for the State.

Mraz, Aycock & Casstevens by Frank B. Aycock III for juvenile Robert Lee Moses.

GRAHAM, Judge.

The judgment ordering respondent committed to the Board of Youth Development for an indeterminate period of time must be vacated and the cause remanded for resentencing.

It has been repeatedly held in this jurisdiction that a defendant's right to appeal may not be denied or abridged, nor may his attempt to exercise this right impose upon him an additional penalty or an enlargement of his sentence. *State v. May,* 8 N.C. App. 423, 174 S.E. 2d 633, and cases cited therein. It appears from the circumstances described in the record that the action of the trial judge in ordering defendant committed for an indeterminate period was induced by defendant's expression, through counsel, of his intention to appeal the order to cut his hair and shave. The State candidly agrees that such practice has been specifically rejected in this State and in its brief quotes from *State v. Patton,* 221 N.C. 117, 118-19, 19 S.E. 2d 142, 143-44, as follows:

> "However, it appears from the record that after the trial judge had imposed sentence that the prayer for judgment be continued on condition that the defendant be of good behaviour and pay a fine of $25.00 and the costs, the defendant gave notice of appeal. Thereupon the judge ordered the previous judgment stricken out and imposed a sentence of ninety days in jail.
>
> 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. . . .

. . . 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."

We find the instant case indistinguishable from *Patton.*

The subject of "hair" apparently continues, in some instances, to be a source of irritation between persons of different generations. The respondent seeks a decision as to whether a juvenile court may lawfully order him to cut his hair and shave. Since the court's order to this effect was stricken, the question is not before us, and until it is properly presented, we will devote our attention to problems of greater moment. Perhaps the question will never arise, for in most instances juvenile courts will undoubtedly find that there are other probationary conditions which are as well designed to rehabilitate a delinquent and assist him in leading a law abiding life as the requirement that he cut his hair and shave.

Judgment vacated and case remanded.

Judges CAMPBELL and BROCK concur.

HOME MUTUAL INSURANCE COMPANY v. JAMES O. VICK, T/A VICK'S RADIO AND TV SALES AND SERVICE, AND WESTINGHOUSE ELECTRIC CORPORATION

No. 727DC674

(Filed 20 December 1972)

Sales § 14— breach of implied warranty — necessity for privity of contract

The purchaser of a television set from a retailer has no cause of action against the manufacturer for breach of implied warranty to recover for damages sustained when a fire in the television set destroyed the set and damaged the purchaser's home, since there is no privity of contract.

APPEAL by plaintiff from *Carlton, District Judge,* 1 May 1972 Civil Session of District Court held in NASH County.

Subrogation action by plaintiff to recover damages paid to Harold Winstead and his wife Dorathy W. Winstead under the terms of a fire insurance policy issued to them by plaintiff.

In August of 1967, the Winsteads purchased a color television set from defendant Vick, a retail television dealer in Rocky Mount. The television set was manufactured by defendant Westinghouse and sold by Westinghouse to Vick in August of 1967 or prior thereto. Vick, or his employees, installed the television set in the Winstead home and repaired the set when it developed trouble several months later. The television set was repaired by Vick a second time in February of 1968. On 21 February 1968, approximately two weeks after the second repair, a fire occurred in the television set, totally destroyed the set, and caused fire damage to the Winsteads' house. Plaintiff paid the Winsteads' insurance claim for fire damage and brought this action to recover against defendants for breach of implied warranty.

At the conclusion of plaintiff's evidence the court allowed the motion of defendant Westinghouse for a directed verdict. Plaintiff then took a voluntary dismissal against defendant Vick and appealed from the judgment allowing the motion of defendant Westinghouse.

Fields, Cooper & Henderson by Milton P. Fields for plaintiff appellant.

Teague, Johnson, Patterson, Dilthey & Clay by Ronald C. Dilthey for defendant appellee Westinghouse Electric Corporation.

GRAHAM, Judge.

Plaintiff was unable to show any privity of contract between the ultimate purchasers of the television set and defendant Westinghouse, the manufacturer. It seeks, however, to have us abandon the general principle that where an ultimate consumer of a product suffers injury or damage through its use, he has a cause of action against the manufacturer of the product for breach of implied warranty only in the event there is privity of contract between him and the manufacturer. *Wyatt v. Equipment Co.,* 253 N.C. 355, 117 S.E. 2d 21.

A similar effort to have the privity requirement abandoned in breach of warranty cases was made in the case of *Byrd v. Rubber Co.*, 11 N.C. App. 297, 181 S.E. 2d 227. In that case the employee of a retailer of new tractor tires sought to recover against the tire manufacturer for injuries sustained when a tire exploded while being mounted by the employee. In an opinion sustaining a dismissal of the case, Judge Morris noted that in *Corprew v. Chemical Corp.*, 271 N.C. 485, 157 S.E. 2d 98, our Supreme Court abandoned the requirement of privity in tort actions for negligence. She also noted that other exceptions to the privity rule have developed in North Carolina, and concluded with the following:

> "It is true that there has been some slight erosion in this State of the privity requirement in breach of warranty actions. This has been limited to food and drink and insecticides in sealed containers which had warnings on the label which reached the ultimate consumer. . . . Perhaps the rationale for abandoning the requirement in negligence actions applies with equal force to breach of warranty actions. However, we find no case in this State accomplishing for breach of warranty actions what *Corprew* accomplished for negligence actions. *Wyatt* remains the applicable rule in this case. To hold otherwise would, in our opinion, require us to ignore or overrule *Wyatt*. This we cannot do."

We find persuasive plaintiff's arguments in favor of abandoning the privity doctrine in warranty actions. However, the authority to reexamine the rule belongs to the Supreme Court and not to us. We therefore affirm the judgment of the District Court.

Affirmed.

Judges HEDRICK and VAUGHN concur.

STATE OF NORTH CAROLINA v. ROBERT McCUIEN

No. 724SC792

(Filed 20 December 1972)

Criminal Law § 84; Searches and Seizures § 3— sufficiency of affidavit to support search warrant — admissibility of seized heroin and syringe

An affidavit indicating the reliability of its information by naming an informant, indicating the value of his past assistance and corroborating that information with statements from other officers was sufficient to support the issuance of a search warrant for defendant's premises, and bags of heroin, a needle and syringe and other items seized as a result of the search were admissible.

APPEAL by defendant from *Rouse, Judge,* 15 March 1972 Session of Superior Court held in ONSLOW County.

Defendant was tried on three indictments charging him with manufacturing heroin, possessing heroin and with possession of an instrument and implement adapted for the use of administering injections of heroin for the purpose of administering such injections, all in violation of the North Carolina Controlled Substances Act. At the close of the State's evidence, defendant was granted a nonsuit as to the charge of manufacturing heroin.

The State's evidence tended to show that eight officers from the Jacksonville Police Department and the Onslow County Sheriff's Department, in possession of a search warrant and some felony arrest warrants for defendant, went to defendant's apartment. After announcing who they were and failing to be admitted, the officers obtained entrance by force. As they did so, they heard the sound of glass breaking in the front bedroom. Defendant was found in the front bedroom with a fresh cut on his right arm and the front window of the bedroom had a pane broken. There were red stains on the remaining jagged edges. A plastic bag was found outside near a corner of the porch of the apartment approximately nine feet away from the bedroom's broken front window. The bag contained 79 "bindles" and four of those bindles, selected at random and tested by a chemist, contained the controlled substance, heroin. A large syringe and needle were found in a dresser drawer in the bedroom. Three used "cooker caps" containing residue and traces of heroin, two syringe parts, a particle of a syringe, a needle and extra "cooker caps" all were found in defendant's kitchen.

A number of cut sections of glassine paper and cut sections of "tin foil" were also found in the kitchen.

Defendant's evidence tended to show that six days after the search at defendant's apartment, he was examined by a doctor who found a hematoma on defendant's upper right arm. The doctor found no cuts or evidence of cuts on defendant's arm at that time. Defendant testified that he was awakened by banging at the door. As he sat up in bed, the side window of the bedroom was broken and he was struck on his upper right arm by what he thought was the butt of a gun. Defendant denied using and selling drugs and also denied breaking the front window. He stated that other people had been in the apartment earlier in the evening.

Defendant was found guilty and sentenced to five years imprisonment for illegal possession of heroin and he was found guilty and sentenced to serve two years for possession of a hypodermic syringe or needle for the purpose of administering heroin. The sentences are to run consecutively.

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

Edward G. Bailey for defendant appellant.

VAUGHN, Judge.

Defendant assigns as error the court's finding that the search of defendant's premises was lawful and that the evidence obtained as a result of the search was admissible. He contends that the search warrant is invalid because the affidavit upon which it is based is insufficient. Defendant cites, among others, G.S. 15-26(b); *Aguilar v. Texas,* 378 U.S. 108, 12 L.Ed. 2d 723, 84 S.Ct. 1509; and *Spinelli v. United States,* 393 U.S. 410, 21 L.Ed. 2d 637, 89 S.Ct. 584.

Defendant's assignments of error directed to the validity of the search warrant are overruled. The affidavit indicates the reliability of the information by naming an informant, indicating the value of his past assistance and corroborating that information with statements from other officers. In pertinent part, the affidavit recites: ". . . this officer has received information from a reliable source that heroin has been used and is being stored in this apartment. Authur Burke has advised that he has seen heroin in Robert McCuien's apartment and

that is *(sic)* there now. Lt. Jerry Reed has received information from several sources that heroin is being sold and used in this apartment. This apartment has the reputation of a heroin hold where drugs are sold. Two of the girls that works *(sic)* as prostitutes in this apartment use heroin regularly. Det. W. C. Jarman has been receiving information that heroin is being sold at this apartment. Arthur Burke has given Lt. Reed and State ABC Officer Jerry Flowers good reliable *(sic)* on numerous occasions that *(sic)* resulted in arrests and convictions for drug cases and larceny cases." Here the informant states unequivocally that he has seen heroin in defendant's apartment and that heroin is presently on the premises. The affiant also states that two girls associated with the apartment use heroin regularly. *Spinelli, supra,* holds that in the absence of a statement by the informer detailing the manner in which his information was gathered, it is especially important that he describe the accused's criminal activities in sufficient detail that the magistrate may know he is acting on something more substantial than a casual rumor or the accused's general reputation. The informant in *Spinelli* had merely concluded that the accused was engaged in a bookmaking operation without stating any circumstances from which the informant had reached his conclusion. In the present case, however, the informant stated that he had seen the heroin and that it was then presently in the defendant's apartment. The magistrate could reasonably infer from the details recited in the affidavit that the informant had gained his information in a reliable way. *Draper v. United States,* 358 U.S. 307, 3 L.Ed. 2d 327, 79 S.Ct. 329. We hold that the affidavit in the present case is sufficient to reasonably satisfy the magistrate that probable cause existed. *United States v. Harris,* 403 U.S. 573, 29 L.Ed. 2d 723, 91 S.Ct. 2075.

Defendant's other assignments of error have been considered and are overruled.

No error.

Judges HEDRICK and GRAHAM concur.

STATE OF NORTH CAROLINA v. CHARLIE CLEMMONS

No. 7221SC709

(Filed 20 December 1972)

Constitutional Law § 13; Municipal Corporations § 33— ordinance prohibiting open air meetings on public streets and sidewalks — constitutionality

Ordinance of the City of Winston-Salem prohibiting any person or group to conduct an open air public meeting on a public street, alley, sidewalk or mall without first obtaining a permit from the Board of Aldermen *is held* constitutional.

APPEAL by defendant from *Gambill, Judge,* 15 May 1972 Session of Superior Court held in FORSYTH County.

Defendant was convicted of conducting an open air meeting in violation of the following ordinance of the City of Winston-Salem:

"AN ORDINANCE PROMOTING THE FREE FLOW OF VEHICULAR AND PEDESTRIAN TRAFFIC UPON THE PUBLIC STREETS, SIDEWALKS, ALLEYS, AND MALLS IN THE CITY OF WINSTON-SALEM. D-17233 Ord. 3132 (Adopted Sept. 7, 1971).

WHEREAS, the General Assembly of North Carolina has authorized cities to 'adopt such ordinances for the regulation and use of the streets, squares, and parks, and other public property belonging to the City, as it may deem best for the public welfare of the citizens of the City'; and

WHEREAS, the Board of Aldermen of the City of Winston-Salem finds that the holding of open air public meetings by the delivery of sermons, lectures, addresses and discourses on the City streets, sidewalks, alleys and malls needs to be regulated in the interest of promoting the free flow of vehicular and pedestrian traffic, and in promoting the peace, good order and public welfare of the citizens of the City;

NOW, THEREFORE, BE IT ORDAINED by the Board of Aldermen of the City of Winston-Salem:

SECTION 1. Chapter 19 of the Winston-Salem Code is hereby amended by adding at the end thereof a new section to read as follows:

"Sec. 19-62. Conducting Open Air Public Meetings on Public Streets, Alleys, Sidewalks and Malls.

(a) No person or group of persons shall hold an open air public meeting upon a public street, alley, sidewalk or mall unless a permit therefor shall first be obtained from the Board of Aldermen of the City of Winston-Salem. For purposes of this section, an open air public meeting is defined to include the delivery of a public address, lecture, sermon or discourse, or the conducting of a public musical or theatrical performance.

(b) Every permit issued under this section shall be in writing and shall specify the day and hour of such open air public meeting, and shall be limited to a specific occasion on a single day.

(c) Application shall be made to the Board of Aldermen in writing, using forms provided by the said Board, and shall be filed with the secretary to the Board. The Board shall act upon the application at the first meeting of the Board held more than two working days (exclusive of the Board meeting day) after the filing of the application. No permit shall be denied by the Board of Aldermen unless the Board finds that the proposed open air public meeting will conflict with one already scheduled, or that the proposed open air public meeting will seriously obstruct the free flow of vehicular or pedestrian traffic.

(d) A permit shall not be required to hold an open air public meeting on other public property of the City of Winston-Salem, where such open air public meetings does not encroach or go upon any City street, alley, sidewalk or mall, provided public property is not damaged thereby, ingress and egress to public buildings and other public areas is not obstructed, and the public business is not impeded.

(e) Any person who violates this ordinance shall be guilty of a misdemeanor punishable as prescribed by G.S. 14-4, on and after September 21, 1971.

SECTION 2. This ordinance shall become effective upon adoption."

Judgment was entered imposing a thirty day jail sentence, suspended for one year upon the condition that defendant not

violate any of the laws of the State of North Carolina, particularly the ordinances of the City of Winston-Salem and Forsyth County.

Attorney General Robert Morgan by Parks H. Icenhour, Assistant Attorney General, and Edwin M. Speas, Jr., Associate Attorney, for the State.

Drum, Liner & Redden by Charles R. Redden for defendant appellant.

VAUGHN, Judge.

The evidence of defendant's guilt was cogent. In fact, the evidence strongly suggests that defendant deliberately violated the ordinance in order to "test" the same. Defendant brings forward one exception to the charge of the court which is overruled. The remainder of defendant's brief is devoted to argument on the following assignments of error:

> "1. The trial judge erred in failing to allow the defendant's motion to quash the warrant, which motion was based on the unconstitutionality of the ordinance under which the warrant was issued." and;
>
> "3. The trial judge erred in failing to quash the warrant under which the defendant was charged in that the ordinance by the evidence presented is unconstitutional; is discriminatorily enforced; unconstitutionally vague; and in conflict with existing ordinances adopted by the City of Winston-Salem."

These assignments of error are overruled. We find no prejudicial error in the trial from which defendant appealed.

No error.

Judges HEDRICK and GRAHAM concur.

STATE OF NORTH CAROLINA v. CLYBURN LEROY MOSES

No. 7220SC808

(Filed 20 December 1972)

Assault and Battery § 9— defense of third person — insufficiency of evidence to support charge

Evidence tending to show that the victim of an assault was in defendant's place of business, that the victim and his wife began arguing and wrestling and that defendant then shot the victim in the leg did not present the question of defense of a third person and the trial court properly failed to instruct on that doctrine.

APPEAL by defendant from *Falls, Judge,* 31 July 1972 Session of STANLY County Superior Court.

Defendant was tried on a proper indictment charging that on 28 March 1971, he did assault Eugene Lee with a deadly weapon with intent to kill, inflicting serious injury not resulting in death, in violation of G.S. 14-32(a). At the close of the State's evidence defendant's motion for nonsuit to the intent to kill assault was granted, and the case was submitted to the jury under G.S. 14-32(b), assault with a deadly weapon, inflicting serious injury not resulting in death.

All the evidence tended to show that defendant was the proprietor of South Street Grill in Albemarle. On 28 March 1971 Eugene Lee was in the grill talking to a girl named Poochie. Shortly thereafter Lee's wife, Dorothy, entered the grill, saw Lee and Poochie, and began arguing with Lee. When Dorothy tried to hit Lee, he grabbed her arms, and they wrestled, Dorothy was pushed against a freezer and Lee admitted that he probably was cursing her.

A shot was fired, and Lee was wounded in the right leg, 8 to 12 inches above the knee. Lee saw defendant holding a small pistol.

Approximately one month prior to this occasion Lee and two others had been making noise in the grill and were told by the defendant to leave. Lee testified that defendant on this occasion said he had told Lee to stop the argument and leave the grill; that defendant was tired of Lee coming into his grill and "trying to take over."

The defendant offered no evidence.

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

Coble, Morton & Grigg by Ernest H. Morton, Jr., for defendant appellant.

CAMPBELL, Judge.

Defendant contends the trial court committed prejudicial error in failing to instruct the jury that at the time the shot was fired defendant was acting in defense of Dorothy Lee, and that therefore the assault was excused. There is no merit in this contention.

Persons in a family relation, and persons in the relation of master and servant, have the reciprocal right to come to the aid and defense of the person in that relation when faced with an assault. The law does not allow this interference as an indulgence of revenge, but merely to prevent injury. The assistant's act may not be in excess of that which the law would allow the assisted party, for they are in a mutual relation one to another. *State v. Johnson,* 75 N.C. 174 (1876); *State v. Gaddy,* 166 N.C. 341, 81 S.E. 608 (1914).

Where a felonious assault is about to be committed, strangers may invoke the doctrine of self-defense of others under certain circumstances. *State v. Rutherford,* 8 N.C. 457 (1821); *State v. Robinson,* 213 N.C. 273, 195 S.E. 824 (1938); *State v. Fields,* 268 N.C. 456, 150 S.E. 2d 852 (1966).

In an assault case the defendant has no burden to prove self-defense. Thus, assault cases differ from the rule in homicide cases. *State v. Cephus,* 239 N.C. 521, 80 S.E. 2d 147 (1954).

In any event there must be some evidence pertaining to the doctrine before the Court is required to charge about it. Where there is no evidence from which the jury could find that the defendant reasonably believed a third person was in immediate peril of death or serious bodily harm at the hands of another, it would be improper for the Court to instruct on defendant's defense of a third person as justification for the assault. *State v. Cooper,* 266 N.C. 644, 146 S.E. 2d 663 (1966).

In the instant case there is no evidence that Lee was committing a felonious assault on his wife, Dorothy, or that the defendant had reasonable grounds to believe that he was. There was no evidence of a special relationship between defendant and

Dorothy Lee; and there being no felonious assault, there was no occasion for the application of the doctrine of self-defense of a third person.

No error.

Judges BROCK and GRAHAM concur.

STATE OF NORTH CAROLINA v. OTIS LEE LEWIS

No. 7226SC833

(Filed 20 December 1972)

Criminal Law § 156— certiorari — absence of assignments of error — review of record

On *certiorari* the record proper will be examined for error of law appearing thereon notwithstanding the absence of exceptions and assignments of error.

ON *certiorari* to review the order of *McLean, Judge*, 29 May 1972 Criminal Session of MECKLENBURG Superior Court.

Defendant was tried on a valid indictment charging him with felonious breaking or entering, larceny and receiving. Upon his plea of not guilty, trial was conducted before a jury, which found defendant guilty of nonfelonious breaking or entering, in violation of G.S. 14-54(b). Defendant was sentenced to imprisonment for a term of two years.

The State's evidence tended to show that on the night of 14 September 1970, Mr. P. B. Owens, the proprietor of a Midas Muffler Shop in Charlotte, North Carolina, locked the shop and left about 8:00 p.m. In response to a call from a Charlotte policeman he returned to the shop at about 1:30 a.m., 15 September 1970, and saw that the lights were on inside the building, and that the lock on the back door was broken. Some change that had been under the cash register was missing.

Mr. Owens did not know the defendant, had never seen him before that night, and did not give him permission to enter the shop.

Officer J. M. Bryant of the Charlotte Police Department testified that on the night of 14-15 September 1970 he saw a

car parked behind the Muffler Shop. The rear door of the shop was open, and the inside lights were burning. Upon investigation, Officer Bryant found the defendant inside the building in the rest room; no other person was observed in the building. Defendant had in his possession some change and currency. Deposit envelopes containing money of the Muffler Shop were found in a paper towel rack in the rest room.

The defendant's evidence tended to show that defendant had gone to the Muffler Shop on the night of 14-15 September 1970 with one Walter Jackson, who had told defendant that he (Jackson) had a job cleaning the building. Jackson went into the building; defendant waited about forty minutes outside in the car, after which time defendant went into the building to find Jackson.

Jackson said he had to make a bank deposit, and went to the front of the building. At that time the police arrived and "accosted" defendant. Defendant testified that he had been cooperating with the police in their attempt to apprehend Walter Jackson.

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

Arthur Goodman, Jr., for defendant appellant.

CAMPBELL, Judge.

The record contains no exceptions or assignments of error; defendant concedes in his brief that he can find no error in the trial. On certiorari the record proper will be examined for error of law appearing thereon notwithstanding the absence of exceptions and assignments of error. *Furniture Co. v. Herman,* 258 N.C. 733, 129 S.E. 2d 471 (1963).

Having conducted a search of the face of the record proper, we are unable to discover error in the conduct of the trial.

The indictment charging felonious breaking or entering is proper in form. *State v. Sellers,* 273 N.C. 641, 161 S.E. 2d 15 (1968). Nonfelonious breaking or entering (without intent to commit a felony) is a lesser included offense of the felony of breaking or entering with intent to commit a felony under G.S. 14-54(a). *State v. Fowler,* 1 N.C. App. 549, 162 S.E. 2d 39 (1968).

Punishment upon conviction of the offense prohibited by G.S. 14-54(b) is authorized by G.S. 14-3(a); fine, or imprisonment for a term not exceeding two years, or both.

No error.

Judges MORRIS and PARKER concur.

STATE OF NORTH CAROLINA v. RONALD COLEMAN

No. 7226SC669

(Filed 20 December 1972)

Larceny § 7— sufficiency of evidence for jury

The State's evidence was sufficient for submission to the jury on the issue of defendant's guilt of larceny of an automobile where it tended to show that on 19 January 1972 police officers stopped an automobile driven by a State's witness that had been stolen from a car dealer's premises in early October 1971, that while officers had the automobile stopped, defendant approached and stated that it was his automobile but failed to produce a vehicle registration for it upon request, that the automobile bore a license tag that had been reported lost or stolen, and that defendant had been in possession of the automobile for the two months that the driver had known him prior to being stopped by the police.

APPEAL by defendant from *McLean, Judge,* 24 April 1972 Schedule "C" Session of Superior Court held in MECKLENBURG County for the trial of criminal cases.

Defendant was charged in a bill of indictment, proper in form, with the felony of larceny. The evidence for the State tended to show that Avis Rent-A-Car (Avis) purchased from Town and Country Ford, Inc. (Town and Country) a 1972 Ford LTD automobile bearing serial No. 2N64S103637. Shortly after it was delivered on or about 1 October 1971, with 39 or 40 others, it was observed that the paint on this automobile was not of a uniform color. It bore N. C. License No. 6040-C. It was returned to Town and Country around the first of October 1971 for repainting. While it was being processed at the place of business of Town and Country, it was stolen. It had a fair market value of $3,866.35. On 19 January 1972, a police officer of the City of Charlotte stopped the stolen automobile which was

being operated by State's witness Carlton Johnson (Johnson). While the police had the automobile stopped, the defendant approached and stated that it was his automobile but did not produce a vehicle registration for it upon request. The automobile did not have on it the license tag (6040-C) issued for it but bore a license tag that had been reported lost or stolen during the latter part of November 1971. Johnson testified for the State that at the time he was stopped by the police while operating the stolen vehicle, he had known the defendant for about two months and that the defendant had been in possession of the car during all that time.

The defendant offered no evidence.

From a verdict of guilty and judgment of imprisonment, the defendant appealed, assigning error.

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

L. Stanley Brown for defendant appellant.

MALLARD, Chief Judge.

In the original record the serial number of the stolen vehicle is correctly stated in the bill of indictment as 2N64S103637, while in the testimony of the witness and the charge of the court, the serial number is stated as "2N641103637." After the record on appeal in this case was reproduced, the court reporter filed an affidavit in the office of the Clerk of Superior Court of Mecklenburg County in which she stated that she made an error in transcribing the serial number as "2N641103637" in the original record and that in the testimony of witnesses and the charge of the court the serial number was correctly stated as 2N64S103637. This correction has been certified to this court by the Clerk of the Superior Court of Mecklenburg County.

The defendant contends that the trial judge committed error in failing to allow his motion for judgment as of nonsuit. The evidence was circumstantial, but we think it was ample to require submission of the case to the jury.

Defendant also contends that the trial judge committed error in the admission of evidence and in the charge to the jury. We do not agree. After carefully examining all of the defend-

ant's assignments of error, we are of the opinion that the defendant has had a fair trial, free from prejudicial error.

No error.

Judges BROCK and BRITT concur.

STATE OF NORTH CAROLINA v. ARMANDO A. DALE-WILLIAMS

No. 724SC788

(Filed 20 December 1972)

1. **Criminal Law § 36.1— failure to charge on alibi — no error**

Where defendant who was charged with common law robbery testified that he won the victims' money and a watch in a poker game at a cafe near the scene of the alleged crime, the testimony served only to explain how defendant came into possession of the items and did not raise the defense of alibi.

2. **Arrest and Bail § 7— refusal of arresting officer to search for witnesses**

Defendant's rights were not violated when, upon his arrest for robbery, the police officer took him immediately to jail rather than on a search for witnesses.

ON *certiorari* to review judgment entered by *James, Judge,* at the 17 May 1971 Session of Superior Court held in ONSLOW County.

Defendant was tried on his plea of not guilty to a charge of armed robbery. The State presented the testimony of two young marines, the alleged victims of the robbery, each of whom identified defendant as one of the persons whom they met while drinking beer at a place known as "Jazzland" in Jacksonville, N. C. These witnesses testified that defendant told them he knew where he could find some girls, that for this purpose they left the premises with defendant and with one Young, and that shortly thereafter, after crossing the railroad tracks and while walking between two buildings, defendant and Young seized them and robbed them of their money and a watch while defendant held a knife to the throat of one of the victims. Within fifteen minutes after the robbery the two victims returned to the area with a police officer, who arrested the defendant and Young after the two victims had identified them. The officer

searched defendant and found the stolen watch on his arm above the elbow and under his sweater, an open pocket knife wrapped in a piece of newspaper in his pocket, and money in his wallet bearing serial numbers matching the numbers on bills with which the two young marines had that day been paid. (The two victims testified that at the suggestion of their sergeant they had prepared and kept written lists containing the serial numbers of the bills with which they had been paid.)

Defendant and Young (who was tried jointly with defendant but whose rights are not involved on this appeal) testified that they had not been to Jazzland that night, but had met the two marines at Shaw's Cafe, a premises near the scene of the alleged robbery, and had there won their money and the watch in a poker game.

The jury found defendant guilty of common-law robbery, and from judgment imposing a prison sentence, defendant gave notice of appeal. Subsequently, this Court allowed defendant's petition for certiorari to permit him to perfect a late appeal.

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

James R. Strickland for defendant appellant.

PARKER, Judge.

[1] Appellant contends the trial judge erred in failing to instruct the jury on the law applicable to the defense of alibi. In this there was no error. The evidence did not raise the defense of alibi. Defendant's testimony that he was playing poker with the victims of the robbery served to explain how he came into possession of their money and the watch. It did not serve to place defendant at such a distance from the victims and the scene of the robbery as to raise a question whether he could have been present at the time and place that they testified the robbery occurred. On conflicting evidence the jury believed the testimony of the State's witnesses rather than the testimony of the defendant and his codefendant. This was their province.

[2] Next, defendant contends his rights were violated at the time of his arrest when the arresting officer refused his request that he be taken immediately back to Shaw's Cafe so that he might obtain witnesses on the spot to prove that he had been

there playing cards. However, under the circumstances disclosed by the evidence in this case we find no violation of defendant's rights when the officer took him and his codefendant immediately to jail rather than on a search for witnesses. Indeed, it may have been imprudent for the officer to have done otherwise. Futhermore, the record discloses that within four days after defendant's arrest counsel was appointed to represent him, and nothing in the record suggests that he did not have the full assistance of his counsel in seeking and interviewing witnesses in his behalf.

We have carefully examined all of defendant's remaining assignments of error and find them without merit.

No error.

Judges CAMPBELL and MORRIS concur.

STATE OF NORTH CAROLINA v. BILLY RAY BELK

No. 7220SC759

(Filed 20 December 1972)

1. **Automobiles § 127— drunk driving case — sufficiency of evidence**

The trial court properly denied defendant's motion for nonsuit in a drunk driving case where State's evidence tended to show that an officer observed defendant operating a truck, backing it from a position in a ditch onto the street, that the officer observed that defendant was unsteady on his feet and smelled of alcohol and that defendant admitted to the officer that he had been drinking.

2. **Criminal Law § 163— failure to except to jury instructions**

Assignment of error to jury instructions which is not supported by an exception set out in the record will not be considered by the Court on appeal. Court of Appeals Rule 21.

APPEAL by defendant from *Godwin, Judge,* 5 June 1972 Session of Superior Court held in UNION County.

The defendant, Billy Ray Belk, was charged in a warrant, proper in form, with operating a motor vehicle upon a public highway while under the influence of an intoxicating beverage. Upon the defendant's plea of not guilty, the State offered evidence tending to show that at about 2:30 a.m. on 15 January 1972, Officer Joe Moore of the Monroe Police Department saw

the defendant operating a truck at the intersection of Windsor and Saco Streets in the town of Monroe. When the officer first saw the truck, the left wheels were on the pavement of Windsor Street and the right wheels were in a ditch. Officer Moore testified:

> ". . . The vehicle was moving and backing up. The vehicle moved approximately 30 feet. It backed out of the ditch with the right front wheel in the ditch. It backed out of the ditch into Saco Street. The entire vehicle was in the street."

Officer Moore went to the vehicle and found the defendant sitting behind the steering wheel. Officer Moore testified:

> ". . . The defendant stepped out of the vehicle when I asked him to. The defendant was unsteady on his feet, staggery, and had to lean against the truck for support. I also smelled alcohol which was very strong. He walked about four feet to lean against the truck. . . . I also asked him if he had been drinking. He admitted to his drinking."

Officer Moore testified that in his opinion, defendant was under the influence of some intoxicating beverage. The defendant refused to take the breathalyzer test.

Defendant testified that on 15 January 1972 he was a passenger in his truck being operated by Everette Carpenter when the truck became stuck in a ditch. While Carpenter went to telephone his wife, the defendant and three other men lifted the truck out of the ditch and moved it about three or four feet. Defendant denied operating the vehicle at any time but admitted that he had been drinking.

The defendant was found guilty. From a judgment imposing a prison sentence of six months, suspended on condition that defendant pay a fine of $250.00, pay the costs, and not operate a motor vehicle for eighteen months, defendant appealed.

Attorney General Robert Morgan and Assistant Attorney General Richard B. Conely for the State.

John G. Plumides for defendant appellant.

HEDRICK, Judge.

[1] Defendant assigns as error the denial of his motion for judgment as of nonsuit. The record discloses the following at the close of the State's evidence:

"MR. PLUMIDES: We make motion at the close of the State's Evidence, if your Honor pleases.

COURT: Overruled."

No exception appears in the record to any of the rulings of the trial judge. Nevertheless, we have carefully reviewed the record and find there was plenary, competent evidence to require submission of this case to the jury and to support the verdict.

[2] The defendant, by his second assignment of error, contends the Court erred in its instructions to the jury. This assignment of error is not supported by an exception set out in the record and will not be considered. Rule 21, Rules of Practice in the Court of Appeals of North Carolina.

The defendant had a fair trial free from prejudicial error.

No error.

Chief Judge MALLARD and Judge MORRIS concur.

EMILIE H. THOMAS, ADMINISTRATRIX OF THE ESTATE OF LARRY LEE THOMAS v. PENNSYLVANIA NATIONAL MUTUAL CASUALTY INSURANCE COMPANY

No. 7219SC634

(Filed 20 December 1972)

Automobiles § 68— striking vehicle from rear — absence of taillight — insufficiency of evidence of proximate cause

Evidence tending to show that plaintiff's intestate was killed when his automobile struck the rear of an uninsured motorist's vehicle on the left side at 5:20 a.m. and that the uninsured motorist stated that the right taillight had no glass or bulb was insufficient to show any negligence on the part of the uninsured motorist which was a proximate cause of the collision.

APPEAL from *Martin (Robert M.), Judge,* at the 7 February 1972 Session of Superior Court in RANDOLPH County.

Plaintiff-administratrix instituted this action to recover for the alleged wrongful death of Larry Lee Thomas pursuant to an uninsured motorist provision of an insurance policy with

defendant company. Plaintiff contends that Thomas was killed as a result of the negligence of George Washington Hollis, an uninsured motorist.

The insurance policy sued upon was a family automobile policy issued by defendant company to Larry Lee Thomas covering his 1965 Plymouth automobile. The insurance contract contained the following provision: "(insurer agrees) to pay all sums which the insured or his legal representative shall be legally entitled to recover as damages from the owner or operator of an uninsured automobile because of . . . death . . . arising out of the . . . use of such uninsured automobile."

The undisputed evidence shows the following: on 25 January 1965 at approximately 5:20 a.m., Larry Lee Thomas, while operating his 1965 Plymouth on U. S. Interstate Highway 75, near Tifton, Georgia, was killed as a result of a collision with the rear of a 1955 model Studebaker owned and operated by George Washington Hollis; that Thomas' car hit the rear of the Hollis Studebaker on the left side; that at the time of the collision Thomas was covered by the insurance policy in question; that Hollis was an uninsured motorist; that Thomas was killed as a direct result of the collision; and that there were no other witnesses to the collision.

Plaintiff alleged that Hollis, the uninsured motorist, negligently and carelessly operated his vehicle at a slow rate of speed and with improper taillights. The plaintiff's only witness concerning the facts of the accident was the father of Larry Lee Thomas, who was not present at the scene of the accident. This witness had examined Hollis' car at a junk yard three days after the accident, and testified to the following: that the collision impact had demolished the left rear of Hollis' car, but that the right rear was not damaged; that there was no glass or bulb in the right rear taillight, and that it was rusty on the inside.

At the close of plaintiff's evidence, defendant moved for a directed verdict in accordance with G.S. 1A-1, Rule 50. This motion was granted. Plaintiff appealed.

John Randolph Ingram for plaintiff.

Perry C. Henson and Thomas C. Duncan for defendant.

BROCK, Judge.

Plaintiff first assigns as error the exclusion of certain testimony by the father of Larry Lee Thomas concerning an alleged statement made by Hollis, the uninsured motorist. The excluded portion of his testimony was as follows: "He said the left taillight had half a glass in it and was supposed to have been burning, but the right taillight didn't have no glass in it or bulb either."

Assuming, without deciding, that this testimony was admissible, the bare proof that one taillight on Hollis' car was not working does not show any proximate cause relationship between that fact and the collision. On the evidence presented, the manner in which this collision occurred is sheer speculation. Plaintiff must offer evidence "sufficient to take the case out of the realm of conjecture and into the field of legitimate inference from established facts." *Parker v. Wilson,* 247 N.C. 47, 100 S.E. 2d 258.

In order to recover on an uninsured motorist claim, plaintiff must show he is legally entitled to recover damages from the uninsured motorist. Plaintiff has failed to do this.

We find no merit in plaintiff's other assignments of error. In our opinion, defendant's motion for directed verdict was properly allowed.

Affirmed.

Chief Judge MALLARD and Judge BRITT concur.

STATE OF NORTH CAROLINA v. ROGER WALLS

No. 7222SC803

(Filed 20 December 1972)

Criminal Law § 155.5— failure to docket record in apt time — dismissal of appeal

Appeal is subject to dismissal where the record on appeal was not docketed within the time allowed by an order which had extended the time for docketing. Court of Appeals Rules 5 and 48.

APPEAL by defendant from *Wood, Judge,* 24 April 1972 Session of Superior Court held in DAVIDSON County.

Defendant was charged in a bill of indictment with (1) the felony of breaking or entering a motor vehicle with intent to commit larceny therein, (2) larceny after feloniously breaking or entering a motor vehicle, and (3) receiving stolen goods knowing them to have been feloniously stolen.

One Billy Ray Davis testified for the State that he, the defendant, and one Brown went into the parking lot at the Young-Hinkle plant for the purpose of stealing something of value from one of the cars. They unlocked a car by inserting a piece of wire between the door windows and raising the door lock. They took two tapes from the car and had started loosening the bolts on the tape player when they saw someone watching them from the roof of the building. All of them ran away.

Deputy Epley testified that he questioned Davis shortly thereafter, and the deputy testified to substantially the same statements as given by Davis in court. In addition, the deputy testified that he ran a license check on the automobile, and determined that it belonged to Mr. Thomas Snyder. Deputy Epley further testified that he observed the tape player lying on the floorboard of the car. He also found the two tapes in a nearby barn where Davis said he had thrown them when he ran from the scene.

The jury returned a verdict of guilty of breaking and entering an automobile as charged in the (1st count) bill of indictment. Defendant appealed.

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

William B. Mills, for the defendant.

BROCK, Judge.

The judgment appealed from in this case is dated 27 April 1972, and appeal entries are dated the same date as the judgment. Defendant obtained a proper order extending time within which to docket the record on appeal in the Court of Appeals to, and including, the maximum time allowed under Rule 5, Rules of Practice in the Court of Appeals. The maximum time expired on 24 September 1972; however, the record on appeal was not docketed in this Court until 2 October 1972. For failure to comply with the rules of this Court, the appeal is subject to dismissal. Rule 48, Rules of Practice in the Court of Appeals.

Nevertheless, we have examined defendant's properly preserved exceptions and assignments of error. Also, we have reviewed the record proper. In our opinion defendant had a fair trial, free from prejudicial error.

Appeal dismissed.

Judges CAMPBELL and GRAHAM concur.

CHARLES ALBERT MAYNARD v. MARY CLAYTOR PIGFORD

No. 728DC595

(Filed 20 December 1972)

Automobiles § 90— instructions — failure to apply law to evidence

The trial court erred in merely instructing the jury that defendant was negligent if she improperly passed the plaintiff's automobile, failed to maintain a proper lookout or drove carelessly and recklessly without giving the jury further instructions on what would constitute improper passing, failure to maintain a proper lookout or careless and reckless driving. G.S. 1A-1, Rule 51.

APPEAL by defendant from *Hardy, District Court Judge*, 27 March 1972 Session of District Court held in LENOIR County.

Plaintiff seeks to recover for damages to his automobile sustained in a collision with defendant's automobile on 4 November 1971. Issues of negligence, contributory negligence, and damages were submitted. The jury rendered its verdict favorable to plaintiff and awarded damages in the sum of $400.00. Defendant appealed.

Harvey W. Marcus, for the plaintiff.

White, Allen, Hooten & Hines, by John R. Hooten, for the defendant.

BROCK, Judge.

Defendant assigns as error various portions of the trial judge's instructions to the jury.

In the opening and general explanatory instructions to the jury, the judge explained that plaintiff alleged that defendant was negligent in certain respects and that defendant alleged

that plaintiff was contributorily negligent in certain respects. He then generally defined negligence, contributory negligence, proximate cause, reasonable care, and due care. He then instructed the jury as follows:

> "Now, as to the first issue the Court instructs you that if plaintiff has fulfilled the responsibility cast upon him by the law to the extent that the evidence by its quality and convincing force has satisfied you by the greater weight of the evidence that at the time and place complained of that the defendant was negligent either in that she passed the automobile of the defendant improperly or she failed to maintain a proper lookout or she drove carelessly and recklessly; if the plaintiff has proved either of these things then and that either one or all of these was the proximate cause of the collision between the parties and cause for which it would not have taken place, then it would be your duty to answer this first issue in favor of the plaintiff and answer it 'yes.' "

The trial judge failed to explain to the jury what would constitute "proper" or "improper" passing, or what would constitute maintaining a proper lookout, or what would constitute driving carelessly and recklessly. In failing to give the jury guidance upon these questions, he gave it a free hand to decide for itself what "proper" passing was, what maintaining a proper lookout was, and what careless and reckless driving was. G.S. 1A-1, Rule 51 requires the judge to explain the application of law to the evidence in the case.

The trial judge fell into the same error with respect to the contributory negligence issue.

In this case, the trial judge failed to relate any of his instructions to the evidence in the case. The trial judge is not required to review all of the evidence, but he must summarize it sufficiently to permit him to explain the application of the law thereto. Rule 51, *supra.*

New trial.

Chief Judge MALLARD and Judge BRITT concur.

STATE OF NORTH CAROLINA v. JOHN ROSS GRAY

No. 7221SC809

(Filed 20 December 1972)

Criminal Law § 23— plea of guilty

Defendant's plea of guilty to second degree murder was freely, understandingly and voluntarily entered, without undue influence, compulsion or duress, and without promise of leniency.

APPEAL by defendant from *Gambill, Judge,* 8 May 1972 Session of Superior Court held in FORSYTH County.

Defendant was charged in a bill of indictment, proper in form, with the felony of murder. At the 1 May 1972 Session of Superior Court held in Forsyth County, defendant was convicted of murder in the first degree. The jury did not recommend that punishment be by imprisonment for life. On 5 May 1972, Judge Chess, the presiding judge, upon defendant's motion, set the verdict aside as being contrary to the weight of the evidence. During the second week of the 8 May 1972 Session, defendant was arraigned before Judge Gambill at which time he entered a plea of guilty to second degree murder. Judge Gambill sentenced defendant to imprisonment for a term of not less than 25 nor more than 30 years. Defendant appealed.

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

Whicker, Vannoy & Moore, by J. Gary Vannoy and Howard C. Colvard, Jr., for the defendant.

BROCK, Judge.

Defendant argues that his plea of guilty was not freely and voluntarily entered. Counsel's arguments have been ingenious but we are not convinced. The Assistant Attorney General clearly and concisely answered each argument. We see no purpose to be served in discussing them seriatim.

The record clearly and fully supports the judge's findings that the plea of guilty was freely, understandingly and voluntarily entered, without undue influence, compulsion or duress, and without promise of leniency.

We have further examined the face of the record proper and conclude that no prejudicial error appears.

No error.

Judges CAMPBELL and GRAHAM concur.

PLANTERS INDUSTRIES, INC. v. STEPHEN WIGGINS

No. 727DC770

(Filed 20 December 1972)

1. **Evidence § 29— goods sold and delivered — admissibility of documents**

In an action to recover for goods sold and delivered, the trial court properly allowed plaintiff to introduce documents tending to prove the sale and delivery of the goods where the documents were shown to have been made in the regular course of business at the time of the transactions involved and were identified by witnesses who made or were personally familiar with the entries on the documents.

2. **Sales § 10— action for goods sold and delivered — issues**

In an action to recover for goods sold and delivered, it would have been the better practice for the court to have submitted one issue as to the existence of the account and a second issue as to the amount, if any, due thereon instead of submitting only one issue as to the amount, if any, that defendant is indebted to plaintiff.

APPEAL by defendant from *Carlton, District Judge,* 8 May 1972 Session of District Court held in EDGECOMBE County.

Action for goods sold and delivered. Plaintiff alleged that $4,169.84 was due by defendant; that a statement of the account had been submitted to defendant in late July or August, 1968; that defendant did not deny the accuracy of the account and agreed to pay the same. Defendant filed answer denying the material allegations of the complaint.

Plaintiff introduced a duly verified itemized statement of the account. Defendant, testifying in his own behalf, denied the existence of an account with plaintiff, the receipt of the goods in question and contended that he owed plaintiff nothing. Plaintiff then called witnesses whose evidence tended to show the sale and delivery of the goods as shown on the verified account. A number of exhibits tending to corroborate the evidence as

to the sale and delivery of the goods were introduced over defendant's objection. The court submitted the case to the jury on the following issue: "(1) In what amount, if any, is the defendant indebted to the plaintiff?" The jury answered, "$3,000.00."

Battle, Winslow, Scott & Wiley, P. A. by Samuel S. Woodley and Robert M. Wiley for plaintiff appellee.

Ellis Nassif and James M. Kimzey for defendant appellant.

VAUGHN, Judge.

[1] The verified itemized statement of the account, which was properly received in evidence, was prima facie evidence of the correctness of the account sued on. G.S. 8-45. The only evidence for defendant was his own testimony denying the existence of the account or the receipt of the goods. In rebuttal, plaintiff offered testimony from its salesmen, office manager, credit manager, truck deliveryman and a railroad freight agent, all of whom offered evidence and identified exhibits which tended to prove plaintiff's claim. Most of defendant's exceptions are to the admission of such exhibits, contending that the same were inadmissible as constituting hearsay. Defendant's exceptions are overruled. Not only were the documents shown to have been made in the regular course of business at the time of the transactions involved, but for the most part were identified by testimony from witnesses who, in fact, either made or were otherwise personally familiar with the entries on the documents tendered as exhibits.

[2] Defendant also assigns as error the refusal of the court to submit two issues tendered by him. The issues as submitted by defendant were not proper in that they were not determinative of the controversy presented by the pleadings and the evidence. The court did not err in failing to submit the issues as tendered. The better practice, however, would have been for the court to submit one issue as to the existence of the account and a second issue as to the amount, if any, due thereon. Under the facts of this case, however, including the failure of the record on appeal to contain the charge to the jury, we hold that appellant has failed to show prejudicial error requiring a new trial.

No error.

Judges HEDRICK and GRAHAM concur.

IN THE MATTER OF DEBBIE DOWELL

No. 7217DC714

(Filed 20 December 1972)

Infants § 10— delinquent child — violation of probation condition that she attend school

The evidence was sufficient to support the court's determination that respondent was a delinquent child in that she had violated the conditions of her probation by failing to attend school.

APPEAL by respondent from *Harris, District Judge,* 19 July 1972 Session of District Court held in SURRY County.

On 21 April 1972, after notice and hearing, an order was entered which adjudged and decreed that respondent was an undisciplined child. The adjudication was based on findings that the juvenile, a female, stayed out of school for a great portion of time for many months and that she misled her mother as to her school attendance. Respondent was placed on probation under the supervision of the school attendance officer subject to the condition that she attend school every day that she was physically able to attend. No exceptions were taken to this order.

On 19 July 1972, Judge Harris signed an order wherein he adjudged respondent to be a delinquent child in that she had violated the conditions of her probation by failing to attend school. She was ordered to be committed to the custody of the "Board of Youth Development." The order was entered after a hearing at which respondent was represented by court appointed counsel. The court's findings were based on evidence which tended to show that respondent had failed to attend school for a single day after the signing of the order of 21 April 1972, that she was, on several occasions, observed in downtown Mount Airy during school hours and that she was observed out at extremely late hours for a girl of her age.

Attorney General Robert Morgan by R. S. Weathers, Assistant Attorney General, for the State.

Carl E. Bell for defendant appellant.

VAUGHN, Judge.

Respondent contends that the court erred in its finding of facts and entry of the order. We hold that the evidence was

sufficient to support the court's findings that respondent violated the terms of her probation. A "Delinquent Child" includes any child who has violated the condition of probation. G.S. 7A-278(2). The order from which respondent appealed is affirmed.

Affirmed.

Judges HEDRICK and GRAHAM concur.

STATE OF NORTH CAROLINA v. ROBERT LEE RAY

No. 7212SC816

(Filed 20 December 1972)

Criminal Law § 91— defendant represented by court-appointed counsel — denial of continuance to employ private counsel

The trial court did not abuse its discretion in the denial of a motion by a defendant represented by court-appointed counsel that the case be continued so that he could employ private counsel.

APPEAL by defendant from *Clark, Judge,* 7 August 1972 Criminal Session of Superior Court held in CUMBERLAND County.

Defendant was charged in a bill of indictment, proper in form, with the offense of armed robbery. When the case was called for trial at the 7 August 1972 Session of court, the Public Defender, who had been appointed to represent defendant, made the following motion on defendant's behalf:

> "The defendant moves for a continuance on the basis that Mr. Ray lacks confidence in the ability of his counsel to represent him. He has had contact with Mr. William S. Geimer of the Cumberland Bar. He agreed to represent him for a fee, unknown to myself, and Mr. Ray has stated that he can obtain this fee by Thursday of this week."

The court denied the motion for a continuance after making the following findings of fact, which are not in dispute:

> "The Court finds that the charges against the defendant have been pending for some several months and that defendant made affidavit of indigency and the Court appointed the Honorable Sol Cherry, Public Defender's Office, to represent the defendant on May 31, 1972. That the

Honorable Sol Cherry first conferred with the defendant around about May 31, 1972. That the defendant has not heretofore, up until this date, claimed or contended to Mr. Cherry that he felt Mr. Cherry was incompetent and that he desired further counsel; that the case has been duly calendared for trial and that the State at present has subpoenaed from the City of Chicago, Illinois, a material State's witness and the State is ready for trial; that Mr. Cherry has not contended that he was not ready for trial because of lack of witnesses or from any other reason, prior to making his motion for a continuance."

The jury returned a verdict of guilty and defendant appeals from judgment entered upon the verdict imposing a sentence of imprisonment for a term of seven years.

Attorney General Morgan by Assistant Attorney General Melvin and Assistant Attorney General Ray for the State.

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

GRAHAM, Judge.

The only assignment of error brought forward on appeal is directed to the court's denial of defendant's motion to continue the case so that he might employ private counsel.

A motion for continuance is ordinarily addressed to the sound discretion of the trial court, and its ruling thereon is not subject to review absent an abuse of discretion. 2 Strong, N. C. Index 2d, Criminal Law, § 91; *State v. Baldwin*, 276 N.C. 690, 174 S.E. 2d 526; *State v. Moses*, 272 N.C. 509, 158 S.E. 2d 617. Defendant's court-appointed counsel candidly states that he has found no authority in support of an argument that the trial court abused its discretion in denying defendant's motion under the circumstances presented. We hold that the trial court's findings of fact, which are not challenged, affirmatively show that there was no abuse of discretion in denying defendant's motion.

At the request of defendant's counsel we have reviewed the record, and we conclude that it is free from prejudicial error.

No error.

Judges CAMPBELL and BROCK concur.

STATE OF NORTH CAROLINA v. DONNIE BRYANT AND EARL BRYANT

No. 727SC817

(Filed 20 December 1972)

Criminal Law § 128— motion for mistrial — rebuttal testimony — stolen money given to witness by defendant's wife

In a prosecution for breaking and entering and larceny, the trial court did not err in the denial of defendants' motions for mistrial made when a State's witness testified on rebuttal that one defendant's wife gave him a silver dollar which was subsequently identified by the victim as being part of the stolen property.

APPEAL by defendants from *Friday, Judge,* 17 July 1972 Session of Superior Court held in WILSON County.

The defendants, Donnie Bryant and Earl Bryant, were charged in separate two count bills of indictment, proper in form, with felonious breaking and entering and felonious larceny from the home of Coleman Farr on Williams Drive in Black Creek. Upon the defendants' pleas of not guilty, the State offered evidence tending to show the following:

On 19 February 1972 the home of Coleman Farr was broken into and the following items were removed from that home: a .22 caliber pistol, a .22 caliber rifle, an old coin collection, fifteen silver dollars, a tape recorder, a camera, a satchel, a portable file box, insurance policies, receipts and important papers, checkbooks, a savings account book, a tool box and tools, a circular saw, a jig saw, a soldering gun, a transistor radio and a color television. These items were subsequently found in the possession of Earl Johnson and Bobby Deans who denied stealing the property. They testified that they purchased the property from the defendants who brought it to Bobby Deans' residence on the night of 19 February 1972. The testimony of these two witnesses was corroborated by the wife of Bobby Deans and by the girl friend of Earl Johnson. Wilson County Deputy Sheriff James Hawley testified that these witnesses related the same story to him. None of the stolen property was ever found in the possession of the defendants.

Defendants testified, denying participation in the crime and attempting to establish an alibi. Defendants also denied ever having any of the stolen property in their possession.

Each defendant was found guilty of felonious breaking and entering and felonious larceny. Prayer for judgment was continued as to each defendant on the count charging felonious larceny. From a judgment imposing a prison sentence of eight to ten years, Earl Bryant, and four to seven years, Donnie Bryant, on the count charging felonious breaking and entering, defendants appealed.

Attorney General Robert Morgan and Assistant Attorney General Eugene Hafer for the State.

Ezzell and Henson by Thomas W. Henson for defendant appellants.

HEDRICK, Judge.

The one assignment of error brought forward and argued in defendants' brief is that the court erred in not allowing defendants' motions for mistrial made when a State's witness, on rebuttal, testified that Sandy Bryant, Donnie Bryant's wife, gave him a silver dollar, subsequently identified by Mr. Farr as being part of the stolen property. This assignment of error has no merit. Defendants have failed to show the court abused its discretion in denying the motion.

The defendants had a fair trial free from prejudicial error.

No error.

Judges VAUGHN and GRAHAM concur.

STATE OF NORTH CAROLINA v. FREDDIE LEVESTER SIMONS

No. 7218SC742

(Filed 20 December 1972)

Criminal Law § 23— plea of guilty

Defendant's plea of guilty to armed robbery was entered freely, understandingly and voluntarily.

APPEAL by defendant from *Seay, Judge,* 29 May 1972 Criminal Session, Superior Court, GUILFORD County.

By bill of indictment, proper in form, defendant was charged with armed robbery. At trial, he entered a plea of

guilty, and judgment was entered sentencing him to imprisonment for a term of 20 years. Defendant appealed, and is represented on appeal by the Assistant Public Defender for the Eighteenth Judicial District.

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

Dallas C. Clark, Jr., Assistant Public Defender, Eighteenth Judicial District, for defendant appellant.

MORRIS, Judge.

Upon defendant's plea of guilty, the court questioned him extensively to determine whether defendant understood the charge against him; the possible penalty for the offense; whether he was then under the influence of narcotics or alcohol; and whether his plea was freely, understandingly and voluntarily given without compulsion, duress, or promise of leniency. Defendant, under oath, answered the questions and signed a transcript thereof. Thereupon, the court entered its adjudication that the plea was freely, voluntarily and understandingly entered. The transcript of plea and the adjudication of the court are made a part of the record in compliance with *Boykin v. Alabama,* 395 U.S. 238, 23 L.Ed. 2d 274, 89 S.Ct. 1709 (1969).

Evidence presented tended to show that defendant entered the Diplomat Motel and inquired of the clerk whether a certain person was registered there. While the clerk turned to check his files, defendant put a nylon stocking on his head. When the clerk turned back to give the information requested, defendant pointed a pistol at him, handed him a bag and demanded that the clerk fill it with money. The clerk complied and was then told to lie on the floor for 10 minutes and that if he didn't "he was dead." The clerk had seen defendant pull into a parking lot near the motel. After defendant left, the clerk called the police and gave a description of the car and the robber. The officers stopped the car on Highway 29 North and observed a weapon partially concealed under the seat and also a piece of nylon hose in the car. This was a portion of a stocking 11 to 12 inches in length and knotted at one end. The description of the driver fitted the description of the robber given by the motel clerk.

Character witnesses for defendant testified that he had never been known to be in trouble until he "got into the drug

problem at A & T University." This is apparently another of the increasing incidents of crimes committed in order to purchase drugs. However unfortunate defendant's position may be, we find no error in the proceedings resulting in his imprisonment. The indictment is valid, his plea was voluntary, and the sentence imposed is considerably less than the statutory maximum.

No error.

Chief Judge MALLARD and Judge HEDRICK concur.

DOVIE M. CARROLL v. ELMORE LEWIS SANDLIN

No. 724DC763

(Filed 20 December 1972)

Contempt of Court § 6; Divorce and Alimony § 21— failure to pay child support — contempt proceeding — means to make payments

In a hearing upon an order to show cause why defendant should not be held in contempt for failure to make child support payments as ordered by the court, the evidence was sufficient to support the court's finding that defendant possessed the ability and means to make the payments he had been ordered to make.

APPEAL by defendant from *Crumpler, District Judge*, 5 June 1972 Session of District Court held in DUPLIN County.

This matter was heard upon an order entered on plaintiff's motion in the cause directing defendant to show cause why he should not be adjudged in willful contempt for failure to comply with a previous order of the District Court which had been entered in this case on 25 August 1971 in which defendant had been ordered to pay $200.00 per month for the support of two minor children of the parties. After hearing evidence of both parties, the court found that defendant's admitted failure to comply was willful and without just cause or excuse, adjudged him in contempt, and ordered him confined in the Duplin County jail for a term of thirty days, or until he shall show compliance, whichever is earlier. Defendant appealed.

Russell J. Lanier, Jr. for plaintiff appellee.

Grady Mercer for defendant appellant.

PARKER, Judge.

By this appeal defendant challenges the sufficiency of the evidence to support the trial court's findings of fact and the sufficiency of the findings to support the judgment. 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. *Rose's Stores, Inc. v. Tarrytown Center, Inc.*, 270 N.C. 206, 154 S.E. 2d 313. While the evidence in the present case was conflicting and differing inferences could legitimately be drawn therefrom, in our opinion it was sufficient to support the crucial finding made by the trial court to the effect that, since the entry of the previous order and at time of entry of the order finding him in willful contempt, defendant possessed the ability and the means to make the child support payments which he had been ordered to make. Thus, the essential finding which the Supreme Court found missing in *Mauney v. Mauney*, 268 N.C. 254, 150 S.E. 2d 391, and *Yow v. Yow*, 243 N.C. 79, 89 S.E. 2d 867, was here made. Since defendant admitted he had failed to comply with the court's order and the court on competent evidence has found he possessed the means to do so, the judgment finding him in willful contempt and imposing punishment therefor is

Affirmed.

Judges CAMPBELL and MORRIS concur.

STATE OF NORTH CAROLINA v. ALFRED CREWS

No. 729SC774

(Filed 20 December 1972)

Criminal Law § 113— evidence on defense of coercion — failure to give instructions — prejudicial error

In a kidnapping and felonious assault case where defendant offered evidence that his only participation in the event was in driving the car and that he was forced at gunpoint by the other two men involved to do that, the trial court erred in its jury charge by not instructing on defendant's defense of coercion.

APPEAL by defendant from *Godwin, Special Judge*, 24 April 1972 Criminal Session of FRANKLIN County Superior Court.

Defendant was tried on a proper bill of indictment charging him with the offenses of kidnapping and felonious assault upon Robert Hodge on 13 October 1970.

The defendant was found not guilty of the charge of felonious assault but was found guilty of the charge of kidnapping, and from a judgment of imprisonment, he appealed.

Attorney General Robert Morgan by Assistant Attorney General Rafford E. Jones for the State.

Hubert H. Senter for defendant appellant.

CAMPBELL, Judge.

The evidence on behalf of the defendant tended to show that his only participation in the event was in driving the car and that he was forced at gunpoint by the other two men involved to do that and that this automobile ride to a secluded spot where Robert Hodge was beaten was not only against the will of Hodge but also was against the defendant's will and only because of the coercion imposed upon the defendant by the other two men.

Nowhere in the court's charge to the jury did the court instruct on defendant's defense that he was coerced at gunpoint into participating in the kidnapping. The defendant offered evidence on this point.

The defendant was entitled to have the court instruct the jury to the effect that if, upon a consideration of all the evidence it found the facts to be that what the defendant did in driving the automobile was under compulsion or through fear of death or great bodily harm, it should return a verdict of not guilty. *State v. Sherian,* 234 N.C. 30, 65 S.E. 2d 331 (1951).

We do not think the charge given was adequate in this respect.

The defendant is entitled to a new trial, and it is so ordered.

New trial.

Judges BROCK and GRAHAM concur.

JAMES A. TAYLOR AND WIFE, FRANKIE G. TAYLOR v. TRI-COUNTY ELECTRIC MEMBERSHIP CORPORATION

No. 728SC682

(Filed 20 December 1972)

1. **Judgments § 35— res judicata — necessity for judgment on merits**

A plea of *res judicata* must be founded on a judgment on the merits.

2. **Judgments § 40— directed verdict — judgment on merits — res judicata**

Judgment in a trespass action granting defendant's motion for directed verdict under G.S. 1A-1, Rule 50(a) for failure of plaintiffs to prove that the description in their deed covered the property which defendant allegedly had wrongfully entered constituted a judgment on the merits for *res judicata* purposes.

3. **Judgments § 37— trespass action — directed verdict — res judicata**

Plaintiffs' prior trespass action alleging that defendant wrongfully entered their land and destroyed trees, plants and boundary stakes in digging holes, inserting poles and stringing electric power lines wherein a directed verdict was entered in favor of defendant on the ground that plaintiffs failed to prove that the description in their deed covered the land upon which defendant placed its power lines *held* to constitute *res judicata* to plaintiffs' action based upon essentially the same allegations with additional allegations that the erection and maintenance of the poles and power lines constituted a "taking" of their property and that such taking was unnecessary and unreasonable, since the material question of title as between the parties had been determined in the prior action.

APPEAL by plaintiff from *Cowper, Judge,* at the 1 May 1972 Civil Session of WAYNE Superior Court.

In their complaint in a prior action between the parties, commenced on 22 October 1969, plaintiffs alleged in substance the following: Plaintiffs own a parcel of land in Indian Springs Township on S. R. 1932, said land being described in a deed recorded in Deed Book No. 717 at page 318 in the Wayne County Registry. On or about 1 July 1969, agents and employees of defendant wrongfully entered upon plaintiffs' land and destroyed trees, plants and boundary stakes; they also dug holes and inserted poles over which wire was strung. Plaintiffs purchased said property for the purpose of building a house thereon and said holes, poles and wires detract from the property's intrinsic worth. The trespass committed by defendant will continue to plaintiffs' irreparable injury and damage unless defendant is restrained. As part of the relief sought, plaintiffs

prayed judgment for damages in the amount of $500.00, for removal of the poles, wire and debris from their property, and a restraining order prohibiting further trespass upon plaintiffs' land.

In its answer in the prior action, defendant denied any wrongful and unlawful entry upon property belonging to plaintiffs, and denied the commission of any wrongful and unlawful acts on property belonging to plaintiffs.

At trial of the prior action on or about 9 June 1970, when plaintiffs rested their case, defendant moved for a directed verdict under G.S. 1A-1, Rule 50, on the ground that plaintiffs failed to prove that the description in the deed offered into evidence covered the land upon which defendant placed its power lines. The motion was allowed and from judgment predicated thereon, plaintiffs appealed. In an opinion reported in 10 N.C. App. 277, 178 S.E. 2d 130 (1970), the Court of Appeals affirmed the trial court's judgment.

On 20 September 1971 plaintiffs instituted this action against defendant. The complaint sets forth essentially the same allegations contained in the complaint in the prior action except for the additional allegations that said erection and maintenance of poles and wires on plaintiffs' property by defendant constitutes a "taking" under Article 1, Section 19, of the North Carolina Constitution and under the Fifth and Fourteenth Amendments to the United States Constitution; and, further, that said "taking" was unreasonable for that defendant used plaintiffs' land to install poles and wires to connect power lines on its easement near S.R. 1932 to property adjacent to plaintiffs' land when the adjacent property touched defendant's said easement.

In its answer to the complaint in the present action, defendant makes the same denials set forth in its answer in the prior action and pleads the judgment in the prior action as res judicata to each of the several claims asserted in the present action.

Following a hearing, the trial court entered judgment sustaining defendant's plea of res judicata and dismissing plaintiffs' action. Plaintiffs appealed.

Dees, Dees, Smith & Powell by Tommy W. Jarrett for plaintiff appellants.

Herbert B. Hulse and George F. Taylor for defendant appellee.

BRITT, Judge.

The sole question for our determination is whether the trial court erred in dismissing plaintiffs' action on the ground of res judicata. We hold that it did not.

[1, 2] In their brief plaintiffs note that if old G.S. 1-25 were still in effect, they could maintain their action. They concede that this "saving" statute has been repealed and largely replaced by G.S. 1A-1, Rule 41(a)(2), which permits the court to order a voluntary dismissal without prejudice. Plaintiffs maintain that while the trial court made no such order in the prior action, that action was not a trial on the merits for that the judgment therein granted a directed verdict due to a technical rule of evidence; that since the prior action was not tried before a jury, plaintiffs have never had their full day in court.

Basic to the doctrine of res judicata is the premise that a plea of res judicata must be founded on an adjudication—a judgment on the merits. *Pack v. McCoy,* 251 N.C. 590, 112 S.E. 2d 118 (1960). As Sharp, Justice, points out in *Cutts v. Casey,* 278 N.C. 390, 420, 180 S.E. 2d 297, 313 (1971), "When a motion for a directed verdict under Rule 50(a) is granted, the defendant is entitled to a *judgment on the merits* unless the court permits a voluntary dismissal of the action under Rule 41(a)(2)." (Emphasis added.) In McIntosh, *North Carolina Practice and Procedure,* 2d Ed., Vol. 2, § 1488.30, Pocket Supplement, p. 28, we find: "Judgment entered upon a directed verdict is a final judgment on the merits. It is therefore appealable, and operates with full res judicata effect." A footnote to this statement explains: "This differs from the effect of involuntary nonsuit under former practice where the nonsuit was granted for insufficiency of evidence to make out a prima facie case. Plaintiff was barred in such circumstances only if his proof on second trial was substantially similar to that on first trial; he could 'mend his licks' with substantially different proof." (Citation.) Therefore, plaintiffs' contention in the case at bar that they were deprived of their full day in court is untenable.

Plaintiffs further contend that even if the directed verdict in the prior action is res judicata as to matters and occurrences prior to its effective date, that a continuing trespass exists as long as defendant's power lines remain on said land and such continuing trespass gives rise to a new and separate claim for relief. This contention has no merit.

[3] As between the parties the question of title to the subject property was determined in the prior action and that determination is conclusive. Of necessity the question of title would be raised in the present case and as was said in *Poindexter v. Bank,* 247 N.C. 606, 618-619, 101 S.E. 2d 682, 691-692 (1958), " 'It is a fundamental principle of jurisprudence that material facts or questions which were in issue in a former action, and were there admitted or judicially determined, are conclusively settled by a judgment therein, and that such facts or questions become res judicata and may not again be litigated in a subsequent action between the same parties * * * regardless of the form the issue may take in the subsequent action.' * * * "

In order for a judgment to constitute res judicata in a subsequent action there must be identity of parties, subject matter, issues and relief demanded. *Shaw v. Eaves,* 262 N.C. 656, 138 S.E. 2d 520 (1964); *Mason v. Highway Comm.,* 7 N.C. App. 644, 173 S.E. 2d 515 (1970). In the instant case, the parties are identically the same as in the original action; the cause of action arises from the same facts upon which recovery was initially predicated; the merits of the cases are the same; and plaintiffs seek the same type of relief initially sought.

For the reasons stated, the judgment appealed from is

Affirmed.

Chief Judge MALLARD and Judge BROCK concur.

STATE OF NORTH CAROLINA v. JOHN ALLEN PENNY

No. 7210SC835

(Filed 20 December 1972)

Criminal Law § 34— defendant's guilt of other offense — prejudicial testimony — correction of error

Defendant's motion for mistrial in a drunken driving case based on allegedly improper and prejudicial testimony by the arresting officer as to defendant's prior convictions was properly denied, particularly in view of the court's prompt admonition to the jury to disregard the testimony.

APPEAL by defendant from *Copeland, Judge,* at the 5 June 1972 Special Criminal Session of WAKE Superior Court.

By warrant proper in form defendant was charged with operating a vehicle on the highways of this State while under the influence of intoxicating liquor. From a verdict of guilty and judgment imposed thereon in district court, defendant appealed to superior court where he was found guilty by a jury and from judgment imposed on that verdict, he appealed to this court.

Attorney General Robert Morgan by Thomas B. Wood, Assistant Attorney General, for the State.

Tharrington & Smith by Roger W. Smith for defendant appellant.

BRITT, Judge.

Defendant's first assignment of error is to the failure of the trial judge to grant his motion for a mistrial based on allegedly improper and prejudicial testimony by the arresting officer. The record reveals:

"I (Officer McLeod) went back to Mr. Penny where he and I had a conversation about this was going to be his driver's license because he had just been tried—

MR. CHURCHILL: OBJECTION.

A. —on a case in Hillsborough.

COURT: SUSTAINED.

MR. CHURCHILL: I move for a mistrial.

COURT: MOTION FOR A MISTRIAL DENIED. Do not consider the statement that the witness just made. Has nothing to do with the case."

The incident complained of occurred while the witness was providing rebuttal testimony for the State. Defendant had theretofore testified as a witness for himself and had stated: "I have one ticket for 70 in a 60 and one for 68 in a 60 and one careless and reckless in April, 1970. . . . I have not been convicted of any offense since March 28, 1971."

We do not think defendant was prejudiced by the incident, particularly in view of the court's admonition to the jury. See *State v. Battle,* 269 N.C. 292, 152 S.E. 2d 191 (1967); also, *State v. Smith,* 5 N.C. App. 505, 168 S.E. 2d 494 (1969). The assignment of error is overruled.

Defendant assigns as error a portion of the jury charge explaining "reasonable doubt." We have carefully considered this assignment but conclude that it too is without merit.

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

No error.

Judges PARKER and VAUGHN concur.

DAVID EARL LAMBERT v. JACK RANDALL PATTERSON AND JACK DEMPSEY PATTERSON

No. 728SC741

(Filed 20 December 1972)

Appeal and Error § 39— ineffective order extending time for docketing appeal

The trial court was without authority to enter a valid order extending the time for docketing appeal after the original 90-day period had expired.

APPEAL from *Cowper, Judge,* 1 May 1972 Session, Superior Court, WAYNE County.

This is a civil action in which plaintiff seeks to recover of defendants damages for personal injuries and property dam-

age allegedly resulting from negligence of defendants in the operation of an automobile. Defendants answered and filed a counterclaim alleging that the collision was caused solely by plaintiff's negligence.

The collision occurred on a dusty unpaved road in Wayne County. Plaintiff's car and defendants' car were traveling in opposite directions when the two cars collided. The driver and passenger in each vehicle testified. Each driver testified that he was on his side of the center of the road and that the other driver came over the center onto his side of the road and caused the collision.

The jury answered the issues submitted in plaintiff's favor and defendants appealed.

Sasser, Duke and Brown, by John E. Duke; and Herbert B. Hulse, for plaintiff appellee.

Dees, Dees, Smith and Powell, by William W. Smith, for defendant appellants.

MORRIS, Judge.

Judgment in this case was entered on 10 May 1972. As was said in *Distributing Corp. v. Parts, Inc.*, 10 N.C. App. 737, 738-39, 179 S.E. 2d 793 (1971), quoting from the opinion in *Roberts v. Stewart* and *Newton v. Stewart*, 3 N.C. App. 120, 164 S.E. 2d 58 (1968), cert. denied 275 N.C. 137:

> " . . . The record on appeal must be docketed in the Court of Appeals within ninety days after the date of the judgment, order, decree or determination appealed from. Within this period of ninety days, *but not after the expiration thereof*, the trial tribunal may for good cause extend the time not exceeding sixty days for docketing the record on appeal. . . . " (Emphasis supplied.)

Here motion to extend time for docketing the appeal was made on 17 August 1972, and order entered allowing the motion on 18 August 1972, both after the expiration of the 90-day period. At this time, the trial tribunal was without authority to enter a valid order extending the time. *Distributing Corp. v. Parts, Inc., supra; Simmons v. Textile Workers Union*, 15 N.C. App. 220, 189 S.E. 2d 556 (1972), cert. denied 281 N.C. 759. Since there was a failure to comply with Rule 5 of the Rules of Practice in the Court of Appeals, the appeal is subject

to dismissal under Rule 17, Rules of Practice in the Court of Appeals.

Although we do not treat the appeal as an application for writ of certiorari, we have examined appellant's contentions and find that there was sufficient evidence upon which the case was submitted to the jury and that the charge of the court was free from prejudicial error.

Counsel who presented oral argument for appellant stated with commendable candor that he was aware of the instances on this appeal of noncompliance with our rules. In all fairness to the able counsel who presented the argument, we feel compelled to say that the failures to comply with procedure evident on this appeal are not compatible with counsel's usual meticulousness in complying with the rules.

Appeal dismissed.

Judges CAMPBELL and PARKER concur.

STATE OF NORTH CAROLINA v. FRED MARK DOVER, III

No. 7210SC801

(Filed 20 December 1972)

Narcotics § 3; Searches and Seizures § 3— validity of search warrant — admissibility of seized items

In a case charging defendant with felonious possession of LSD and other drugs, the search warrant and the affidavit attached thereto were in substantial compliance with statutory and constitutional requirements and the trial judge did not err in denying defendant's motion to suppress the evidence obtained as a result of a search of defendant's dormitory room under authority thereof.

APPEAL by defendant from *Canaday, Judge,* 29 May 1972 Session of Superior Court held in WAKE County.

Defendant, Fred Mark Dover III, was charged in separate bills of indictment, proper in form, with:

(1) felonious possession of a narcotic drug, to wit: lysergic acid diethylamide (LSD);

(2) felonious possession of a narcotic drug, to wit: Phencyclidine;

(3) felonious possession of a narcotic drug, to wit: more than one gram of marijuana;

(4) felonious possession of 1,900 tablets of Amphetamine, a stimulant drug, for the purpose of "selling, dispensing, giving away such drug."

Upon the defendant's plea of not guilty, the State offered evidence tending to show that at about 9:50 p.m. on 13 May 1972, officers of the Raleigh Police Department, armed with a search warrant, went to defendant's room at 115 D, Bragaw Dormitory, North Carolina State University, Raleigh. The room was designed for occupancy by two people. After defendant was served with the search warrant, Officer Dickerson conducted a search of the room and found, on a bookshelf, a bag containing more than one gram of marijuana. Defendant identified the bookshelf as being his. In a chest of drawers, also identified by the defendant as being his, Officer Dickerson found a tin container containing approximately 1,900 white tablets, subsequently identified as Amphetamines, and a quantity of other pills, capsules and white powder, subsequently identified as being Phencyclidine, and LSD.

Defendant was found guilty as charged in each bill of indictment and from judgments imposing active consecutive prison sentences totalling 6 years, defendant appealed.

Attorney General Robert Morgan and Assistant Attorney General Eugene Hafer for the State.

Russell W. DeMent, Jr., for defendant appellant.

HEDRICK, Judge.

Defendant assigns as error the failure of the trial judge to suppress the evidence on the grounds that it was obtained with the use of an invalid search warrant.

We hold that the search warrant and the affidavit attached thereto are in substantial compliance with statutory and constitutional requirements and the trial judge did not err in denying defendant's motion to suppress the evidence obtained as a result of a search of defendant's premises under authority thereof. *State v. Vestal,* 278 N.C. 561, 180 S.E. 2d 755 (1971); *State v. Flowers,* 12 N.C. App. 487, 183 S.E. 2d 820 (1971); cert. den. 279 N.C. 728, 184 S.E. 2d 885 (1971); *State v. Moye,* 12 N.C. App. 178, 182 S.E. 2d 814 (1971).

After a careful examination of the record, we are of the opinion that the defendant had a fair trial free from prejudicial error.

No error.

Chief Judge MALLARD and Judge MORRIS concur.

STATE OF NORTH CAROLINA v. BOBBIE GENE THOMAS

No. 725SC755

(Filed 20 December 1972)

Criminal Law § 106— corroboration of confession — proof of corpus delicti

Though the State is required to establish the commission of a crime, the *corpus delicti,* by evidence apart from, or *aliunde,* the confession, there is no requirement that defendant be connected with the commission of the crime, the *corpus delicti,* in addition to, apart from, or *aliunde,* the connection contained in his confession.

APPEAL by defendant from *Wells, Judge,* 17 July 1972 Session of Superior Court held in NEW HANOVER County.

Defendant was charged in a warrant with larceny of property of a value of less than $200.00, a misdemeanor. He was found guilty in District Court and appealed. Upon trial *de novo* by jury in Superior Court he was found guilty and judgment of confinement was entered. Defendant appealed.

The facts necessary for an understanding of this appeal are set out in the opinion.

Attorney General Morgan, by Associate Attorney Byrd, for the State.

Charles E. Rice III for the defendant.

BROCK, Judge.

The State's evidence tended to show the following: On 8 December 1971 a ten-wheel truck with storage bins around the bed was stored for the night within a fence enclosure. The individual storage bins on the truck were locked and the gate through the fence was locked. The truck and the equipment

stored thereon were the property of Harrison-Wright Company. During the night of 8 December 1971 two of the storage bins on the truck were broken into and tools valued at $179.00 were taken. On 19 December 1971 defendant confessed to climbing over the fence, breaking into the two storage bins, and taking the tools. Defendant admitted disposing of the tools by sales to persons unknown. Defendant offered no evidence.

Defendant admits that the commission of the crime, the *corpus delicti,* was established by evidence *aliunde* the confession by defendant. He also admits that defendant duly confessed that he committed the crime. However, defendant argues that he is entitled to a nonsuit because the State failed to connect defendant with the *corpus delicti* by evidence apart from defendant's confession. Defendant cites *State v. Thomas,* 241 N.C. 337, 85 S.E. 2d 300, and *State v. Whittemore,* 255 N.C. 583, 122 S.E. 2d 396, in support of his argument.

Defendant has completely misread the cases he cited. Both *Thomas* and *Whittemore* hold that an extrajudicial confession standing alone is not sufficient to warrant a conviction; the State is required to establish the commission of a crime, the *corpus delicti,* by evidence apart from, or *aliunde,* the confession. They also hold that full, direct, and positive evidence of the *corpus delicti* is not indispensable. There is no requirement that defendant be connected with the commission of the crime, the *corpus delicti,* in addition to, apart from, or *aliunde,* the connection contained in his confession. *See State v. Macon,* 6 N.C. App. 245, 170 S.E. 2d 144.

No error.

Chief Judge MALLARD and Judge BRITT concur.

STATE OF NORTH CAROLINA v. LARUE SHERMAN

— AND —

STATE OF NORTH CAROLINA v. FRANK GAINEY

No. 724SC642

(Filed 20 December 1972)

Escape § 1— felonious escape — sufficiency of evidence

State's evidence required submission of defendant's case to the jury where it tended to show that defendants were serving sentences

imposed upon convictions for felonies, that it was determined that defendants were missing from their prison unit and that defendants were apprehended the next day at a place other than within the confines of the prison unit.

APPEAL by defendants from *Rouse, Judge,* 24 April 1972 Session of Superior Court held in SAMPSON County.

Defendants were charged in separate bills of indictment with felonious escape.

The State's evidence tended to show the following: On 13 November 1971 defendant LaRue Sherman was serving a sentence imposed upon a conviction in Johnston County of the felony of armed robbery; on 13 November 1971 defendant Frank Gainey was serving a sentence imposed upon a conviction in Cumberland County of the felony of armed robbery; on 13 November 1971 both defendants were in custody in prison unit 4545 located near Clinton in Sampson County; at the time for the evening lockup at unit 4545 on 13 November 1971 it was determined that defendants were missing; in response to a call from the captain in charge of unit 4545, the highway patrol and Clinton police aided in a search for defendants; at about 4:00 a.m. on 14 November 1971, patrolman L. W. Harrington apprehended both defendants on Peterson Street in the town of Clinton and, with the aid of the Clinton police, returned the two defendants to unit 4545. Defendants offered no evidence.

From verdicts of guilty of felonious escape, and additional prison sentences imposed thereon, defendants appealed.

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

Joseph B. Chambliss for the defendants.

BROCK, Judge.

The State's evidence required submission of these cases to the jury, and it supports the verdicts of guilty. We have examined the record proper in each case and no prejudicial error appears.

No error.

Chief Judge MALLARD and Judge BRITT concur.

RANCO INDUSTRIAL CORPORATION v. PATELOS DOOR CORPORATION AND S. N. PATELOS

No. 728DC810

(Filed 20 December 1972)

Sales § 13— misrepresentation in sale of goods — award of damages proper

Plaintiff was not prejudiced by the fact that the trial court may have applied an inappropriate measure of damages where the amount awarded defendants on their counterclaim for misrepresentation in the sale of goods was no more than they were entitled to, as a matter of law, under the court's findings of fact.

APPEAL by plaintiff from *Nowell, District Judge,* 17 July 1972 Session of District Court held in WAYNE County.

Plaintiff instituted this action for the claim and delivery of a roof spray kit that was in defendants' possession. The kit was loaned to defendants by plaintiff to use in applying a roof spray sold to defendants by plaintiff for the price of $407.00. Defendants filed a counterclaim, and offered evidence tending to show that the spray preparation was misrepresented by plaintiff, that it was unfit for the particular use for which it was sold, and that after one-third of the amount purchased had been applied to defendants' roof, it had to be removed at a cost to defendants of $150.00.

The court allowed plaintiff's motion for summary judgment on the question of its right to the possession of the spray kit and ordered defendants to deliver possession of the kit forthwith to plaintiff. Sitting without a jury, the court then heard evidence relating to defendants' counterclaim, and after making findings of fact and conclusions of law consistent with the evidence, entered judgment ordering defendants to return to plaintiff the unused portion of the spray and awarding judgment to defendants in the sum of $271.30, being the amount defendants paid for the portion of the spray which they were ordered to return. Plaintiff appeals from this judgment.

Turner and Harrison by Fred W. Harrison for plaintiff appellant.

Baddour and Lancaster by Philip A. Baddour, Jr., for defendant appellees.

GRAHAM, Judge.

Plaintiff's assignments of error to the admission of testimony by the individual defendant as to the representations made by plaintiff's agent when the spray was purchased are overruled.

The findings of fact made by the trial judge are supported by the evidence and must be sustained. The $271.30 awarded defendants is no more than they were entitled to, as a matter of law, under the court's findings of fact. Under these circumstances, plaintiff was not prejudiced by the fact the court may have applied an inappropriate measure of damages. *Cf. Motors, Inc. v. Allen,* 11 N.C. App. 381, 181 S.E. 2d 134.

No error.

Judges HEDRICK and VAUGHN concur.

ROY BRAXTON JAMES v. GREENWAY, INC.

No. 725SC726

(Filed 20 December 1972)

Appeal and Error § 39— failure to file record on appeal in apt time

Appeal is dismissed for failure to file the record on appeal within ninety days after the date of the order appealed from. Court of Appeals Rule 5.

APPEAL by plaintiff from an Order of *Wells, Judge,* 8 May 1972 Session of NEW HANOVER Superior Court.

In this action plaintiff seeks to recover the sum of $6,000.00, plus interest, on a promissory note. Defendant answered and in the answer set up a counterclaim.

Plaintiff moved to quash the pleadings of the defendant and for the relief requested in the complaint for that the pleadings of defendant were not timely filed and served.

By order dated and filed 17 May 1972 Judge Wells denied the relief sought by plaintiff, and plaintiff appealed.

Poisson, Barnhill & Butler by Algernon L. Butler, Jr. for plaintiff appellant.

White, Allen, Hooten & Hines by John R. Hooten for defendant appellee.

CAMPBELL, Judge.

The order appealed from was dated and filed 17 May 1972. The Rules of Practice in this Court require the record on appeal to be docketed within ninety (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 sixty (60) days. Rule 5. In the instant case no extension of time was procured from the trial tribunal, and the ninety (90) days expired 15 August 1972. The record on appeal was not filed in this Court until 21 August 1972 and was therefore not timely filed. *Dixon v. Dixon*, 6 N.C. App. 623, 170 S.E. 2d 561 (1969); *Kurtz v. Insurance Co.*, 6 N.C. App. 625, 170 S.E. 2d 496 (1969).

For failure to comply with the rules of this Court

Appeal dismissed.

Judges MORRIS and PARKER concur.

HELEN GILBERT SIFFORD, INDIVIDUALLY AND AS EXECUTRIX UNDER THE WILL OF ERNEST J. SIFFORD, ERNEST J. SIFFORD, JR., AND WIFE, NANCY PRICE SIFFORD, AND DAISY SIFFORD LITTLEFIELD v. FRIENDLY PARKING SERVICE, INC.

No. 7226SC640

(Filed 20 December 1972)

Judgments § 1; Pleadings §§ 32, 41— pending motions to strike and to amend — judgment entered on merits

Where the case had been placed on the motion calendar for disposition of a motion by defendant to strike portions of the complaint and a motion by plaintiff to amend the complaint, the court erred in entering a judgment on the merits.

APPEAL by defendant from *Friday, Judge*, 27 April 1972 Schedule "B" Session of Superior Court held in MECKLENBURG County.

Plaintiffs instituted this action for declaratory judgment, seeking to determine the rights of the parties under a certain option to lease allegedly accepted by defendant. Defendant filed a motion to strike certain parts of the complaint. Plaintiffs filed a motion to amend their complaint. No orders were entered

disposing of the pending motions. On appeal, and as appears in the statement of the case on appeal, appellant argued and appellee conceded: that the case had been placed on the motion calendar for disposition of the pending motions; that the judge advised the parties that he would take the files and advise counsel at a later date; that subsequently counsel received a judgment purporting to dispose of the case on its merits. From the entry of this judgment, defendant appealed.

Hovis & Hunter by John N. Hunter for plaintiff appellees.

Newitt & Newitt by John G. Newitt, Sr., for defendant appellant.

VAUGHN, Judge.

Although we do not doubt that the respected trial judge was of the opinion that the cause was before him for final disposition, it clearly appears that the case was not yet ripe for adjudication on the merits. The order from which defendant appeals is vacated and the cause is remanded to the Superior Court of Mecklenburg County.

Vacated and remanded.

Judges HEDRICK and GRAHAM concur.

STATE OF NORTH CAROLINA v. WALTER JUNIOR JOHNSON

No. 7210SC806

(Filed 20 December 1972)

1. **Homicide § 12— murder indictment — plea to manslaughter**

An indictment for murder will support a plea of *nolo contendere* to voluntary manslaughter.

2. **Constitutional Law § 36— cruel and unusual punishment — sentence for voluntary manslaughter**

A sentence of twelve to fifteen years imposed upon defendant's plea of *nolo contendere* to voluntary manslaughter does not constitute cruel and unusual punishment.

APPEAL by defendant from *Brewer, Judge,* 31 July 1972 Session of Superior Court held in WAKE County.

Defendant was indicted for murder. He was allowed to enter a plea of *nolo contendere* to voluntary manslaughter. Judgment imposing a prison sentence of not less than twelve nor more than fifteen years was entered. Defendant subsequently wrote his court appointed counsel and asked that notice of appeal be entered.

Attorney General Robert Morgan by Russell G. Walker, Jr., and Roy A. Giles, Jr., Assistant Attorneys General for the State.

James R. Fullwood for defendant appellant.

VAUGHN, Judge.

[1, 2] The record discloses that defendant's plea was accepted only after the court made due inquiry of the defendant and adjudged that the plea was freely, understandingly and voluntarily entered. On appeal, defendant does not contend that his plea was not freely, understandingly and voluntarily entered. Defendant argues that a bill of indictment for murder will not support a plea of manslaughter. He further argues that the sentence imposed constitutes cruel and unusual punishment prohibited by the United States Constitution. These are the only assignments of error brought forward and they are without merit.

No error.

Judges BRITT and PARKER concur.

STATE OF NORTH CAROLINA v. OTIS LEE LEWIS

No. 7226SC834

(Filed 20 December 1972)

ON *certiorari* to review order of *McLean, Judge,* entered at 10 May 1971 Session of Superior Court, MECKLENBURG County.

Defendant was charged with forgery and uttering a forged check. At trial he entered a plea of guilty to uttering a forged check. The court questioned him at length with respect to the voluntariness of his plea. Defendant, a high school graduate,

stated under oath that he understood the charge against him; was not under the influence of alcohol, narcotics, medicines, or pills; that he was satisfied with the services of his counsel; was in fact guilty; had had time to subpoena witnesses; had not received any promises or threats to influence his plea; and was freely, voluntarily and understandingly pleading guilty. The court entered judgment that defendant be imprisoned for a period of ten years. Defendant, in open court, gave notice of appeal. Counsel was appointed to perfect his appeal.

Attorney General Morgan, by Deputy Attorney General Vanore, for the State.

Arthur Goodman, Jr., for defendant appellant.

MORRIS, Judge.

We note that the bill of indictment contained two counts—one for felonious forgery and one for feloniously uttering a forged instrument. It appears that the first count, forgery, may be fatally defective. However, the indictment for the felony of uttering a forged instrument is, in all respects, proper. This was the charge to which defendant entered a plea of guilty. The transcript of his plea and the adjudication of the court thereon appear in the record. The sentence imposed is within the statutory limits.

No error.

Judges CAMPBELL and PARKER concur.

STATE OF NORTH CAROLINA v. RANSOM POWELL

No. 728SC705

(Filed 20 December 1972)

APPEAL by defendant from *Cowper, Judge,* 27 March 1972 Session of Superior Court held in WAYNE County.

Defendant was charged in a bill of indictment, proper in form, with the felony of armed robbery.

From the imposition of a prison sentence upon a verdict of guilty of common law robbery, the defendant appealed to the Court of Appeals, assigning error.

Attorney General Morgan and Associate Attorney Boylan for the State.

Whitley & Vickory by C. Branson Vickory for defendant appellant.

MALLARD, Chief Judge.

The evidence for the State tended to show that there was ample evidence of the defendant's guilt to require submission of the case to the jury. The defendant offered evidence of an alibi.

The defendant contends that the trial judge committed error in the admission of evidence, the charge to the jury and in other rulings. We have considered all of the defendant's assignments of error properly presented and are of the opinion that the defendant has had a fair trial free from prejudicial error.

No error.

Judges BROCK and BRITT concur.

STATE OF NORTH CAROLINA v. KENNETH REDEN SHOE

No. 7215SC756

(Filed 20 December 1972)

APPEAL by defendant from *Godwin, Judge,* 5 June 1972 Session of Superior Court held in ALAMANCE County.

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

Lee W. Settle for defendant appellant.

MALLARD, Chief Judge.

The defendant, in writing, pleaded guilty to a bill of indictment charging him with the felony of larceny. The judge found upon competent evidence that the plea of guilty was freely, understandingly and voluntarily made. The defendant was sentenced, as permitted by statute, to not less than four nor

more than six years in prison. We find no prejudicial error. The judgment of the Superior Court is affirmed.

Affirmed.

Judges MORRIS and HEDRICK concur.

STATE OF NORTH CAROLINA v. JEANETTE BURNEY SMITH

No. 7213SC832

(Filed 20 December 1972)

APPEAL by defendant from *Hall, Judge,* 14 August 1972 Session of Superior Court held in BLADEN County.

Defendant was indicted for murder. The jury returned a verdict of guilty of voluntary manslaughter. Judgment imposing a prison sentence not less than four nor more than ten years was entered. Defendant was represented at trial and on appeal by court appointed counsel.

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

Moore & Melvin by Reuben L. Moore, Jr., for defendant appellant.

VAUGHN, Judge.

Defendant's counsel states that, except for the admission of certain exhibits, he is unable to discover prejudicial error in the trial and urges that the court scrutinize the record to determine if error appears. The exhibits, which were introduced over defendant's objections, were relevant and their admission into evidence did not constitute prejudicial error. We have reviewed the record and find no prejudicial error.

No error.

Judges BRITT and PARKER concur.

State v. Mink; State v. Shaffer

STATE OF NORTH CAROLINA v. TONY GWYN MINK

No. 7223SC840

(Filed 20 December 1972)

APPEAL by defendant from *Kivett, Judge,* 14 August 1972 Session of Superior Court held in WILKES County.

Defendant, represented by counsel, entered pleas of guilty to two charges of felonious larceny and one charge of larceny punishable as a misdemeanor. From the judgments entered, defendant appealed.

Attorney General Robert Morgan by James E. Magner, Jr., Assistant Attorney General for the State.

Porter, Conner & Winslow by Douglas L. Winslow for defendant appellant.

VAUGHN, Judge.

Defendant's court appointed counsel, with appropriate candor, states that he is unable to assign error. The record reveals that the trial judge, after due inquiry of defendant and upon sufficient evidence, adjudicated that defendant understandingly and voluntarily entered pleas of guilty. We have reviewed the record proper and find no prejudicial error.

No error.

Judges BRITT and PARKER concur.

STATE OF NORTH CAROLINA v. GERALD M. SHAFFER

No. 7230SC819

(Filed 20 December 1972)

APPEAL by defendant from *Falls, Judge,* 24 July 1972 Session of Superior Court held in CHEROKEE County.

Defendant was charged in a warrant with misdemeanor escape. After appeal from District Court he entered a plea of guilty in Superior Court. From a sentence of imprisonment he appealed to this court.

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

McKeever, Edwards, Davis & Hays, by W. Arthur Hays, Jr., for defendant.

BROCK, Judge.

We have examined the record proper and find no prejudicial error. The warrant is sufficient to charge the offense. Defendant was properly before the Superior Court upon the warrant after appeal from the District Court. The record fully supports Judge Falls' finding that the plea of guilty was freely, understandingly, and voluntarily entered. The sentence imposed is within the limits provided by statute.

No error.

Judges CAMPBELL and GRAHAM concur.

STATE OF NORTH CAROLINA v. HAROLD EMANUEL

No. 7216SC782

(Filed 20 December 1972)

APPEAL by defendant from *Hobgood, Judge,* 26 June 1972 Session of Superior Court held in SCOTLAND County.

Defendant appeals from a judgment of imprisonment imposed upon his plea of guilty to a charge of armed robbery.

Attorney General Morgan by Deputy Attorney General Bullock for the State.

Jennings G. King for defendant appellant.

GRAHAM, Judge.

After the case was docketed and briefs were filed in this Court, defendant moved for leave to withdraw his appeal. We denied his motion and have reviewed the appeal on the merits.

The record supports the trial judge's adjudication that defendant's plea of guilty was freely, understandingly and vol-

untarily made, and no error appears in the record. We find and hold that defendant had a fair trial free from prejudicial error.

No error.

Judges CAMPBELL and BROCK concur.

STATE OF NORTH CAROLONA v. GERALD M. SHAFFER

No. 7230SC818

(Filed 20 December 1972)

APPEAL by defendant from *Falls, Judge,* 24 July 1972 Session of Superior Court held in CHEROKEE County.

Defendant appeals from a judgment of imprisonment imposed upon his plea of guilty of possessing, with intent to distribute, a controlled drug, Diphylets (Dextro Amphetamine Sulfate).

Attorney General Robert Morgan by Deputy Attorney General James F. Bullock for the State.

McKeever, Edwards, Davis & Hays by W. Arthur Hays, Jr., for defendant appellant.

CAMPBELL, Judge.

Upon a proper bill of indictment charging him with possession of a controlled drug, with intent to distribute, the defendant entered a plea of guilty.

The record supports the trial judge's adjudication that defendant's plea of guilty was freely, understandingly and voluntarily made. No error appears in the record. We find and hold that defendant had a fair trial free from prejudicial error.

No error.

Judges BROCK and GRAHAM concur.

STATE OF NORTH CAROLINA v. ALBERT LOCKLEAR, ALIAS, BUDDY LOCKLEAR

No. 7216SC784

(Filed 20 December 1972)

APPEAL by defendant from *Hobgood, Judge,* 26 June 1972 Session of Superior Court held in SCOTLAND County.

Defendant appeals from a judgment of imprisonment imposed upon his plea of guilty to a charge of armed robbery.

Attorney General Robert Morgan by Assistant Attorney General Raymond W. Dew, Jr., for the State.

James W. Mason for defendant appellant.

CAMPBELL, Judge.

The defendant entered a plea of guilty to a bill of indictment charging him with armed robbery.

The record supports the adjudication of the trial judge to the effect that defendant's plea of guilty was freely, understandingly and voluntarily made. No error appears in the record. We find and hold that defendant had a fair trial free from prejudicial error.

No error.

Judges BROCK and GRAHAM concur.

STATE OF NORTH CAROLINA v. WILLIAM UPTON

No. 7220SC820

(Filed 20 December 1972)

APPEAL by defendant from *Lupton, Judge,* 24 July 1972 Criminal Session, STANLY Superior Court.

Defendant was charged in a bill of indictment proper in form with felonius escape from the lawful custody of the Superintendent of Unit 5540, Stanly County Subsidiary of the North Carolina Department of Correction, defendant being lawfully

confined therein and serving a sentence for armed robbery and a sentence for escape. At trial defendant, orally and in writing, tendered a plea of guilty as charged. After due inquiry and adjudging that the plea was freely, understandingly and voluntarily made, without undue influence, compulsion or duress, and without promise of leniency, the court accepted the plea. From judgment imposing prison sentence, defendant appealed.

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

Brown, Brown & Brown by Fred Stokes for defendant appellant.

BRITT, Judge.

Conceding that he can find no error in the record in this case, defendant's court appointed counsel asks that we determine if there is error. We have carefully reviewed the record on appeal and perceive no prejudicial error.

The judgment appealed from is

Affirmed.

Judges PARKER and VAUGHN concur.

STATE OF NORTH CAROLINA v. JAY WISE BUTLER

No. 724SC610

(Filed 20 December 1972)

APPEAL by defendant from *Rouse, Judge,* 17 April 1972 Session, ONSLOW Superior Court.

By warrant proper in form defendant was charged with maintaining and operating "a structure (home)" for the purpose of prostitution and assignation, a violation of G.S. 14-204. From judgment imposed on a verdict of guilty in district court, defendant appealed to superior court where he was found guilty by a jury. From judgment in superior court imposing prison sentence of 18 to 24 months, defendant appealed.

Attorney General Robert Morgan by Charles M. Hensey, Assistant Attorney General, for the State.

Bailey & Robinson by Edward G. Bailey for defendant appellant.

BRITT, Judge.

Stating that he has carefully reviewed the record in this case but is unable to assign any error, defendant's court appointed counsel asks us to make a careful review and determine if there is error. Following a careful review of the entire record on appeal, we conclude that defendant received a fair trial, free from prejudicial error, and the sentence imposed is within the limits allowed by statute.

No error.

Chief Judge MALLARD and Judge BROCK concur.

STATE OF NORTH CAROLINA v. MALACHI FAISON

No. 724SC645

(Filed 20 December 1972)

APPEAL by defendant from *Rouse, Judge,* April-May 1972 Session, SAMPSON Superior Court.

By two warrants issued on 5 May 1971, defendant was charged with (1) illegal possession and sale of whiskey on 13 February 1971 and (2) illegal possession and sale of whiskey on 20 February 1971. In superior court a jury found defendant guilty as charged in the warrants and from judgment imposing prison sentence, suspended on certain conditions, defendant appealed.

Attorney General Robert Morgan by George W. Boylan, Associate Attorney, for the State.

Chambliss, Paderick and Warrick by Joseph B. Chambliss for defendant appellant.

BRITT, Judge.

Although defendant has filed a motion to withdraw his appeal, we have elected to deny the motion and consider the

case on its merits. After careful consideration of the record on appeal and the briefs, we find no prejudicial error.

No error.

Chief Judge MALLARD and Judge BROCK concur.

STATE OF NORTH CAROLINA v. ELMOND (EDMOND) GABRIEL HARDY, JR.

No. 7218SC773

(Filed 29 December 1972)

1. **Searches and Seizures § 4— automobile search under warrant — hostile crowd — continuance of search in another location — no error**

Where a threatening and angry crowd gathered at the scene of defendant's arrest, it was not error for the arresting officers to remove defendant and his automobile to a location two miles away to complete the search of the automobile; therefore, items seized as a result of that search were properly admitted in evidence, and no error was committed in denying defendant's motion to quash the search warrant and suppress the evidence seized pursuant thereto.

2. **Criminal Law § 75— failure to give Miranda warnings — in-custody statements admissible**

Where defendant was under arrest but had been given no "Miranda warnings," his statements that he wanted to see what officers could find in a search of his car and that glassine bags of heroin found by officers were all there was to be found were not coerced as a result of a custodial interrogation; rather, the statements were volunteered and were properly admitted in evidence regardless of the fact that no "Miranda warnings" were given the defendant before making them.

APPEAL by defendant from *Seay, Judge,* 5 June 1972 Session of Superior Court held in GUILFORD County.

Defendant was charged in a bill of indictment, proper in form, with the felony of possession of a controlled substance (heroin) with intent to distribute. At the trial of the cause, the State announced its intention to "prosecute and proceed on simple possession of heroin." The defendant pleaded not guilty. Trial was by jury.

The evidence for the State tended to show that Officers Heffinger, Daughtry, Bunton and Gibson of the Greensboro Police Department, armed with a duly issued search warrant,

stopped the defendant's car at the rear of the apartment at 701-B Jennifer Street, Greensboro, about 12:15 a.m. on 16 February 1972. The defendant was driving the automobile and there were two passengers. Officer Heffinger approached the automobile, identified himself as a police officer, and read the search warrant to the defendant. The search warrant commanded the affiant, or other lawful official, to "search Elmond G. Hardy, his person and his residence at 701-B Jennifer St., and his automobile, a 1970 red Oldsmobile, 1972 N.C. Lic. SONNIE, for the property in question." Pursuant to the warrant, Officers Heffinger and Gibson searched the person of the defendant and seized from his right front pants pocket a "bullet projectile that comes from the base of the shell" which had "a small gold-colored spoon at the base of the bullet," with some white powder in it.

Thereafter, the officers began to search defendant's automobile, which was the same automobile as was described in the search warrant. While the automobile was being searched, people came out of nearby apartments, gathered around the car, and cursed loudly, using threatening language toward the officers. Officer Heffinger recovered a loaded .38 caliber pistol and two needles and syringes from underneath the dashboard of the defendant's Oldsmobile near the steering column.

Heffinger placed the defendant under arrest for carrying a concealed weapon. Thereafter, because of the harassment and threatening nature of the crowd gathered around the defendant's automobile, the officers took the defendant and drove the defendant's Oldsmobile and their two unmarked police cars to the premises of the Kirk-Sineath Motor Company about two miles from Jennifer Street, where the search was continued. As a result of the search, the officers recovered some nineteen glassine bags containing a white powder which was analyzed and determined to be the narcotic drug heroin. Defendant offered no evidence.

After his arraignment, at which defendant pleaded not guilty, and the selection of a jury, defendant moved to quash the search warrant upon the grounds of the insufficiency of the affidavit upon which it was based and to suppress the evidence seized pursuant thereto. The motion, after a voir dire hearing, was denied. At the close of all the evidence, the defendant moved for judgment as of nonsuit. The motion was denied. The jury returned a verdict of guilty of the unlawful possession of the

controlled substance heroin. Judgment was entered on the verdict that defendant be imprisoned for a term of five years. Defendant appealed to the Court of Appeals, assigning error.

Attorney General Morgan and Associate Attorney Sherrill for the State.

Lee, High, Taylor & Dansby by Herman L. Taylor and Samuel S. Mitchell for defendant appellant.

MALLARD, Chief Judge.

In the record on appeal the defendant is referred to as Edmond Gabriel Hardy, Jr., as Elmond Gabriel Hardy, Jr., and otherwise. In the search warrant he is referred to as Elmond Gabriel Hardy, Jr. In the bill of Indictment he is referred to as Edmond Gabriel Hardy, Jr. In the title of the Judgment and Commitment on the original record filed wtih the Court of Appeals he is referred to as Edmond (Elmond) Gabriel Hardy. In the title to the defendant's "statement of case on appeal" and in a stipulation signed by his attorney he is referred to as Edmond Gabriel Hardy, Jr. In the title to the appearance bond he signed when he appealed to the Court of Appeals he is referred to as Edmond Gabriel Hardy. However, in places where a reproduction of his signature appears in the original record filed in this office, he appears to have signed his name "Elmond G. Hardy, Jr." In the briefs and record on appeal and during the trial, no objection and no reference was made to the different spellings of the defendant's name. We are of the opinion that if the question had been raised, the doctrine of idem sonans would apply. See 4 Strong, N. C. Index 2d, Indictment and Warrant, § 10.

[1] Defendant assigns as error the denial of his motion to quash the search warrant and to suppress the evidence seized pursuant thereto. Defendant argues in his brief "that the trial court committed prejudicial and reversible error by failing to quash the search warrant and all evidence presumably gathered thereunder *by reason of the unreasonablenesss of the search* and its contravention of rights guaranteed to the defendant by the 4th and 14th Amendments to the United States Constitution and by Section 20 and 23 of Article I of the Constitution of North Carolina." (Emphasis added.) The defendant does not otherwise contend or argue in his brief that the affidavit used to obtain the search warrant was insufficient or that the search

warrant was not properly issued. Defendant argues, however, that the search of the defendant's automobile was conducted in an unreasonable manner in that during the course of the search, the automobile was moved from the parking area near 701-B Jennifer Street to the grounds of the Kirk-Sineath Motor Company, approximately two miles from Jennifer Street, where the search was completed.

After the defendant moved to quash the search warrant, the trial judge conducted a voir dire hearing to determine the validity of the search warrant and the lawfulness of the search. After hearing the evidence and argument, the court made findings of fact and concluded that the affidavit was sufficient, that the search warrant was properly issued and was valid, and that:

> " . . . (T)he search was begun there at 701-B Jennifer Street and continued in the vicinity of the Kirk-Sineath Motor Company, being moved by reason of the arrival of a threatening and angry crowd; . . . that from the evidence and the facts found, the Court concludes that . . . the search was a reasonable search; . . . and that the reason for changing the location of the search was a valid one . . . ."

We hold that the affidavit used to obtain the search warrant was sufficient, the search warrant was valid, and there was ample evidence to support the findings of fact and conclusions of law made by Judge Seay.

We now consider whether the circumstances of this case made the search unreasonable as a matter of law.

In *State v. Hill,* 278 N.C. 365, 180 S.E. 2d 21 (1971), it is stated that:

> "We think it clear that *Chambers* controls the instant case. Here, the police, acting on reliable information, had probable cause to stop the 1964 Fairlane driven by Galloway and arrest him. As in *Chambers,* a careful search of the car was reasonable, but impractical and perhaps dangerous at the time and place of the arrest. The station house search a short time later was fully justified and constituted a lawful search."

Accord, Chambers v. Maroney, 399 U.S. 42, 26 L.Ed. 2d 419, 90 S.Ct. 1975 (1970); *United States v. Chalk,* 441 F. 2d 1277 (4th Cir. 1971), *cert. denied,* 404 U.S. 943.

In the case before us the State's evidence tended to show that an "angry" crowd of people gathered around the officers while they were attempting to search the defendant's automobile there in the dark parking area back of the apartment building. Some of the members of this group were cursing in a loud voice and making threats against the police officers. The police officers properly removed the arrested defendant and his automobile to a less turbulent scene in order to complete the search of the vehicle under the search warrant. This was the exercise by the police officers of proper precautionary measures, and it was not error to complete the search of the defendant's automobile at a more tranquil scene.

It follows, therefore, that items seized as a result of that search were properly admitted in evidence, and no error was committed in denying the motion to quash the search warrant and suppress the evidence seized pursuant thereto. This assignment of error is overruled.

[2] Defendant assigns as error the admission in evidence of inculpatory statements made by defendant after defendant had been arrested and while his automobile was being searched and when the police officers had not informed defendant of his constitutional right to counsel and to remain silent.

Officer J. D. Heffinger of the Greensboro Police Department testified that:

> "Before the bags were found, Officer Bunton, who was standing with Mr. Hardy, asked Mr. Hardy if he wanted to go and sit in the police car out of the rain and cold. Mr. Hardy stated that—
>
> DEFENSE COUNSEL: Objection.
>
> COURT: Overruled. EXCEPTION NUMBER E-58.
>
> WITNESS (continuing): — that he did not, that he wanted to stay there and see what stuff that the officers found. About five or ten minutes passed before the glassine bags were found. As I was counting the bags, Detective Gibson again laid down in the seat and started to reach up under the dash and he said, 'Let me see if I can find anything else.' Mr. Hardy said, 'No, that's all there is.'
>
> MR. TAYLOR: Objection to that and move to strike."

On voir dire examination, the court concluded, on facts properly found and supported by the evidence, that the "response and statement made by the defendant was freely and understandingly and voluntarily made, without coercion; that it was not as the result of an interrogation . . . . Further, that when Officer Gibson found certain glassine bags . . . that the defendant made a spontaneous statement at that time; that the statement was not in response to any questions directed toward him and was not the product of any threat, offer of reward, or intimidation of the defendant," and thereupon overruled the objection and motion to strike.

The issue is whether the circumstances of this case, as a matter of law, rendered the statements inadmissible.

The statements made by defendant to Officers Bunton and Gibson were inculpatory since they admitted, in effect, that defendant had heroin under his control, hidden in his car. Moreover, defendant was under arrest when he made the statements and was in a police dominated atmosphere. However, the fact that defendant was in custody when he made the inculpatory statements does not of itself render them inadmissible. *State v. Muse,* 280 N.C. 31, 185 S.E. 2d 214 (1971), *cert. denied,* 406 U.S. 974; *State v. Fletcher* and *State v. St. Arnold,* 279 N.C. 85, 181 S.E. 2d 405 (1971). Voluntariness remains the test of admissibility of inculpatory statements. *State v. Fletcher* and *State v. St. Arnold, supra; State v. McCloud,* 276 N.C. 518, 173 S.E. 2d 753 (1970). The so-called "Miranda warnings" are only required when a defendant is subjected to a custodial interrogation. *Miranda v. Arizona,* 384 U.S. 436, 16 L.Ed. 2d 694, 86 S.Ct. 1602, 10 A.L.R. 3d 974 (1966); *State v. Fletcher* and *State v. St. Arnold, supra; State v. Meadows,* 272 N.C. 327, 158 S.E. 2d 638 (1968). Volunteered statements are competent evidence, and their admission is not barred under any theory of the law, state or federal. *State v. Haddock,* 281 N.C. 675, 190 S.E. 2d 208 (1972); *State v. Ratliff,* 281 N.C. 397, 189 S.E. 2d 179 (1972); *State v. Stepney,* 280 N.C. 306, 185 S.E. 2d 844 (1972); *State v. Chance,* 279 N.C. 643, 185 S.E. 2d 227 (1971).

Under the totality of the circumstances of this case, the inculpatory statements made by defendant were not coerced as a result of a custodial interrogation; rather, the statements were volunteered and were properly admitted in evidence regardless of the fact that no "Miranda warnings" were given the defendant before making them. This assignment of error is overruled.

Defendant's other assignments of error, including his motion for nonsuit, were not brought forward in the brief and argued; therefore, they are taken as abandoned. Rules of Practice in the Court of Appeals, No. 28.

In the trial we find no prejudicial error.

No error.

Judges MORRIS and HEDRICK concur.

BRUCE ERNEST SPRINKLE, JR. v. DELORES DRAKE SPRINKLE

No. 7226DC646

(Filed 29 December 1972)

1. **Divorce and Alimony §§ 16, 18— hearing on alimony pendente lite — dismissal of action for alimony without divorce error**

Where defendant wife's cross action was for alimony *pendente lite*, counsel fees and permanent alimony without divorce, a dismissal of the entire claim on its merits after a hearing for temporary alimony was error since the trial court failed to make findings of fact on the alleged grounds for permanent alimony.

2. **Divorce and Alimony § 18— alimony pendente lite — required findings of fact**

In a hearing for alimony *pendente lite* it is not required that the trial judge make findings as to each allegation and evidentiary fact presented; rather, it is necessary for the judge to make findings from which it can be determined, upon appellate review, that an award of alimony *pendente lite* is justified and appropriate in the case. G.S. 50-16.3; G.S. 50-16.8.

3. **Divorce and Alimony § 18— alimony pendente lite — sufficiency of findings of fact**

A finding by the trial court that the defendant wife was supporting herself, but that she could not be represented in the divorce action by counsel without financial help from her husband was equivalent to a finding that she did not have sufficient means whereon to subsist during the defense of the suit and to defray the expenses thereof, and that finding was equivalent to a finding that the wife was substantially in need of support from the husband; therefore, having found facts which showed only that the wife was a dependent spouse, the court erred in denying alimony *pendente lite* without finding against the wife on any one of the other issues raised in her application for alimony *pendente lite*. G.S. 50-16.6; G.S. 50-16.3.

4. **Divorce and Alimony § 18— alimony pendente lite — basis of award**

Alimony *pendente lite* is measured, among other things, by the needs of the dependent spouse and the ability of the supporting spouse to pay.

5. **Divorce and Alimony § 18— alimony pendente lite — needs of dependent spouse**

The spouse making application for alimony *pendente lite* must show a substantial need to approximate his accumstomed station in life, not a substantial need in order to exist.

6. **Divorce and Alimony § 18— award of counsel fees — necessity for award of alimony pendente lite**

A spouse who is not entitled to alimony *pendente lite* is also not entitled to an award of counsel fees. G.S. 50-16.4.

7. **Divorce and Alimony § 18— alimony pendente lite — counsel fees — insufficiency of findings**

Where the trial court made no findings of fact which were sufficient to support an award of alimony *pendente lite*, there were no findings of fact sufficient to support an award of reasonable counsel fees and judgment of the trial court awarding defendant wife such fees is vacated.

APPEAL by defendant-wife from *Arbuckle, District Judge,* 10 April 1972 Session of MECKLENBURG District Court.

Plaintiff-husband filed a complaint on 6 December 1971 alleging that he and defendant-wife were lawfully married on 17 November 1962; that they have lived continuously separate and apart from each other since 10 November 1970; and that there were no children born of the marriage, but that an interlocutory decree of adoption of two children had been entered. Plaintiff-husband prayed for a decree of absolute divorce.

Defendant-wife, on 20 January 1972, filed an answer in which she alleged that after the filing and entering of the interlocutory adoption decree, the plaintiff-husband moved and was allowed to dismiss the adoption proceeding; that the defendant-wife is a dependent spouse within the meaning of G.S. 50-16.1(3); that the plaintiff-husband is the supporting spouse within the meaning of G.S. 50-16.1(4); that on or about 28 November 1970 the plaintiff-husband did, without just cause or provocation, willfully abandon the defendant-wife; that since the abandonment, plaintiff-husband has failed to provide defendant-wife with adequate funds with which to support herself, thus making her life intolerable and her condition burdensome; and that defendant-wife has insufficient means whereby to defray the costs and expenses incurred as a result of this action.

Defendant-wife, in her answer and cross action, prayed for relief in that absolute divorce be denied; that she be awarded alimony pendente lite and counsel fees; and that she be awarded permanent alimony without divorce.

Defendant's claim for alimony pendente lite and counsel fees came on for hearing before Judge Arbuckle on 14 April 1972, at which time the court found the following facts:

"(1) That the defendant has a net take-home pay of from $80.00 to $85.00 per week.

(2) That she produced an expense figure of $335.00.

(3) That the court finds that she is living within her earnings and able to support herself.

(4) That the defendant is entitled to have counsel appear for her in court."

Upon these findings of fact the court entered an order *dismissing* the defendant-wife's answer and cross action in its entirety, denying her alimony pendente lite, and granting her an award of $200.00 counsel fees.

Scarborough, Haywood & Selvey by William H. Scarborough for plaintiff appellee.

Hamel & Cannon by Thomas R. Cannon for defendant appellant.

CAMPBELL, Judge.

The defendant-wife's appeal brings before this Court several questions: (1) Did the trial court err in dismissing her claim for permanent alimony without divorce in a hearing to determine if she was entitled to alimony pendente lite? (2) Did the trial court find sufficient facts to support a denial of alimony pendente lite? (3) Did the trial court find sufficient facts to support an award of counsel fees?

[1] I. Prior to 1 October 1967 G.S. 50-16 provided that upon proving enumerated grounds for divorce the wife could be awarded a reasonable subsistence and counsel fees in an action instituted by her, or in a cross action, for alimony without divorce, absolute divorce, or divorce from bed and board. It was held by the Supreme Court that this section created two distinct and separate remedies: one for alimony without divorce, and the

other for alimony pendente lite and counsel fees. When the trial court conducts a hearing upon application for alimony pendente lite and counsel fees, upon denial of alimony pendente lite the court has no jurisdiction to dismiss an action for alimony without divorce. A hearing to determine an award of alimony pendente lite is interlocutory in nature, and the issues are not the same as those presented by a claim for divorce or alimony without divorce; for this reason it has been held that a hearing on motion for alimony pendente lite and counsel fees is not a hearing on the merits, and the court is without jurisdiction to dismiss the action as of nonsuit. *Briggs v. Briggs,* 234 N.C. 450, 67 S.E. 2d 349 (1951); *Bond v. Bond,* 235 N.C. 754, 71 S.E. 2d 53 (1952); *Flynt v. Flynt,* 237 N.C. 754, 75 S.E. 2d 901 (1953).

In *Griffith v. Griffith,* 265 N.C. 521, 144 S.E. 2d 589 (1965), the wife brought an action for alimony without divorce. On hearing for alimony pendente lite and counsel fees the trial court found that she had a substantial salary, denied pendente lite allowance, but ordered defendant-husband to pay child support and $500.00 counsel fees. Plaintiff moved for voluntary nonsuit, which was denied, based on the ruling in the *Briggs* case. The Supreme Court, in reversing the trial court, pointed out that *Briggs* and related cases held that the court may not dismiss an action after a hearing for alimony pendente lite because the claimant has the right to try the merits of the case *before the jury* for permanent alimony; but where the claimant asks for the dismissal, as in *Griffith,* then the dismissal is all right.

In construing the new statute, G.S. 50-16.1 *et seq.,* this Court held, in *Williams v. Williams,* 13 N.C. App. 468, 186 S.E. 2d 210 (1972), that the procedure to be followed in actions for alimony without divorce is the same as that applicable to other civil actions, and that, upon failure to demand a jury trial in accordance with Rule 38(b), the claimant waives his right to jury trial. There does not appear to be a demand for jury trial in the record of the case at bar by either plaintiff or defendant, and for that reason the right to jury trial has been waived. Therefore, trial must be before the court sitting without a jury.

In cases where the trial judge passes on the facts, it is necessary that he (1) find the facts *on all issues joined on the pleadings,* (2) declare the conclusions of law arising on the facts, and (3) enter judgment accordingly. *Williams v. Williams, supra.*

In the case at bar the wife's cross action alleged that she is a dependent spouse, that her husband is the supporting spouse, and that he had committed two of the grounds for alimony enumerated in G.S. 50-16.2: abandonment and failure to support. The trial court made no findings on the alleged grounds for permanent alimony, which are issues joined on the pleadings, and for that reason a dismissal of the claim on the merits after the hearing for temporary alimony was error.

II. Whether a dependent spouse is entitled to alimony pendente lite depends upon the facts in each case in relation to the applicable statutory requirements.

G.S. 50-16.3 provides that:

"(a) A dependent spouse who is a party to an action for absolute divorce, divorce from bed and board, annulment, or alimony without divorce, shall be entitled to an order for alimony pendente lite when:

(1) It shall appear from all the evidence presented pursuant to G.S. 50-16.8(f), that such spouse is entitled to the relief demanded by such spouse in the action in which the application for alimony pendente lite is made, and

(2) It shall appear that the dependent spouse has not sufficient means whereon to subsist during the prosecution or defense of the suit and to defray the necessary expenses thereof."

G.S. 50-16.8(a) provides that the procedure in actions for alimony and actions for alimony pendente lite shall be as in other civil actions. Subsection (f) provides, "When an application is made for alimony pendente lite, the parties shall be heard orally, upon affidavit, verified pleading, or other proof, and *the judge shall find the facts* from the evidence so presented." (Emphasis added.)

A. REQUIRED FINDINGS OF FACT.

[2] These statutory enactments are entirely different from prior law in this area. They require that the trial judge find the facts from the evidence presented; however, it is not required that the trial judge make findings as to each allegation and evidentiary fact presented. The statute makes it necessary for the trial judge to make findings from which it can be determined,

upon appellate review, that an award of alimony pendente lite is justified and appropriate in the case. *Hatcher v. Hatcher,* 7 N.C. App. 562, 173 S.E. 2d 33 (1970). The trial judge must find the *ultimate facts* on each issue which are sufficient to establish that the dependent spouse is entitled to an award of alimony pendente lite. *Blake v. Blake,* 6 N.C. App. 410, 170 S.E. 2d 87 (1969).

Such an award can be supported only by findings of ultimate facts to the extent that:

(1) The spouse to whom it is given a dependent spouse (G.S. 50-16.3(a));

(2) The supporting spouse is capable of making the payments required (G.S. 50-16.5(a));

(3) It appears from the evidence that the dependent spouse is entitled to the relief demanded by such spouse in the action (G.S. 50-16.3(a)(1)) (that the alleged ground for alimony appears to be true);

(4) It appears from the evidence that the dependent spouse does not have sufficient means whereon to subsist during the prosecution or defense of the suit and to defray the necessary expenses thereof (G.S. 50-16.3(a)(2)). *Hatcher v. Hatcher, supra; Whitney v. Whitney,* 15 N.C. App. 151, 189 S.E. 2d 629 (1972).

B. SUFFICIENCY OF THE FINDINGS OF FACT.

[3] The facts found in an alimony pendente lite case must be determinative of all the questions at issue in the proceeding. Specific factual findings as to each ultimate fact in issue upon which the rights of the litigants are predicated must be found. A failure to make a proper finding of fact in a matter at issue between the parties will result in prejudicial error, especially where the evidence is conflicting. A finding of fact in an alimony pendente lite matter is a narrative statement by the trial judge of the *ultimate fact* at issue and need not include the evidentiary or subsidiary facts required to prove the ultimate facts. *Peoples v. Peoples,* 10 N.C. App. 402, 179 S.E. 2d 138 (1971).

In *Peoples* this Court had occasion to determine the sufficiency of a trial court's findings of fact as tested by the statutory requirement. It was held that findings that the defendant left the home, had abandoned the plaintiff, and had failed to

provide adequate support for her are narrative statements of some of the ultimate facts at issue, not conclusions.

However, it was also held that to find that one is a "dependent spouse" or a "supporting spouse" is a consequence of two or more related propositions taken as premises, and thus, the finding would be a conclusion not supported by a finding of fact.

G.S. 50-16.1(3) provides two different factual situations from which the conclusion could be reached that a spouse is a dependent spouse: (1) when a spouse is actually substantially dependent upon the other spouse for his or her maintenance and support; and (2) when a spouse is substantially in need of maintenance and support from the other spouse.

The evidence upon which the findings in the instant case were based is not within the record. Since the evidence is not brought forward in the record, the findings must be deemed supported by competent and sufficient evidence.

However, although it be deemed that the evidence supports the findings of fact, it does not follow that the findings of fact support the conclusion of law. The trial court found that the wife is living within her earnings and is able to support herself, but that she is entitled to have counsel appear for her in court. Based upon that finding the court concluded that she is not entitled to alimony pendente lite, but that she is entitled to $200.00 counsel fees. The conclusion is not consistent with the factual finding, and is contrary to applicable law.

A finding that the wife is now supporting herself, but that she cannot be represented in the divorce action by counsel without financial help from her husband is equivalent to a finding that she does not have sufficient means whereon to subsist during the defense of the suit *and* to defray the expenses thereof (G.S. 50-16.3(a)(2)); and that finding is equivalent to a finding that the wife is substantially in need of support from the husband (G.S. 50-16.1(3)). The latter finding is one of the two alternative conditions which supports the conclusion that she is a dependent spouse.

Having found facts which show only that the wife *is a dependent spouse,* it was error for the court to deny alimony pendente lite without finding against her on any one of the other issues raised in her application for alimony pendente lite, which

issues are: (1) that the supporting spouse is capable of making the payments required (G.S. 50-16.5(a)); and (2) that it appears from the evidence that the husband did abandon the wife, or that he has willfully failed to provide her with necessary subsistence so as to render the condition of the wife intolerable and her life burdensome. (G.S. 50-16.3(a)(1)).

C. THE NATURE AND PURPOSE OF ALIMONY PENDENTE LITE.

The remedy established for the subsistence of the wife pending the trial and final determination of the issues involved and for her counsel fees is intended to enable her to maintain herself *according to her station in life* and to have sufficient funds to employ adequate counsel to meet her husband at the trial *upon substantially equal terms. Myers v. Myers,* 270 N.C. 263, 154 S.E. 2d 84 (1967); *Fogartie v. Fogartie,* 236 N.C. 188, 72 S.E. 2d 226 (1952).

That the wife is *now* employed and able to support herself on her earnings does not answer the issue whether, under the circumstances of prolonged litigation, she will be capable of supporting herself and meeting her husband at the trial upon substantially equal terms. It appears from the order that the trial judge had some doubt as to the wife's ability to defray the cost of this divorce litigation and to support herself during the pendency of the trial, for otherwise he would not have granted her counsel fees. As will be shown below, it was improper for the trial judge to deny her application for alimony pendente lite, but grant an award of counsel fees. The entering of such an order indicates that the trial judge misunderstood the applicable law.

In determining the needs of a dependent spouse, all of the circumstances of the parties should be taken into consideration, including the property, earnings, earning capacity, condition and accustomed standard of living of the parties. G.S. 50-16.5.

[4] Alimony pendente lite is measured, among other things, by the needs of the dependent spouse and the ability of the supporting spouse. The mere fact that the wife has property or means of her own does not prohibit an award of alimony pendente lite. *Cannon v. Cannon,* 14 N.C. App. 716, 189 S.E. 2d 538 (1972). In the *Cannon* case the wife owned the home free of encumbrances and had a yearly income of about $3,800.00. She also owned stock and beach and mountain real property which she alleged she would have to sell if her husband did not

support her. The husband owned no real property or income producing personal property, and earned a yearly income of about $15,000.00. The Court of Appeals affirmed the trial court's finding that the wife was a dependent spouse.

In *Peeler v. Peeler,* 7 N.C. App. 456, 172 S.E. 2d 915 (1970), the plaintiff-wife sued for alimony without divorce, and was granted alimony pendente lite and counsel fees. Plaintiff was employed and had a total net monthly income of $280.00. In addition she owned bonds, cash and an automobile, all valued at $8,000.00. The court's holding that she was a dependent spouse was affirmed.

[5] In order to be deemed a dependent spouse it is not necessary that the spouse should be unable to exist without the aid of the other spouse. The spouse need not be impoverished before the court can make an award. Alimony is determined by the needs of the spouse and the ability of the supporting spouse to pay. The spouse making application for alimony pendente lite must show a substantial need to approximate her accustomed station in life, not a substantial need in order to exist. *Peeler v. Peeler, supra.*

III. The purpose of the allowance for counsel fees is to put the dependent spouse on substantially even terms with the husband in the litigation. *Harrell v. Harrell,* 253 N.C. 758, 117 S.E. 2d 728 (1961). Prior to 1 October 1967, even though the trial court had denied the applicant alimony pendente lite it could properly allow counsel fees in order that the dependent spouse could have adequate means to meet the other spouse at the trial upon substantially equal terms. *Deal v. Deal,* 259 N.C. 489, 131 S.E. 2d 24 (1963).

G.S. 50-16.1 *et seq.,* effective as of 1 October 1967, keys all spousal awards in the nature of permanent alimony, alimony pendente lite and counsel fees to a common factual status of the spouse to whom the award is granted: that spouse must be a dependent spouse within the meaning of G.S. 50-16.1(3). G.S. 50-16.4 further qualifies the spousal right to counsel fees: *"At any time that a dependent spouse would be entitled to alimony pendente lite* pursuant to G.S. 50-16.3, the court may, upon application of such spouse, enter an order for reasonable counsel fees for the benefit of such spouse, to be paid and secured by the supporting spouse in the same manner as alimony." (Emphasis added.)

[6] Because of the clear statutory mandate, a spouse who is not entitled to alimony pendente lite is also not entitled to an award of counsel fees. See *Presson v. Presson,* 13 N.C. App. 81, 185 S.E. 2d 17 (1971), in which this Court held that where the findings of fact do not support an award of alimony pendente lite, those findings do not support an award of counsel fees either.

[7] Since the trial court made no findings of fact which are sufficient to support an award of alimony pendente lite, there are no findings of fact sufficient to support an award of reasonable counsel fees. The same findings required to support alimony pendente lite are required to support an award of counsel fees. *Smith v. Smith,* 15 N.C. App. 180, 189 S.E. 2d 525 (1972).

The judgment below must be vacated, and this cause remanded for rehearing on defendant-wife's application for alimony pendente lite and counsel fees, which application shall be granted or denied based on findings of fact in accordance with this opinion.

Vacated and remanded for rehearing.

Judges MORRIS and PARKER concur.

STATE OF NORTH CAROLINA v. ANDERSON COOPER, ALIAS WALTER JONES

No. 725SC783

(Filed 29 December 1972)

Arrest and Bail § 3; Searches and Seizures § 1— arrest without warrant — probable cause — search of person

Where defendant was seen walking on a deserted street near a shop that had been broken into soon after a security officer had observed two men loading clothes into a van parked at the shop's rear door and a few minutes after one of the two suspects had eluded the security officer in the same area and where defendant was placed under arrest by officers who had knowledge, either direct or indirect, that the shop had been broken into, the officers had reasonable ground in believing that defendant had just committed the crime of felonious breaking and entering, and their search (which produced incriminating evidence) was incident to a lawful arrest.

APPEAL by defendant from *Wells, Judge,* 24 April 1972 Session of NEW HANOVER Superior Court.

Defendant was charged in a three-count indictment with (1) felonious breaking or entering, (2) felonious larceny and (3) felonious receiving of stolen goods. At trial the State elected not to pursue the receiving count.

Upon defendant's plea of not guilty to the first two counts, the State offered evidence which tended to show the following:

Samuel Hicks of the Carolina Security Patrol went to the Stork Shoppe, Ltd. on the night of 20 December 1971 in response to a call over his radio. The Stork Shoppe is a maternity and children's clothes store located at 1306 South Sixteenth Street, Wilmington, N. C. Earlier that evening at 5:00 p.m. the shop had been closed and both front and back doors had been locked by one of the owners. When Hicks arrived at the shop he found a van bearing New Jersey license plates pulled up to the back door and observed someone going from the store to the van. As Hicks drew closer he saw two men inside the building in the process of loading clothes into the van. Hicks announced his presence as he entered the back door and immediately thereafter heard glass shatter in the front of the store. As he entered the main portion of the store he noticed that the front glass door had been broken out. Exiting through the broken door, Hicks spotted two men running through a field beside the shop. After ordering the men to halt, Hicks fired a warning shot into the air. One of the fleeing men fell to the ground while the other kept running. Hicks handcuffed the man lying on the ground and carried him back to his patrol car parked at the rear of the store.

Sergeant J. S. Williams of the Wilmington Police Department, also responding to a call, arrived at the scene and found Hicks with his prisoner. Hicks then informed Sergeant Williams that another suspect was still at large. Williams ran around to the front of the building and saw defendant Anderson Cooper walking northward on the otherwise deserted Sixteenth Street. He started following Cooper and commanded him to stop. At approximately the same time, officers in a police car proceeding southward on Sixteenth Street noticed Sergeant Williams following the defendant at a "fast pace" and pulled up right in front of defendant Cooper who then stopped. Patrolman Everett J. Hamilton of the Wilmington Police Department got out of the police car and Sergeant Williams informed him that the Stork Shoppe had just been broken into.

Defendant Cooper was then placed under arrest and searched by Patrolman Hamilton. Before Patrolman Hamilton was allowed to testify as to the results of his search, a *voir dire* examination was held to determine the admissibility of the items found on defendant Cooper. In the absence of the jury, Patrolman Hamilton gave testimony repetitious of that stated above as to what transpired after he observed defendant on Sixteenth Street. He then testified that while searching defendant Cooper, he found a pocketknife and some papers in defendant's pocket. He then told the court that he advised the defendant at that time that he was under arrest as being suspected of having broken into the Stork Shoppe and that defendant was advised of his constitutional rights. Patrolman Hamilton also stated that at the time defendant was taken into custody, he had reason to believe that defendant had committed a felony. Defendant did not testify on *voir dire*.

The record reveals the following ruling by the trial judge:

> "The Court finds the following facts: That the witness Mr. Hamilton saw Mr. Anderson Cooper on the evening of 20 December, 1971, at or near the scene of the crime, The Stork Shoppe; that he placed Mr. Cooper under arrest before he frisked him, and the knife and papers from his pocket were taken as a result of the witness' assumption that a felony had been committed and therefore the evidence was admissible."

Patrolman Hamilton was then allowed to testify in the presence of the jury that a pocketknife was found in defendant's pocket as well as some papers among which was one part of a two-part New York operator's license bearing the name Thomas Ross. The van parked at the rear entrance of the shop was also searched and another part of a two-part New York operator's license was found inside also bearing the name Thomas Ross. A truck rental contract issued in the City of New York was also found in the van.

At the police station, defendant was again advised of his constitutional rights and signed a waiver. During interrogation defendant denied seeing any glass door broken and denied being near any glass door that was broken on the night in question. Defendant's shoes were examined and glass was found embedded in the soles. Also a shiver of glass was detected on defendant's forehead near his hairline.

Defendant offered no evidence in his behalf. The jury found defendant guilty as charged and from a judgment imposing an active prison sentence, defendant appealed.

Attorney General Morgan, by Associate Attorney Speas, for the State.

Burney, Burney, Sperry, Barefoot and Scott, by Herbert P. Scott, for defendant appellant.

MORRIS, Judge.

Defendant assigns as error the ruling of the trial court that the search of defendant Cooper was incident to a lawful arrest and that the evidence obtained thereby was admissible. Defendant contends that the arrest was made without a warrant and not authorized by the provisions of G.S. 15-41. Therefore the arrest being invalid, defendant argues that the evidence obtained from the search incident to such an arrest was "tainted" and inadmissible.

An arrest without a warrant is illegal unless authorized by statute. *State v. Moore,* 275 N.C. 141, 166 S.E. 2d 53 (1969); *State v. Mobley,* 240 N.C. 476, 83 S.E. 2d 100 (1954).

G.S. 15-41 provides:

"*When officer may arrest without warrant.*—A peace officer may without warrant arrest a person:

(1) When the person to be arrested has committed a felony or misdemeanor in the presence of the officer, or when the officer has reasonable ground to believe that the person to be arrested has committed a felony or misdemeanor in his presence;

(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."

The State makes no contention that any felony or misdemeanor was committed in the arresting officers' presence prior to arrest, but asserts that the officers had reasonable ground to believe that defendant had committed a felony and would evade arrest if not immediately taken into custody. G.S. 15-41(2).

Defendant contends that since the breaking or entering statute of North Carolina, G.S. 14-54, has two parts, § (a) defining a felony, and § (b) defining a misdemeanor, the officers at the time of the arrest of defendant could not have a reasonable belief that a felony had been committed. Defendant argues that it might have just as easily been a misdemeanor depending on whether he had or had not the requisite "intent to commit any felony or larceny therein" that would support a felony conviction, and that there was no evidence from which the arresting officers could form such a reasonable belief. We do not agree.

In *State v. Harris,* 279 N.C. 307, 182 S.E. 2d 364 (1971), the following was stated by Justice Sharp at p. 311:

> "Probable cause and 'reasonable ground to believe' are substantially equivalent terms. 'Probable cause for an arrest has been defined to be a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing the accused to be guilty. . . . To establish probable cause the evidence need not amount to proof of guilt, or even prima facie evidence of guilt, but it must be such as would actuate a reasonable man acting in good faith. One does not have probable cause unless he has information of facts which, if submitted to a magistrate, would require the issuance of an arrest warrant.' (Citation omitted.) 'The existence of "probable cause," justifying an arrest without a warrant, is determined by factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. It is a pragmatic question to be determined in each case in the light of the particular circumstances and the particular offense involved.' (Citations omitted.)"

The facts found by the trial judge on *voir dire* were amply supported by competent evidence in the record and are, therefore, conclusive. *State v. Gray,* 268 N.C. 69, 150 S.E. 2d 1 (1966), cert. denied 386 U.S. 911, 17 L.Ed. 2d 784, 87 S.Ct. 860 (1967). A recapitulation of that evidence reveals that: (1) Defendant Cooper was seen walking on a deserted street, (2) near the shop that had just been broken into, (3) soon after a security officer had observed two men loading clothes in a van parked at the shop's rear door, (4) a few minutes after one of the two suspects had eluded the security officer in

the same area, and (5) was placed under arrest by officers who had knowledge, either direct or indirect, that the Stork Shoppe had been broken into.

In our opinion, the officers had reasonable ground in believing that defendant Cooper had just committed the crime of felonious breaking or entering, and that their search (which produced incriminating evidence) was incident to a lawful arrest. The officers could lawfully take from the defendant any property which such person had about him and which is connected with the crime charged or which may be required as evidence thereof. Such evidence if otherwise competent, may be properly introduced at trial by the State. *State v. Harris, supra.*

Defendant also contends that the trial judge erred in failing until after the trial to make findings of fact and conclusions of law as to his motion to suppress the evidence obtained in the aforementioned search. We can conceive of no prejudice defendant could have possibly suffered as a result of this procedure. The trial judge did rule that the evidence was admissible and to such ruling defendant's counsel, who had an opportunity and who did cross-examine Patrolman Hamilton on *voir dire,* duly excepted. Also, the findings of fact and conclusions of law were properly inserted in the record for this Court to consider on appeal. The trial judge, in conducting a *voir dire* examination in the absence of the jury to determine the admissibility of the disputed evidence, discharged her duty in compliance with the holding of this Court in *State v. Wood,* 8 N.C. App. 34, 173 S.E. 2d 563 (1970).

In the trial in Superior Court, we find

No error.

Judges CAMPBELL and PARKER concur.

STATE OF NORTH CAROLINA v. JAMES BERNARD BRICE

No. 7226SC673

(Filed 29 December 1972)

1. Homicide § 15— conclusions of witness — failure to strike — harmless error

Failure of the trial court to strike as conclusions testimony by a lay witness that deceased suffered a "nasty" wound and that the

shotgun was fired so close to deceased that the pellets did not have a chance to spread did not constitute prejudicial error in light of other testimony of the witness describing the wound.

2. **Criminal Law § 77— admissions by defendant — competency**

Testimony of witnesses as to incriminating statements which they overheard defendant make at the time of the shooting or shortly thereafter was competent in this homicide prosecution.

3. **Criminal Law § 43— admissibility of color photographs**

Color photographs are admissible in evidence to illustrate the testimony of a witness when properly authenticated by the witness as a correct portrayal of conditions which he observed and which he relates in his testimony.

4. **Criminal Law § 86— cross-examination of defendant — question as to trial for another crime — harmless error**

Although the trial court in this homicide prosecution should have sustained defendant's objection to a question asked him by the solicitor as to whether he had been tried for assault with intent to kill in South Carolina, the court's failure to do so did not constitute prejudicial error where defendant's answer was not responsive to the question and it appears that defendant never admitted he had been tried or convicted of assault with intent to kill.

5. **Homicide § 19— evidence of assault by deceased — inadmissibility**

The trial court in a homicide prosecution properly refused to permit a witness to testify that she saw deceased assault her brother with a pistol and knife on an occasion prior to the date of the homicide where defendant was not present at the time of such assault and there was no evidence that the act was ever communicated to defendant.

6. **Criminal Law § 75— in-custody statements — impeachment of defendant — failure to hold voir dire**

The trial court did not err in the admission of defendant's in-custody statements for the purpose of impeaching defendant's testimony without first conducting a *voir dire* hearing to determine whether defendant waived counsel and voluntarily made the statements.

APPEAL by defendant from *McLean, Judge,* 10 April 1972 Schedule "C" Criminal Session of Superior Court held in MECKLENBURG County.

Defendant was tried under a bill of indictment charging him with the first degree murder of Alvin Caple.

The State's evidence tended to show the following:

On 25 November 1971, deceased was living in an apartment on Brookvale Street in Charlotte with Rosa Lee Davis and her two children. Defendant lived in an apartment in an

adjoining building with Helen Broome and her children. On the morning of that date a son of Mrs. Davis and a son of Mrs. Broome got into a fight while playing marbles. The fight precipitated an argument between deceased and defendant. Later that morning deceased and Rosa Lee Davis went to South Carolina to a birthday party. They returned to the apartment about 6:00 p.m. and about 7:00 p.m. defendant drove up, parked in the parking lot near the apartments and went toward his apartment. A few minutes later he came from the direction of his apartment and walked toward deceased, who was standing on the porch of his apartment. Defendant had his hands behind his back. When he got within a few feet of deceased, defendant pulled a shotgun from behind his back and stated: "Are you ready for me now?" He then shot deceased in the stomach and deceased fell to the floor and died immediately. The gun was within a foot of deceased when it was fired. After defendant fired the gun, Mrs. Broome ran toward him and said "No, J. B., no, don't do that." Defendant replied, "People think I am playing, but I don't play. I get tired of people f. . . . . with me, let the son-of-a-bitch die." Defendant left the scene and later walked up to where police officers were talking with Mrs. Broome. Defendant voluntarily stated that "I'm the one you want, she didn't do it." He also said that " . . . he had killed him," and that ". . . he had done what he had to do, and didn't care if he rotted in jail."

Defendant's evidence tended to show the following:

On the morning of 25 November 1971, defendant saw deceased on the sidewalk in front of his apartment. Deceased was holding Helen Broome by the collar and arm. Defendant went to Helen Broome's defense and told deceased "to turn her loose." Deceased started threatening defendant and saying that he was going to kill him. Later that day defendant saw deceased in the window of his apartment. Deceased raised a gun and stated "I'm coming on down, I'm ready." About 7:00 p.m. defendant drove into the parking lot near the apartments, got out of his car and walked over to Helen Broome's car. Deceased was standing on the sidewalk in front of his apartment at this time. Deceased, armed with a pistol, and two brothers of Rosa Davis, each armed with a knife, started toward defendant. Deceased told defendant, "You son-of-a-bitch you I'm going to kill you." Defendant got a shotgun from the back seat of his car and told deceased to get back. Defendant's gun suddenly

fired. Defendant testified that he did not intend to shoot deceased or anyone else but only intended to frighten the men who were coming toward him.

The court instructed the jury that they could return a verdict of guilty of first degree murder, guilty of second degree murder, guilty of manslaughter or not guilty. The jury returned a verdict finding defendant guilty of manslaughter, and he appeals from judgment entered upon the verdict imposing a prison sentence of eighteen years.

Attorney General Morgan by Assistant Attorney General Melvin and Assistant Attorney General Ray for the State.

Edmund A. Liles for defendant appellant.

GRAHAM, Judge.

Defendant brings forth and argues fourteen assignments of error.

[1, 2] The first, third and fourth assignments of error relate to the admission of certain testimony over objection. A lay witness characterized the gunshot wound suffered by deceased as a "nasty" wound and stated that the gun was fired so close to deceased that the pellets did not have a chance to spread. While the trial judge would have been justified in striking these statements as conclusions of the witness, his failure to do so does not, under the circumstances, constitute reversible error. The witness described the size and location of the stomach wound and stated that he saw the deceased's intestines coming through the wound. His description of the wound as "nasty" was little more than a shorthand statement of the facts. Other exceptions grouped under this assignment of error relate to testimony of witnesses as to incriminating statements which they overheard defendant make at the time of the shooting or shortly thereafter. This evidence was competent. "It is well settled law in this jurisdiction that in a criminal prosecution admissions of fact by a defendant pertinent to the issue which tend to prove his guilt of the offense charged are competent against him. *State v. Porth,* 269 N.C. 329, 153 S.E. 2d 10; *State v. Woolard,* 260 N.C. 133, 132 S.E. 2d 364; *State v. Abernethy,* 220 N.C. 226, 17 S.E. 2d 25; *State v. Lawhorn,* 88 N.C. 634." *State v. Robbins,* 275 N.C. 537, 546, 169 S.E. 2d 858, 864.

[3] In his second assignment of error defendant attacks the admission in evidence of a single color photograph of the body of deceased. The record indicates that a photograph was marked for identification as a State's exhibit and a witness was asked if it fairly and accurately represented the wound on the deceased's stomach and the porch where deceased fell. However, the record does not show that this photograph was offered or received in evidence and no photograph has been filed with the clerk of this Court as required by Rule 19(j), Rules of Practice in the Court of Appeals of North Carolina. It is noted, however, that photographs are admissible in evidence to illustrate the testimony of a witness, when properly authenticated by the witness as a correct portrayal of conditions which he observed and which he relates in his testimony. *State v. Atkinson,* 275 N.C. 288, 167 S.E. 2d 241, and cases cited. The fact a photograph is in color does not affect its admissibility. *State v. Hill,* 272 N.C. 439, 158 S.E. 2d 329.

Under his fifth assignment of error defendant states that the court erred in refusing his motions for nonsuit and his motion for a mistrial.

Defendant now concedes that there was sufficient evidence to go to the jury on the charge of murder in the first degree and the lesser included offenses, but he insists that the court erred in denying his motion for a mistrial. Suffice to say, no grounds appear which would have justified an order for a mistrial.

[4] In questioning defendant concerning his prior criminal record, the solicitor asked: "On August 1st, 1965, you were tried for Assault and Battery with intent to kill in Winnsboro, South Carolina, were you not?" Defendant's objection to the question was overruled, and this constitutes his sixth assignment of error. The question was improper; defendant's objection should have been sustained and the jury should have been instructed to disregard the question. *State v. Williams,* 279 N.C. 663, 185 S.E. 2d 174. However, the narration of defendant's answer, as it appears in the record, is not responsive to the question and it appears that he never admitted that he had been tried or convicted for the offense of assault and battery with intent to kill. Under these circumstances, the question was not sufficiently harmful to require a new trial.

[5] Defendant's seventh assignment of error is to the refusal of the court to permit a witness to testify that she saw deceased

assault her brother with a pistol and a knife on an occasion prior to 25 November 1971. This was not error. Evidence of prior threats and of incidents of violence on prior unrelated occasions are ordinarily competent, but only if the defendant was present when the incident occurred, or had knowledge of the incident prior to the alleged homicide or assault. *State v. Johnson,* 270 N.C. 215, 154 S.E. 2d 48; *Nance v. Fike,* 244 N.C. 368, 93 S.E. 2d 443; *State v. Blackwell,* 162 N.C. 672, 78 S.E. 316. Defendant was not present at the time of the assault described by the witness and there is no evidence that the act was ever communicated to defendant. The witness stated that she had never had a conversation with defendant about the incident and did not know whether her brother or anyone else had told him about it.

[6] Through his eighth assignment of error, defendant challenges the admission of testimony by a police officer as to certain in-custody statements. While the record indicates defendant was warned of his constitutional rights before he was questioned by the officers, it does not show that he was given a *voir dire* hearing at the trial for the purpose of determining whether he waived counsel and voluntarily made the statements. However, the statements were not offered to prove the State's case, but to impeach defendant's credibility. They were allowed only after defendant testified and denied that he had made the statements. The use of defendant's in-custody statement to impeach and contradict his testimony was not error. *Harris v. New York,* 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed. 2d 1 (1970); *State v. Bryant,* 280 N.C. 551, 187 S.E. 2d 111.

Defendant's fourteenth assignment of error encompasses an exception that is simply formal in nature and needs no discussion. All other assignments of error relate to portions of the charge. These assignments of error have been reviewed and are overruled.

We find that defendant had a fair trial free from prejudicial error.

No error.

Judges HEDRICK and VAUGHN concur.

STATE OF NORTH CAROLINA v. JOHN THOMAS JEFFERIES

No. 7215SC781

(Filed 29 December 1972)

1. **Arrest and Bail § 6— resisting arrest — not guilty verdict for offense for which arrested — probable cause**

Verdict of not guilty of the misdemeanor for which defendant was arrested—drunken driving—was not tantamount to a finding that the arresting officer did not have reasonable grounds to believe that defendant had committed such offense in his presence and that defendant therefore could lawfully resist the arrest.

2. **Assault and Battery § 15— assault on police officer in resisting arrest — probable cause for arrest — instructions**

In this prosecution for assault on a public officer when the officer attempted to arrest defendant for a misdemeanor, the question of the reasonableness of the officer's grounds to believe defendant had committed a misdemeanor in his presence was properly left to the jury by the court's instruction that the jury must find beyond a reasonable doubt, as an element of the assault charge, that the officer had probable cause to believe that defendant had committed an offense in his presence.

3. **Arrest and Bail § 6— resisting arrest for misdemeanor — probable cause for arrest — instructions**

In a prosecution for resisting arrest for a misdemeanor, the trial court's instruction requiring the jury to find merely that defendant resisted arrest "after an officer had given him notice that he was arresting him for a criminal offense" *held* erroneous in failing to require a jury finding that the officer had reasonable grounds to believe defendant had committed the misdemeanor in his presence.

APPEAL by defendant from *McKinnon, Judge,* at the 26 June 1972 Session of Superior Court held in ALAMANCE County.

Defendant was charged in separate warrants (1) with driving under the influence of alcohol, and (2) with assault upon an officer and with resisting arrest.

The evidence for the State tended to show the following facts. On 18 April 1971, while on patrol, State Trooper Coleman observed a 1954 two-toned Plymouth, occupied by the defendant and three other persons, being operated on Willy Pace Road in Alamance County. The Plymouth was weaving from one side of the road to the other, crossing two feet over the center line on two to three occasions in the course of 3/4 of a mile. Trooper Coleman observed the driver of the Plymouth turning the steering wheel "as if to make the car go first to the left and

then to the right." Trooper Coleman stopped the Plymouth and asked to see defendant-driver's operator's license. He detected a strong odor of alcohol on defendant's breath and noticed that his eyes were glary. He asked defendant to step back between the patrol car and defendant's vehicle, and as defendant walked back to this area he was unsteady on his feet. He advised defendant that he was under arrest for driving under the influence and would have to go with him to jail.

After placing defendant under arrest, Trooper Coleman took hold of defendant's right arm, at which time defendant jerked and made a quick movement toward a wooded area. Trooper Coleman grabbed defendant's shirt, and both fell into a shallow ditch. Trooper Coleman attempted to handcuff the defendant who hit him, twisted, and screamed for someone to come out of the vehicle defendant was operating and help him. In the scuffle, Trooper Coleman dropped his handcuffs, and, as he was trying to pick them up, defendant grabbed the handle of his service revolver with both hands and tried to pull it out. Trooper Coleman struck defendant with his blackjack, and, when defendant did not release his service revolver, struck him again. At this time, one or two of the occupants of the Plymouth got out of the vehicle and started toward Trooper Coleman and defendant. Defendant was calling to them, cursing, and telling them to come help him. Trooper Coleman told the two to get back in the car, which they did. Trooper Coleman got the handcuffs on defendant, radioed for help, and got a can of chemical mace from the patrol car.

While attempting to place defendant in the patrol car, defendant kicked Trooper Coleman in the chest with both feet, at which time Trooper Coleman sprayed defendant with chemical mace. After much difficulty, defendant was placed in the front seat of the patrol car. When the car was in motion, defendant again grabbed the grip of the service revolver with both hands, and Trooper Coleman again sprayed defendant with chemical mace and pushed him away.

Trooper Coleman met Trooper Davis at the intersection of NC 62 and NC 49, and asked defendant to transfer to Davis' car to be carried to the hospital for treatment. Defendant was uncooperative, and had to be placed in the second police car. After transferring defendant, Trooper Coleman returned to check on defendant's car, which was gone.

Defendant refused to take a breathalyzer test at the hospital. In Trooper Coleman's opinion, defendant was under the influence of intoxicating liquor at the time of his arrest.

Defendant offered evidence which tended to show the following facts: that defendant was not driving under the influence of intoxicating liquor, did not resist arrest, and did not assault Trooper Coleman; that defendant had taken some pills for his nerves on the date in question; that when Trooper Coleman stopped him, defendant showed him his operator's license as asked; that he was told to "Get out of the car" and to "Come with me"; that as defendant started to go with Trooper Coleman, he was grabbed by the arm, and that defendant pulled loose; that he had not been told he was under arrest; that Trooper Coleman shoved him into a ditch, handcuffed him, and beat him without provocation; that he was dragged out of Trooper Coleman's car and roughly treated in the transfer to Trooper Davis' car; that he refused to take the breathalyzer test before he received medical treatment for his cuts, and that after he received attention he refused because of the shots he had received in his treatment at the emergency room of the hospital; that defendant had a good general character and reputation. Defendant's evidence directly contradicted that of the State's.

The jury returned a verdict of not guilty of driving under the influence of intoxicating liquor, and guilty as to the charges of resisting arrest and assault on a police officer. From an active sentence of imprisonment, defendant appealed.

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

W. R. Dalton, for the defendant.

BROCK, Judge.

Defendant's assignments of error are directed to one principal argument. Defendant argues that the trial judge failed and refused to allow the jury to pass upon whether the arresting officer had reasonable grounds to believe that defendant had committed a misdemeanor (operated a motor vehicle upon a public highway while under the influence of intoxicating liquor) in the officer's presence.

Under the provisions of G.S. 20-183 and G.S. 15-41(1) a North Carolina Highway Patrolman has authority to arrest

without a warrant when the officer has reasonable ground to believe that the person to be arrested has committed a misdemeanor in the officer's presence.

[1] Defendant first argues that the verdict of not guilty of the offense for which defendant was arrested (driving a motor vehicle on a public highway while under the influence of intoxicating liquor) was tantamount to a finding that the arresting officer did not have reasonable ground to believe defendant had committed the offense in the officer's presence. This argument must fail. The failure of the State to satisfy the jury beyond a reasonable doubt of defendant's guilt of the offense charged is a far cry from a failure to satisfy the jury beyond a reasonable doubt that the arresting officer had reasonable ground to believe defendant had committed the offense in the officer's presence. In order to justify an officer in making an arrest without a warrant, it is not essential that the offense be shown to have been actually committed. It is only necessary that the officer have reasonable ground to believe such offense has been committed. *State v. Mobley,* 240 N.C. 476, 83 S.E. 2d 100.

Defendant argues that, unless the arresting officer had reasonable grounds to believe that defendant had committed the offense in the officer's presence, the arrest would be unlawful and defendant would be justified in resisting. We think the legal principles argued by defendant are generally sound.

"The offense of resisting arrest, both at common law and under the statute, G.S. 14-223, presupposes a lawful arrest." *State v. Mobley, supra.* Likewise, the offense under G.S. 14-33(c)(4) of assaulting a public officer when such officer is discharging or attempting to discharge a duty of his office presupposes lawful conduct of the public officer in discharging or attempting to discharge a duty of his office. "It is axiomatic that every person has the right to resist an unlawful arrest. In such case the person attempting the arrest stands in the position of a wrongdoer and may be resisted by the use of force, as in self-defense. (citations omitted)." *State v. Mobley, supra.*

Defendant further argues that his plea raised the question of whether the officer had reasonable grounds to believe defendant had committed the offense in the officer's presence. He argues that this is a factual question to be decided by the jury and that the trial judge would not allow the jury to decide it.

[2] We agree that the reasonableness of the officer's grounds to believe the defendant had committed a misdemeanor in the officer's presence, when properly raised, is a factual question to be decided by the jury. However, we do not agree with defendant that the jury was not allowed to decide the question in this case. The trial judge clearly instructed the jury that it must find beyond a reasonable doubt, as one of the elements of the offense of an assault on a public officer, that the officer had probable cause to believe that defendant had committed the offense in the officer's presence. With respect to the conviction of assault under G.S. 14-33(c)(4) defendant's assignment of error is overruled.

[3] However, with respect to the charge of resisting arrest, the trial judge did not require the State to prove beyond a reasonable doubt that the officer had reasonable grounds to believe the defendant had committed the misdemeanor offense in his presence. The instructions given merely required the State to prove beyond a reasonable doubt that the defendant resisted arrest "after an officer had given him notice that he was arresting him for a criminal offense." Under this instruction a defendant could be found guilty of resisting an *illegal* arrest. We hold this instruction to be incomplete and erroneous.

However, we note that the two charges of which defendant was found guilty were consolidated for judgment. The sentence imposed is fully supported by the verdict of guilty of assault under G.S. 14-33(c)(4) in which we find no error. Therefore, we conclude that the error in the instruction upon the charge of resisting arrest is not prejudicial. *See State v. Thomas,* 244 N.C. 212, 93 S.E. 2d 63.

Defendant does not argue or otherwise raise any question in this case as to whether the evidence discloses one offense against the arresting officer or whether it discloses two offenses against the arresting officer. *Cf. State v. Summrell,* 282 N.C. 157, 192 S.E. 2d 569.

No error.

Judges CAMPBELL and GRAHAM concur.

STATE OF NORTH CAROLINA v. WILLIAM CLIFTON FAISON

No. 7215SC841

(Filed 29 December 1972)

1. **Searches and Seizures § 1— search of vehicle without warrant — probable cause**

A police officer had probable cause to conduct a warrantless search of defendant's station wagon for a stolen television set where the officer had investigated a breaking and entering and was told by the victim that a described television set and a Sunbeam percolator box were missing, the officer had been told to be on the lookout for a vehicle with license number R9555 in connection with another breaking and entering and defendant's vehicle had such a license, while standing outside defendant's vehicle the officer observed a Sunbeam percolator box on the rear floorboard of the vehicle, and the officer took the box out of the vehicle and found the stolen television set inside it.

2. **Searches and Seizures § 3— validity of search warrant**

Search warrant obtained after defendant's arrest was valid and a search of defendant's vehicle conducted pursuant to the warrant was lawful.

3. **Criminal Law § 128— motion for mistrial — intimidation of defense witness**

The trial court, after conducting a *voir dire* hearing, did not err in the denial of defendant's motion for a mistrial made on the ground that a police detective had intimidated a witness subpoenaed by defendant so that the witness would not give testimony favorable to defendant.

APPEAL by defendant from *Godwin, Judge,* at the 12 June 1972 Session of ALAMANCE Superior Court.

Defendant was tried on a bill of indictment charging him with (1) breaking and entering a dwelling house occupied by Mrs. Clyde King and (2) larceny of a Sony portable television set from said house after breaking and entering the same. He pleaded not guilty.

At trial Mrs. King gave testimony summarized in pertinent part as follows: On 17 August 1971 she lived alone at her home at 532 Circle Drive, Burlington. On that date she left her home at approximately 7:15 a.m. and went with her daughter to Cheraw, South Carolina. Before leaving she determined that all doors and screens were locked. She returned home around 6:00 that afternoon and on entering her home found that her Sony, blue and white television set bearing serial number 19368 was

missing. When she left home that morning the TV set was in her breakfast room. On returning home she found the front door open, a back window screen was pulled open and unfastened, the basement door was unlocked, dresser drawers were pulled out and bed clothing was disarranged. She did not give anyone permission to enter her home on that date. On finding that her home had been entered, she telephoned her daughter and police.

Other pertinent evidence provided by Mrs. King and other witnesses is hereinafter set forth.

Defendant offered no evidence. The jury returned a verdict finding defendant guilty as charged and from judgment imposing prison sentences, defendant appealed.

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

John D. Xanthos for defendant appellant.

BRITT, Judge.

By his assignments of error Nos. 1-6, defendant contends the court erred in admitting the testimony of Officer Gregory relative to the initial search of the station wagon occupied by defendant and admitting into evidence the television set taken from the station wagon.

Testimony of Officer Gregory pertinent here is summarized as follows: On 17 August 1971 he was employed by the Burlington Police Department. At approximately 6:15 p.m. he went to the home of Mrs. Clyde King. Mrs. King's home had been broken into and entered, disarranged, and a small Sony blue and white television set was missing. After staying at the King home some 10 minutes, Mr. Gregory left in a police car; a few minutes later he saw a 1968 blue Ford station wagon drive onto the premises of a "Serve Yourself Car Wash." Mr. Gregory drove onto the premises behind the station wagon, got out of the police car and walked over to the driver's side of the vehicle. Two people were in the station wagon, Lawrence Smit being in the driver's position and defendant being on the passenger side of the front seat. Gregory asked Smit for his driver's license and Smit said that he did not have his license with him. Defendant told Gregory that he was the owner of the station wagon but did not have a registration card; that he had

the title to the vehicle in the glove compartment. As he stood beside the station wagon, Gregory could see inside and saw a Sunbeam percolator box on the back floorboard behind the front seat. Defendant gave Gregory permission to search the vehicle. Gregory took the Sunbeam percolator box out of the station wagon, opened it and inside was Mrs. King's Sony blue and white television set.

Thereafter, Gregory arrested Smit for operating a motor vehicle without a valid operator's license and for possession of a concealed weapon. He arrested defendant for allowing an unlicensed driver to operate a motor vehicle.

Other testimony presented by the State, either before the jury or on the voir dire hereafter referred to, tended to show: Some two days before Mrs. King's residence was broken into, a residence on Chapel Hill Road in Burlington was broken into and entered. Pursuant to investigation in that case, Detective Dunevant of the Burlington Police Department caused a bulletin to be published directing all Burlington police officers to be on the lookout for a 1968 Ford automobile bearing license number R 9555. The vehicle stopped by Officer Gregory was bearing NC 1971 license number R 9555. Det. Dunevant arrived at the car wash when Officer Gregory was removing the Sony TV set from the Sunbeam percolator box and immediately thereafter advised defendant and Smit they would be charged with breaking into and entering Mrs. King's residence and stealing her TV set. Officer Gregory did not have a search warrant when he removed the TV set from the station wagon.

Constitutional rights of a defendant are not violated by a warrantless search unless the search is unreasonable. *State v. Robbins,* 275 N.C. 537, 169 S.E. 2d 858 (1969). Evidence obtained pursuant to the search of an automobile with the permission of the one in possession is competent against him and the occupants. *State v. Hamilton,* 264 N.C. 277, 141 S.E. 2d 506 (1965). In the instant case, however, defendant argues that under *State v. Vestal,* 278 N.C. 561, 180 S.E. 2d 755 (1971) he was entitled to a voir dire which he requested to determine if his consent to a search of the car was freely and voluntarily given.

[1] Needless to say, legal doubt could have been removed if the trial court had granted the voir dire as was done in *State v. Grant,* 279 N.C. 337, 182 S.E. 2d 400 (1971). However, we

think the search of the car challenged here was valid and the evidence obtained from the car was admissible on grounds other than the consent of defendant.

In *State v. Simmons,* 278 N.C. 468, 471, 180 S.E. 2d 97 (1971), our Supreme Court said:

> "Automobiles and other conveyances may be searched without a warrant under circumstances that would not justify the search of a house, and a police officer in the exercise of his duties may search an automobile or other conveyance without a search warrant when the existing facts and circumstances are sufficient to support a reasonable belief that the automobile or other conveyance carries contraband materials. *Carroll v. U.S.,* 267 U.S. 132, 69 L.Ed. 543, 45 S.Ct. 280; *Chambers v. Maroney,* 399 U.S. 42, 26 L.Ed. 2d 419, 90 S.Ct. 1975; *State v. McCloud,* 276 N.C. 518, 173 S.E. 2d 753; *State v. Jordan,* 277 N.C. 341, 177 S.E. 2d 289; *Ramsey v. United States,* 27 F. 2d 502."

In *Simmons,* the police knew defendant by name and were looking for his car; on locating his car, police blocked its path and defendant tried to flee by backing into a police car; while removing defendant from his vehicle, police saw therein several plastic jugs of a type which they knew was commonly used as a container for non-taxpaid whiskey; the court held that although the police could not see the contents of the jugs they had reasonable cause to believe that the jugs contained non-taxpaid whiskey and lawfully seized the same without a warrant.

In the instant case, the evidence showed: Officer Gregory had been to Mrs. King's home, talked with her and otherwise investigated the breaking and entering of, and larceny from, her home. She testified that not only was the television set missing but a Sunbeam percolator box was also missing. Officer Gregory had been directed to be on the lookout for a 1968 Ford bearing license number R 9555 and within minutes after leaving Mrs. King's home saw an automobile bearing that license number. He drove up behind the vehicle and proceeded to talk with the two occupants. While standing outside the station wagon, during daylight hours, talking with defendant and his companion, Mr. Gregory saw a Sunbeam percolator box on the rear floorboard of the station wagon. We hold that the officer had reasonable cause to believe that the box contained the stolen

television set and no warrant was required for him to search the automobile. The assignments of error are overruled.

[2] By his next assignment of error defendant challenges the validity of a search warrant obtained by Det. Dunevant some three hours after the arrest of defendant and the introduction into evidence of a screwdriver, two pairs of gloves, a pair of socks, a Burlington Telephone Directory, a Burlington City Directory and a composition book obtained from the Ford station wagon pursuant to the search warrant. The court, following a voir dire, made findings of fact and concluded as a matter of law that the warrant was valid and the evidence admissible. We hold that the court did not err and the assignment of error is overruled.

[3] Defendant assigns as error the failure of the court to grant his motion for a mistrial, interposed at the close of the State's evidence, contending that Lawrence Smit who was subpoenaed as a witness for defendant was intimidated by Det. Dunevant to the extent that he would not give testimony favorable to defendant. The record discloses that at the time of defendant's trial Smit was in prison in Raleigh and was taken to Alamance County pursuant to a court order obtained at defendant's request. When defense counsel moved for a mistrial, the court conducted a voir dire in the absence of the jury.

Smit and Det. Dunevant testified at the voir dire. Smit testified that on the morning of defendant's trial, while he (Smit) was in the Alamance County Jail, Det. Dunevant visited him and reminded him that the solicitor had nol prossed with leave some seven cases against him; that although Det. Dunevant did not threaten him that he considered the visit an indirect threat that he would be prosecuted in the other cases if he testified for defendant. Det. Dunevant testified that he visited Smit in the jail, reminded Smit of the several statements that Smit had made to him implicating defendant and that Smit told him he was familiar with the law against perjury. Det. Dunevant testified that the conversation lasted not more than five minutes, that it was friendly in every respect and that he did not do or say anything that was calculated to threaten or intimidate Smit.

The record fails to reveal what defendant contends Smit would have testified to if Det. Dunevant had not talked with him.

Following the voir dire the trial court made findings of fact and conclusions to the effect that Smit had not been threatened or intimidated and denied defendant's motion for a mistrial.

We have carefully reviewed the record covered by this assignment of error and can perceive no prejudice to defendant, therefore, the assignment of error is overruled.

We have considered the other assignments of error brought forward and argued in defendant's brief but find them to be without merit.

No error.

Judges PARKER and VAUGHN concur.

STATE OF NORTH CAROLINA v. BILLIE JOYCE FREDELL

No. 7218SC778

(Filed 29 December 1972)

1. **Infants § 11— child abuse statute — conduct made punishable**

To convict a parent of child abuse under G.S. 14-318.2, it is necessary that the State prove only one of three separate and distinct acts or courses of conduct: that the parent, other than by accidental means, (1) inflicted physical injury upon the child, (2) allowed physical injury to be inflicted upon the child, or (3) created or allowed to be created a substantial risk of physical injury upon the child.

2. **Criminal Law § 1; Infants § 11— child abuse statute — severability of provisions — vagueness of one provision**

Where defendant's case was submitted to the jury only on the issue of whether defendant actually inflicted her child's injuries, defendant could not complain of unconstitutional vagueness in the provision of the child abuse statute making it a criminal offense to create or allow to be created a substantial risk of physical injury upon a child since provisions of that statute are severable. G.S. 14-318.2.

3. **Criminal Law § 33— child abuse — evidence of permanency of injuries — admissibility as showing seriousness**

In a child abuse case where the jury was instructed that defendant could be found guilty only if found to have inflicted serious injury upon the child, evidence as to the permanency of some of the child's injuries was competent as tending to establish the seriousness of the injuries.

4. Criminal Law § 97— testimony on redirect examination — admissibility for clarification

Testimony by a physician on redirect examination in a child abuse case which tended to clarify some of the evidence that had been presented on direct examination and also some of the evidence elicited on cross-examination was properly admitted.

5. Criminal Law § 43— introduction of photographs — procedure for admission into evidence

Where the record showed that certain photographs were marked for identification as State's exhibits, were properly authenticated and were used by a witness to illustrate his testimony, the photographs were received into evidence, though the record was silent as to whether the solicitor ever formally offered them into evidence.

APPEAL by defendant from *Exum, Judge,* 1 May 1972 Criminal Session of Superior Court held in GUILFORD County.

Defendant appeals from a conviction in Superior Court under a warrant charging her with inflicting serious physical injury on her two-year-old son, in violation of G.S. 14-318.2. Judgment was entered imposing an active prison sentence.

Only the State offered evidence. Its evidence tends to show that on 4 October 1971, the infant was carried by defendant and her husband to the emergency room of Cone Hospital in Greensboro. The child was barely breathing and was in circulatory collapse or profound shock. His condition at that time was described as moribund, meaning "a state close to death." Several of the child's front teeth were missing; his abdomen was distended; there was swelling about his abdomen and arms, and there were a number of bruises about his abdomen, head and extremities. X-rays revealed a linear fracture of the skull of fairly recent origin, a fracture of the eleventh rib, and fractures of the bones in both arms. Some of the fractures appeared to be recent and others appeared to have occurred several months previously. In the opinion of an orthopedic surgeon who testified for the State, the older fractures received no medical attention before the child was admitted to the hospital on 4 October 1971.

Four physicians testified for the State and their testimony tends to show that the child's injuries resulted from severe trauma and could not have been sustained in the course of normal child play. Two physicians diagnosed the condition of the child as that of a "battered child." Battered was described

as a term meaning the most extreme form of child abuse, characterized by multiple injuries in different states of healing.

A physician attempted to establish a history upon the child's admission to the hospital. The parents told him that the child had a growth problem and fell frequently. He asked them directly why they struck the child. Defendant replied that they did not because they loved the child. He then asked if anyone else might have struck their child. The parents mentioned a baby-sitter, but admitted that the child had not been exposed to a baby-sitter in some four or five months.

On 8 October 1972, defendant talked with a Greensboro detective, after having been first advised of her constitutional rights and having executed a written waiver thereof. Defendant stated to the detective that she had a temper and quite often got mad and whipped the child with a lady's plastic belt. She started the whippings when the child was about a year old. When questioned as to why she administered the whippings, defendant stated that the child cried a lot and would often crawl to the bathroom, play in the commode and drink water from it. Defendant denied that her husband had ever whipped the child and stated that she had admitted to her mother-in-law that she knew she had whipped the child too hard. Her mother-in-law had replied, "You'd better watch it." Defendant stated that only she and her husband had been caring for the child for the two months preceding the interview. He had been cared for by baby-sitters for a few hours from time to time. When defendant would pick up the child from the custody of the baby-sitters, there would be no bruises or marks about him.

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

Wallace C. Harrelson, Public Defender, Eighteenth Judicial District, and Vaiden P. Kendrick, Assistant Public Defender, Eighteenth Judicial District, for defendant appellant.

GRAHAM, Judge.

Defendant moved in District Court, and again in Superior Court, to quash the warrant on the grounds that certain portions of G.S. 14-318.2 are unconstitutionally vague, uncertain and indefinite. The denial of this motion is asserted as error.

G.S. 14-318.2 provides:

"Sec. 14-318.2. *Child abuse a general misdemeanor.*— (a) Any parent of a child less than 16 years of age, or any other person providing care to or supervision of such child, who inflicts physical injury, or who allows physical injury to be inflicted, or who creates or allows to be created a substantial risk of physical injury, upon or to such child by other than accidental means is guilty of the misdemeanor of child abuse."

[1, 2] In order to convict a parent of child abuse under the statute quoted above, it is necessary that the State prove only one of three separate and distinct acts or courses of conduct; to wit, that the parent, by other than accidental means, (1) inflicted physical injury upon the child; (2) allowed physical injury to be inflicted upon the child; or (3) created or allowed to be created a substantial risk of physical injury upon the child. Defendant attacks only the portion of the statute making it unlawful to create or allow to be created a substantial risk of physical injury. She argues that the word "substantial" has a "veritable multitude of meanings and shades of meaning" and that the term "substantial risk" is so elusive that a person of ordinary intelligence would be required to guess at its meaning. We note in passing that in two recent cases, a New York appellate court held that an identical phrase used in a penal statute was not unconstitutionally vague and indefinite. *People v. Lucchetti,* 305 N.Y.S. 2d 259, 33 A.D. 2d 566 (1969), and *People v. Nixon,* 309 N.Y.S. 2d 236, 33 A.D. 2d 403 (1970). However, the question is not presented here because the case was submitted to the jury only on the issue of whether defendant actually inflicted the child's injuries. This is illustrated by the following mandate given to the jury in the court's charge:

"Now, members of the jury, I instruct you finally that if you find from the evidence in this case and beyond a reasonable doubt, the burden being upon the State to so satisfy you, that the defendant, Billie Joyce Fredell, is the mother of Kelly Joe Fredell, a child, and that Kelly Joe Fredell on or about October 4, 1971, and before that time was a child less than sixteen years of age, and that the defendant, Billie Joyce Fredell, inflicted serious injuries on that child; that is to say, she inflicted injuries which caused severe and massive bruising and hematomas and

fractures of both arms and skull and, members of the jury, if you further find that these injuries were inflicted by the defendant by other than accidental means as I have defined that term to you, then, members of jury, it would be your duty to return a verdict of guilty as charged in this case. If you fail to so find or have a reasonable doubt as to any one or more of these necessary things, then you would give the defendant the benefit of that doubt and find her not guilty."

Ordinarily an appellate court will not undertake to determine whether a statute is unconstitutional except with reference to the ground on which it is attacked. *Martin v. Housing Corp.*, 277 N.C. 29, 175 S.E. 2d 665; 16 Am. Jur. 2d, Constitutional Law, § 114. The provision of the statute making it a criminal offense to create or allow to be created a substantial risk of physical injury upon a child may be severed from the other provisions of the statute without affecting the sufficiency of the latter to accomplish the statutory purpose. Therefore, even if there is merit in defendant's contention that the phrase "substantial risk" is unconstitutionally vague, and we do not hold that there is, she has no grounds for complaint.

[3] Defendant contends that evidence tending to show that some of the child's injuries were permanent in nature was incompetent and should have been excluded. We disagree. Evidence as to the seriousness of the injuries allegedly inflicted by defendant was essential since the jury was instructed that defendant could be found guilty only if found to have inflicted *serious* injury upon the child. Evidence that some of the injuries were permanent tended to establish that they were serious and it was relevant for that purpose.

[4] One of the physicians who testified for the State was allowed to give his opinion on redirect examination that the injuries he had described could not have been caused by a fall from a bed. He was also permitted on redirect examination to define "a battered child syndrome." Defendant contends this constituted new evidence and should have been excluded. In our opinion, the testimony tended to clarify some of the evidence that had been presented on direct examination and also some of the evidence elicited on cross-examination. Even if the evidence is regarded as new matter, it was not error for the court to allow it, absent an abuse of discretion. See 7 Strong,

N. C. Index 2d, Trial, § 14. No abuse of discretion has been shown.

[5] Defendant complains that certain photographs were shown to the jury without having been introduced into evidence. The record indicates that the photographs in question were marked for identification as State's exhibits, were properly authenticated, and were used by a witness to illustrate his testimony. While the record is silent as to whether the solicitor ever formally offered them into evidence, it does show that defendant's counsel stated, "objection to the introduction of these pictures as being too inflammatory." The court overruled this objection and instructed the jury that the photographs were offered into evidence solely for the purpose of illustrating the witness's testimony and for no other purpose. We hold that this constituted receiving the photographs in evidence.

Defendant's remaining contention relates to the admission of testimony of physicians, over objection, that in their opinion the child was suffering from a malabsorption syndrome and from a blizzard syndrome. There was evidence that child abuse can cause a malabsorption syndrome and that the blizzard syndrome is a component of "battered child syndrome." We find the evidence competent.

No error.

Judges CAMPBELL and BROCK concur.

LAFAYETTE TRANSPORTATION SERVICE, INC. v. THE COUNTY OF ROBESON, SAM R. NOBLES, COMMISSIONER OF ROBESON COUNTY, HOWARD M. COOPER, COMMISSIONER OF ROBESON COUNTY, HERMAN DIAL, COMMISSIONER OF ROBESON COUNTY, CARL L. BRITT, COMMISSIONER OF ROBESON COUNTY, J. A. SINGLETON, JR., COMMISSIONER OF ROBESON COUNTY, GEORGE R. PATE, COMMISSIONER OF ROBESON COUNTY, AND W. D. WELLINGTON, COMMISSIONER OF ROBESON COUNTY, SANITATION SERVICES, INC. AND JAMES PORTER

No. 7216SC750

(Filed 29 December 1972)

Counties § 2— authority of county to grant licenses for collection of "garbage"

The statute authorizing counties to regulate the collection and disposal of "garbage," G.S. 153-272, relates only to putrescible wastes;

consequently, the trial court properly determined that a county had authority to issue exclusive licenses to collect and dispose of putrescible solid wastes constituting "garbage" in specified areas but that the county had no authority to grant an exclusive right to collect and dispose of non-putrescible solid wastes constituting "rubbish" or "trash."

Judge VAUGHN dissents.

APPEAL by defendants from *McKinnon, Judge,* 19 July 1972 Session of Superior Court held in ROBESON County.

This is a civil action wherein plaintiff, LaFayette Transportation Service, Inc., seeks to enjoin the defendant, Robeson County, from withholding issuance of an "approval letter" which is, by regulation, a prerequisite to approval of "solid waste disposal facilities and operations" by the State Board of Health and to have declared null and void a resolution of the Board of Commissioners of Robeson County purporting to grant to defendants, Sanitation Services, Inc., and James Porter, exclusive franchises to collect and dispose of "trash and garbage" in all of Robeson County excluding incorporated cities and towns.

The trial judge made findings and conclusions which, except where quoted, are summarized as follows:

In 1966 plaintiff contracted with B. F. Goodrich Company, Footwear Division, to collect and dispose of "solid waste" from the Robeson County plant. "The waste includes scrap fabric and rubber material, cardboard and cartons, paper and other waste from the offices and rest rooms, and the waste from such food as employees may carry in lunches or buy from vending machines in the lunchrooms of the plant." Since 1969 plaintiff has provided similar services for TexFi industries, a textile manufacturer. Plaintiff disposes of this material in a landfill which it owns in Robeson County. Defendants, Sanitation Services, Inc., and James Porter, are also engaged in waste collection and disposal in Robeson County. At the meeting of the Board of Commissioners on 6 December 1971, ". . . action was taken with respect to exclusive rights and franchises for garbage collection and disposal . . . and thereafter written instruments labeled, 'Exclusive Franchise and Agreement' were entered into between the County of Robeson and Sanitation Services, Inc. . . . and James Porter . . . respectively." Plaintiff has applied to the Tax Collector of Robeson County for a license required by an ordinance adopted by the Board of Commissioners on 6 December 1971, but has been denied a license because of the

existence of the exclusive franchise agreements. Plaintiff, because of the exclusive franchise agreement, has also been denied an "approval letter" from the County Commissioners which is required by regulation of the State Board of Health.

The court made the following pertinent "conclusions of law":

"1. [U]nder the authority of G.S. 153-272 and the Resolutions and Ordinance adopted by the Board of Commissioners of Robeson County the power of the Board to issue licenses to collect and/or dispose of garbage; to prohibit the collection and/or disposal of garbage by unlicensed persons; and to grant to licensed persons the exclusive right to collect and/or dispose of garbage within a specified area, is limited to 'garbage' as given its ordinary and accepted meaning.

2. For the purposes of this action, the Court adopts as the ordinary and accepted meaning of the words 'garbage' and 'rubbish' the definitions contained in 'The Rules and Regulations Governing the Storage, Collection, Transportation and Disposal of Refuse in Robeson County, North Carolina' adopted by the Robeson County Board of Health on January 28, 1971, as follows:

'B. The word "garbage" means all putrescible solid wastes, including vegetable matter, animal offal, and carcasses of small animals (100 pounds or less), but excluding human body wastes, animal manure, and recognizable industrial by-products. Used milk cartons, or other discarded food containers that are not dry and clean shall be included in this definition.'

'C. The word "rubbish" means non-putrescible solid wastes.'

3. That the industrial solid wastes shown to have been removed and disposed of by plaintiff from The B. F. Goodrich Company and from TexFi Industries, do not constitute 'garbage,' with the exception of discarded food scraps, used milk cartons and other discarded food containers which are not dry and clean, but such industrial wastes constitute 'rubbish' as above defined, and the Court finds the word 'trash' as used in the Resolutions,

Ordinance and 'Exclusive Franchises and Agreements' is synonymous with 'rubbish.'

4. That as against the plaintiff the purported grant of an Exclusive Right or Franchise to pickup, collect, transport and dispose of trash or 'rubbish' within a specified area is ultra vires and void.

5. That as against the plaintiff the grant of an exclusive right to pickup, collect, transport and dispose of 'garbage' within the respective areas described in the Resolution and the 'Exclusive Franchises and Agreements' is a valid exercise of authority pursuant to G.S. 153-272.

6. That Robeson County may not withhold the granting of a license to plaintiff to collect, pickup, or dispose of industrial solid wastes which do not contain 'garbage' by reason of the existence of the 'Exclusive Franchises and Agreements' entered into with defendants, Sanitation Services, Inc., and James Porter, and the resolutions of December 6, 1971, and May 27, 1972.

7. That Robeson County may not withhold the granting of an 'approval letter' to plaintiff as may be required by the Rules and Regulations of the State Board of Health for Solid Waste Disposal Facilities by reason of the existence of those 'Exclusive Franchises and Agreements.' "

From an order enjoining Robeson County from withholding the granting of a license to plaintiff to collect or dispose of solid wastes which do not contain "garbage" and from withholding the issuance of an "approval letter" required by regulations of the State Board of Health, defendants appealed.

Musselwhite & Musselwhite by Fred L. Musselwhite and Charlie S. McIntyre, Jr., for plaintiff appellee.

Eugene Boyce for defendant appellant (Sanitation Services, Inc.).

Ellis Page for defendant appellant (Robeson County).

W. Earl Britt for defendant appellant (James Porter).

HEDRICK, Judge.

The one question presented on this appeal is whether the trial judge correctly interpreted the intention of the legislature in enacting G.S. 153-272 which provides:

> "*Control of private collectors.*—The board of county commissioners of any county is hereby empowered to regulate the collection and disposal of garbage by private persons, firms, or corporations outside of the incorporated cities and towns of the county for the purpose of encouraging and attempting to insure an adequate and continuing service of garbage collection and disposal where the board deems it to be desirable. In the exercise of such power, the board may issue a license to any private person, firm, or corporation to collect and/or dispose of garbage; may prohibit the collection and/or disposal of garbage by unlicensed persons, firms, or corporations; may grant to licensed persons, firms, or corporations the exclusive right to collect and/or dispose of garbage for compensation within a specified area and prohibit unauthorized persons, firms, or corporations from collecting and/or disposing of garbage within said area; and may regulate the fees charged by licensed persons, firms, and corporations for the collection and/or disposal of garbage to the end that reasonable compensation may be provided for such services. The board may adopt regulations pursuant to the power herein granted, and the violation of any such regulation shall be a misdemeanor, subject to a fine not exceeding fifty dollars ($50.00), or imprisonment not exceeding thirty days; each week that any such violation continues to exist shall be a separate offense."

Appellants contend that the trial court erred in concluding that "garbage" is:

> "[A]ll putrescible solid wastes, including vegetable matter, animal offal, and carcasses of small animals (100 pounds or less), but excluding human body wastes, animal manure, and recognizable industrial by-products. Used milk cartons, or other discarded food containers that are not dry and clean shall be included in this definition."

We do not agree.

It is fundamental that "[i]n the enactment of a statute, earlier acts on the same subject are generally presumed to have been in the knowledge and view of the legislature which is regarded as having adopted the new statute in the light thereof and with reference thereto." 50 Am. Jur. *Statutes* § 354 (1944). In attempting to ascertain the legislative intent in enacting a statute, the terms of a statute are construed in light of related statutes then existing which are deemed to have been known and considered by the General Assembly. *Hobbs v. Moore County*, 267 N.C. 665, 149 S.E. 2d 1 (1966).

When G.S. 153-272 was enacted in 1961, G.S. 160-233, a related statute then existing, provided:

> "*Provide for removal of garbage.*—The governing body may by ordinance provide for the removal, by wagon or carts, of all garbage, slops, and trash from the city; and when the same is not removed by the private individual in obedience to such ordinance, may require the wagons or carts to visit the houses used as residences, stores, and other places of habitation in the city, and also may require all owners or occupants of such houses who fail to remove such garbage or trash from their premises to have the garbage, slops, and trash ready and in convenient places and receptacles, and may charge for such removal the actual expense thereof."

It seems clear that by the use of the word "trash" in connection with the word "garbage" in G.S. 160-233, the legislature intended that municipalities might enact ordinances providing for the collection and removal of both putrescible and nonputrescible wastes. The omission of the word "trash" in the 1961 enactment of G.S. 153-272 signifies the legislative intent to authorize counties to regulate the collection and disposal of only putrescible wastes.

The problem of the collection and disposal of waste of every sort, kind and description within the congested confines of our municipalities obviously varies considerably from that in our more rural and less congested counties. We think the legislature has recognized this difference by authorizing municipalities to enact ordinances for the collection and disposal of "solid wastes," G.S. 160A-192, while it has authorized counties to regulate only the collection and disposal of "garbage."

Judge McKinnon's order in no way interferes with the authority of Robeson County to regulate the collection and disposal of "garbage" in accordance with his definition of the word. The judgment appealed from is

Affirmed.

Judge GRAHAM concurs.

Judge VAUGHN dissents.

KIRBY D. THOMPSON AND WIFE, MARY E. THOMPSON v. TERRELL HAYES AND WIFE, KEUM JA HAYES

No. 724SC800

(Filed 29 December 1972)

1. **Ejectment § 10; Trespass to Try Title § 4— superior title from common source**

In an action to recover land, a *prima facie* showing of title is made when plaintiff connects his title and defendant's title to the land in controversy with a common source and shows in himself a better title from that source.

2. **Ejectment § 10; Trespass to Try Title § 4— superior title from common source**

In an action for the recovery of land and for trespass thereon, plaintiffs' evidence was sufficient to show superior title to the land in controversy from a common source and that defendants had placed a wooden structure and two trailers either wholly or partially on the land in controversy.

3. **Appeal and Error § 28— absence of exceptions to findings**

Findings of fact to which no exceptions are taken are deemed supported by competent evidence.

APPEAL by defendants from *Rouse, Judge,* 20 March 1972 Session of Superior Court held in ONSLOW County.

This is a civil action wherein plaintiffs, Kirby D. Thompson and wife, Mary E. Thompson, seek *inter alia* an adjudication of their title to certain land in dispute between themselves and the defendants, Terrell Hayes and wife, Keum Ja Hayes, and for an order requiring the defendants to remove "any and all structures and materials placed by them on the land of the Plaintiffs."

In their complaint, plaintiffs allege they are the owners of a lot or parcel of land by virtue of a deed dated 3 February 1967 executed by Matthew Hunter and wife, Eula Mae Hunter, (description by metes and bounds) and that in February, 1970, defendants purchased from Fred Newell and wife, Bettie Newell, an adjacent tract or parcel of land. Plaintiffs further alleged: "That the Defendants have continuously failed to observe the boundary line between the property of the Plaintiffs and the Defendants . . . ." and

> "That the Defendants have trespassed and are trespassing upon the lands of the Plaintiffs; that they have constructed or caused to be constructed a frame structure upon the lands owned by the Plaintiffs, and have attached a mobile trailer to said structure; that the Defendants have caused to be placed upon the property of the Plaintiffs loads of marl and gravel, all without the knowledge or consent of the Plaintiffs herein."

In their answer defendants deny that the plaintiffs are the owners of the lot as described in the complaint, but admit they are owners of a lot or tract of land adjacent to that owned by the plaintiffs. Defendants deny that they have trespassed on the land of the plaintiffs.

After a trial before the judge without a jury, the judge made the following pertinent findings of fact:

> "3. That the Plaintiffs claim title to certain lands located in Jacksonville Township, Onslow County, North Carolina, by virtue of that deed from Matthew Hunter and wife, Eula Mae Hunter, dated February 3, 1967, recorded in Book 357, page 650, Onslow County Registry, and described as follows . . . .
>
> 4. That the lands claimed by Plaintiffs are a portion of Lot No. 8 of the T. B. Koonce Subdivision, a plot of which is recorded in Map Book 1, Page 159, Onslow County Registry, which lot was conveyed to Matthew Hunter and wife by Fred Newell and wife, Bettie Newell, in two deeds, one of which is dated May 25, 1953 and the other being dated March 26, 1955, said two deeds being recorded in Book 244, page 144, and in Book 252, Page 667, Onslow County Registry, respectively.

5. That the Defendants claim title to certain lands located in Jacksonville Township, Onslow County, North Carolina, by virtue of that deed executed by Fred Newell and wife, Cleora Newell dated February 17, 1970, and recorded in Book 387, Page 624, Onslow County Registry, and described as follows . . . .

6. That the lands claimed by the Defendants are a portion of Lot 9 of said T. B. Koonce Subdivision; that the said Fred Newell and wife acquired Lots 8 and 9 by deed executed by T. B. Koonce and wife, Gertrude P. Koonce, dated September 4, 1941 and recorded in Book 194, Page 299, Onslow County Registry.

7. That on November 10, 1971, the Honorable Howard H. Hubbard by consent order appointed Mr. Sam J. Morris, Jr., as court surveyor to survey the contentions of the parties in this action and report his findings and recommendations to the Court.

8. That Plaintiffs' Exhibit Six is the survey prepared by the court-appointed surveyor pursuant to said order; that the area shown thereon in green is the area claimed by the Plaintiffs and the area shown thereon in red is the area claimed by the Defendants.

9. That the area lying between the northern green boundary and the southern red boundary as shown on said Exhibit Six, constitutes the land in dispute and the land upon which the Plaintiffs allege a trespass; that the Defendants have caused to be placed on said disputed area certain structures including a fish market building and mobile home, which structures continue to be located on said disputed area.

10. That the lands shown in green on said Exhibit Six and described as follows are embraced within the properties described in Plaintiffs' chain of title . . . .

11. That the area in dispute is not embraced within the description contained in Defendants' chain of title."

Based on its findings of fact, the court concluded that the plaintiffs were the owners of and entitled to possession of the property embraced by the green boundary lines shown in plaintiffs' exhibit 6, that the structures placed on the area lying be-

tween the northern green boundary line and southern red boundary line as shown on plaintiffs' exhibit 6 constitute a trespass to plaintiffs' lands and that the true boundary line between plaintiffs' property and defendants' property is that shown as the northern green line on plaintiffs' exhibit 6.

Based on its findings of fact and conclusions of law, the court entered judgment declaring that the plaintiffs were the owners of and entitled to possession of all of the land embraced within green boundaries on plaintiffs' exhibit six and ordered the defendants to remove within six months all structures located on plaintiffs' property.

(Metes and bounds descriptions of the property were set out in the findings of fact, conclusions of law and judgment.)

The defendants appealed.

Ellis, Hooper, Warlick, Waters & Morgan by Harold F. Waters for plaintiff appellees.

Frank Cherry for defendant appellants.

HEDRICK, Judge.

Defendants first assign as error the court's denial of their "motion for dismissal at the close of the defendants' case and after the close of all the evidence."

Defendants' motion for an involuntary dismissal in an action tried by the court without a jury challenges the sufficiency of the plaintiffs' evidence to establish the right to relief. *Allen v. Hunting Club,* 14 N.C. App. 697, 189 S.E. 2d 532 (1972); *Wells v. Insurance Co.,* 10 N.C. App. 584, 179 S.E. 2d 806 (1971). In this action for the recovery of land and for trespass thereon, plaintiffs' allegations as to their title and trespass by the defendants were denied. Plaintiffs' burden then became to establish both ownership in themselves and trespass by the defendants. *Midgett v. Midgett,* 5 N.C. App. 74, 168 S.E. 2d 53 (1969), cert. denied, 275 N.C. 595 (1969).

[1] With respect to ownership of the land, the burden is upon the plaintiffs to establish title good against the whole world or against the defendants by estoppel. *Walker v. Story,* 253 N.C. 59, 116 S.E. 2d 147 (1960); *Mobley v. Griffin,* 104 N.C. 112, 10 S.E. 142 (1889). In an action to recover land, a *prima facie* showing of title is made when the plaintiff connects his title

and defendant's title to the land in controversy with a common source and shows in himself a better title from that source. *Mobley v. Griffin, supra.* In support of their claim, plaintiffs introduced into evidence, without objection, the following: a deed from T. B. Koonce and wife to Fred Newell and wife, dated 4 September 1941 (exhibit 1) ; a warranty deed from Fred Newell and wife to Matthew Hunter dated 25 May 1953 (exhibit 2) ; a warranty deed from Fred Newell and wife to Matthew Hunter and wife dated 26 March 1955 (exhibit 3) ; a warranty deed from Matthew Hunter and wife to Kirby D. Thompson and wife dated 3 February 1967 (exhibit 4) ; a warranty deed from Fred Newell and wife to Terrell C. Hayes and wife dated 17 February 1970 (exhibit 5) ; map showing property contentions in *Thompson v. Hayes* prepared 14 February 1972 by Sam J. Morris, Jr., court appointed surveyor (exhibit 6) ; survey sketch of the property of Kirby Thompson prepared by L. T. Mercer, R. S., 30 September 1966 (exhibit 7) ; a plat prepared by Alonzo James Davis III, Reg. Sur., of Terrell C. Hayes' property dated 3 July 1970 from survey by A. D. Hicks (exhibit 8) ; a survey of the Hayes' property prepared by R. W. Craft, 12 November 1969 (exhibit 9). Sam J. Morris, Jr., the court appointed surveyor, testified that he "prepared a map showing the contentions of the parties" (exhibit 6). The evidence tends to show that Morris prepared exhibit 6 from an actual survey made by him of the premises and that when he made the survey he had available for use exhibits 1-5 and 7-9.

[2] We are of the opinion and so hold that when exhibits 1-9 and the testimony of the court appointed surveyor are considered together, the evidence is sufficient to connect the title of the land claimed by the plaintiffs and defendants, which includes the land in controversy, to Fred Newell and wife, Bettie Newell, and to show in plaintiffs better title to the land in controversy from that common source. Furthermore, by the testimony of the court appointed surveyor and Matthew Hunter, plaintiffs offered evidence tending to show that the defendants' fish market and two trailers were wholly or partially located on the land in controversy. The evidence was sufficient to establish plaintiffs' claim for relief, and defendants' motion for involuntary dismissal was properly denied.

[3] By their fifth assignment of error, defendants attempt to challenge the sufficiency of the evidence to support findings of fact numbered 9, 10 and 11. Exception No. 5 appears in the

record as an exception to the judgment. Findings of fact to which no exceptions are taken are deemed supported by competent evidence. *McWhirter v. Downs,* 8 N.C. App. 50, 173 S.E. 2d 587 (1970); 1 Strong, N. C. Index 2d, Appeal and Error § 28. Moreover, the evidence in the record, which we hold was sufficient to establish plaintiffs' claim for relief, will also support the material findings of fact. Conflicts in the evidence were resolved by the findings of fact made by the judge. The facts found support the conclusions of law which in turn support the judgment which is

Affirmed.

Judges VAUGHN and GRAHAM concur.

STATE OF NORTH CAROLINA v. CLARENCE HARRINGTON

No. 7214SC785

(Filed 29 December 1972)

1. **Criminal Law § 21— preliminary hearing as a matter of right**

Defendant who was charged with possessing and transporting heroin was not, as a matter of right, entitled to a preliminary hearing before trial in superior court.

2. **Arrest and Bail § 3— approach of officers — flight of defendant — time of arrest**

Where officers approached defendant in a dinette and asked him to accompany them outside, there was no intent on the part of the officers to arrest defendant inside the dinette, nor was there any manual touching or seizure of defendant while inside; rather, the arrest took place after defendant was apprehended in flight.

3. **Arrest and Bail § 3; Searches and Seizures § 1— arrest without warrant — flight of defendant — probable cause — warrantless search of vehicle**

Where officers, acting on a tip from a reliable informant, approached defendant and asked to talk to him, but defendant ran from officers and tossed away an aluminum foil object while in flight, the officers had probable cause or reasonable ground to believe that a felony or misdemeanor was being committed in their presence and were justified in pursuing defendant, in placing him under arrest, in retrieving the aluminum foil packet, and in searching defendant's automobile incident to his arrest.

4. **Jury § 5— jury selection — questioning conducted by court**

Refusal by the trial court to allow defense counsel personally to conduct a *voir dire* of prospective jurors did not constitute error.

State v. Harrington

APPEAL by defendant from *Cooper, Judge,* at the 22 May 1972 Session of DURHAM Superior Court.

Defendant was charged in two bills of indictment, proper in form, with (1) possessing heroin and (2) transporting heroin. He pleaded not guilty to both charges, a jury found him guilty as charged, and from judgment imposing prison sentences, he appealed.

Attorney General Robert Morgan by William W. Melvin and William B. Ray, Assistant Attorneys General, for the State.

Loflin, Anderson & Loflin by Thomas F. Loflin III for defendant appellant.

BRITT, Judge.

[1] Defendant first assigns as error the court's denial of a pretrial motion to remand his cases to the district court to afford him a preliminary hearing on the charges against him. The Supreme Court of North Carolina has said that under our law a preliminary hearing is not an essential prerequisite to the finding of a bill of indictment. *State v. Gainey,* 280 N.C. 366, 185 S.E. 2d 874 (1972); *Gasque v. State,* 271 N.C. 323, 156 S.E. 2d 740 (1967); cert. den. 390 U.S. 1030, 20 L.Ed. 2d 288, 88 S.Ct. 1423 (1968). We think it follows, and so hold, that a defendant is not, as a matter of right, entitled to a preliminary hearing before trial in superior court. The assignment of error is overruled.

Defendant next assigns as error the failure of the court to allow his motion to suppress all evidence which came from on or about his person at the time of his arrest or detention.

Prior to pleading to the bills of indictment and the admission of any evidence, defendant moved to suppress certain evidence. The jury was excused and a voir dire was conducted. The testimony of two State Bureau of Investigation officers and of a Durham policeman presented on voir dire is summarized in pertinent part as follows:

On 31 October 1971 at approximately 8:30 p.m. S.B.I. Agent Clarence Gooch (Gooch) received a telephone call from a confidential informer who had in the past given to officers tips which had resulted in approximately 50 arrests and 35 convictions. The information received by Gooch was, in substance, that defendant would be operating a black over yellow

Oldsmobile bearing N. C. license number DL-3288, that defendant would stop at the Dunkin Donut Dinette (dinette) located on Roxboro Road in Durham and that defendant would have 36 bindles of heroin in his possession. Gooch contacted S.B.I. Agent Fred Cahoon (Cahoon) and Durham Police Officer J. E. Hunter (Hunter) and requested that they accompany him to the dinette. When the three officers arrived at the dinette at about 9:30 p.m., Cahoon went inside and Gooch and Hunter remained outside to observe the place. Gooch saw defendant drive up in a black over yellow Oldsmobile bearing N. C. license number DL-3288. Defendant and another person alighted from said car and entered the dinette. Gooch and Hunter then entered the dinette; Gooch identified himself to defendant as an S.B.I. Agent and told defendant that the officers "would like to talk to him and wanted to talk to him on the outside if he didn't mind." The other two officers likewise identified themselves to defendant and his companion. Defendant and his friend voluntarily agreed to accompany the officers outside. After they got outside, Gooch asked defendant to remove his hand from his (defendant's) pocket and defendant began running. As defendant was running from the officers, Gooch and Cahoon saw him toss away an aluminum foil object. Cahoon followed the aluminum foil to retrieve it and Gooch pursued defendant, catching defendant about 150 yards from the dinette. Defendant was then placed under arrest. Hunter took charge of defendant's companion and remained in front of the dinette. Cahoon retrieved the aluminum foil object which was out of his immediate line of vision for approximately two seconds and upon opening one flap saw inside glassine envelopes containing what appeared to be 36 bindles of heroin. Cahoon returned to where defendant's car was parked and showed the foil's contents to Gooch. The officers then searched defendant's automobile and found a .22 caliber pistol in the unlocked console glove compartment and in the trunk they found measuring spoons and other items commonly used in the preparation of narcotics for street use.

Following the voir dire, the trial judge found the facts to be as testified to by the three officers and concluded as a matter of law that defendant's arrest without a warrant on 31 October 1971 was made with probable cause and was lawful, that the search of defendant's vehicle was made incident to a lawful arrest and that the aluminum foil containing 36 bindles of heroin and the .22 caliber pistol were seized by the officers as a result of said lawful arrest and search.

Defendant argues that he was *arrested* in the dinette, that said arrest was unlawful, and that the substance identified as heroin was obtained as a result of the unlawful arrest. Assuming, *arguendo,* that defendant was arrested in the dinette, we think the facts are sufficiently similar to the facts in *State v. Roberts,* 276 N.C. 98, 171 S.E. 2d 440 (1969) for the holding in that case to apply here. In *Roberts,* Justice Lake, writing for the court, reviewed applicable statutes and court decisions including *Draper v. United States,* 358 U.S. 307, 3 L.Ed. 2d 327, 79 S.Ct. 329 (1959), and concluded that the police officers who arrested the defendant in that case had reasonable ground to believe that said defendant was committing a felony (possession of LSD) in their presence, therefore, no right conferred upon said defendant by the U.S. Constitution or the Constitution or statutes of this State was violated in the arrest and search of said defendant without a warrant, in the seizure of the LSD pills found upon him, or in the admission of those pills in evidence. We see no point in quoting again excerpts from statutes and court decisions set forth in *Roberts.*

[2] We think, however, the arrest of defendant in the instant case did not occur until after defendant and the officers went out of the dinette, defendant ran and was apprehended by Officer Gooch.

In 5 Am. Jur. 2d, Arrests, § 1, p. 696 (1962), we find: "The act relied upon as constituting an arrest must have been performed with the *intent* to effect an arrest and must have been so understood by the party arrested. In all cases in which there is no manual touching or seizure, or any resistance the intentions of the parties are important. There must have been the *intent* on the part of one of them to arrest the other and the intent on the part of the other to submit under the belief and impression that submission was necessary. However, no formal declaration of arrest is required." (Emphasis added.) The record in the case at bar reveals no intent on the part of the officers to arrest defendant inside the dinette; nothing in the record indicates a manual touching or seizure of defendant while in the dinette. The evidence tended to show that the officers "asked" rather than "ordered" defendant to accompany them outside. In response to a question from defense counsel, Agent Gooch stated, "I told him (reference to defendant) we would like to talk to him and wanted to talk to him on the outside if he didn't mind." Gooch also testified that after defendant was apprehended in flight, he placed defendant under arrest.

[3] Quite obviously, when defendant ran from the officers and tossed away the aluminum foil object, the officers had probable cause or reasonable ground to believe that a felony or misdemeanor was being committed in their presence and were justified in pursuing defendant, in placing him under arrest, G.S. 15-41(1), in retrieving the aluminum foil packet, *State v. Powell,* 11 N.C. App. 465, 181 S.E. 2d 755 (1971), and in searching the defendant's automobile incident to his arrest. See *Chambers v. Maroney,* 399 U.S. 42, 26 L.Ed. 2d 419, 90 S.Ct. 1975 (1970); *United States v. Chalk,* 441 F. 2d 1277 (1971); *State v. Ratliff,* 281 N.C. 397, 189 S.E. 2d 179 (1972); *State v. Simmons,* 278 N.C. 468, 180 S.E. 2d 97 (1971).

We hold that the evidence presented on voir dire fully supports the findings of fact and that the findings of fact support the legal conclusions that defendant's arrest was lawful and that the evidence found in the searches incident to the arrest of defendant was admissible. The trial judge correctly denied defendant's motion to suppress said evidence.

[4] Defendant's third assignment of error relates to the court's refusal to allow defense counsel personally to conduct a voir dire of prospective jurors. In *State v. Dawson,* 281 N.C. 645, 190 S.E. 2d 196 (1972), the Supreme Court held that such procedure by the trial judge was proper. This assignment of error is overruled.

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

No error.

Judges PARKER and VAUGHN concur.

STATE OF NORTH CAROLINA v. DOUGLAS THORNTON

No. 7214SC812

(Filed 29 December 1972)

1. Narcotics § 4.5— stipulation of chemist's testimony — instructions assuming substance obtained from defendant is heroin

In a prosecution for possession and distribution of heroin wherein it was stipulated that an S.B.I. chemist would testify that a glassine

bag given him by a police officer contained heroin, the trial court erred in assuming in its instructions that the substance in glassine bags purchased from defendant was the same substance tested by the S.B.I. chemist.

2. **Criminal Law § 26; Narcotics § 5— conviction of possession and distribution of heroin — double jeopardy**

Defendant's constitutional right against double jeopardy was violated when he was convicted of both possession of heroin and distribution of heroin based on the same incident.

APPEAL by defendant from *Bailey, Judge,* 10 July 1972 Session of DURHAM County Superior Court.

Defendant was tried on two bills of indictment charging that on 18 March 1972 he committed two violations of the North Carolina Controlled Substances Act: in Case No. 72CR7103, with the possession of heroin (G.S. 90-95(a)(3)), and in Case No. 72CR7104, with the distribution of heroin (G.S. 90-95(a)(1)).

The State's evidence in its light most favorable tended to show that on 18 March 1972 at about 4:55 p.m. defendant sold to C. R. Thompson, a Durham policeman, three bags of heroin for $30.00. On that occasion both Thompson and defendant were inside an apartment; Thompson negotiated for the sale of the drug, and defendant went into the kitchen of the apartment; upon returning to the living room, defendant handed Thompson the three bags, and Thompson gave defendant the money.

Defendant's evidence tended to show that the substance sold to Thompson was not heroin, but that the three bags were "dummies" given defendant by the police informer who accompanied Thompson to the apartment. Sale of the "dummies" was a scheme originated by the informer, not the defendant, having as its goal to trick Thompson and to take his money, which was divided between the informer and defendant.

Defendant was convicted of both crimes as charged in the two indictments, and was sentenced to imprisonment for five years for each crime, the sentences to run consecutively. Each statutory section authorizes a maximum punishment of five years' imprisonment.

The defendant alleged prejudicial error in the court's charge in that the trial court assumed, and so instructed the

jury, that the substance taken from defendant was the same substance tested by the State Bureau of Investigation Laboratory, which substance *tested* was found to be heroin.

The defendant also contends that the two convictions were error in that he was twice put in jeopardy for the same offense, since possession was incidental to and inherent in the sale.

Attorney General Robert Morgan by Assistant Attorney General R. S. Weathers for the State.

Loflin, Anderson and Loflin by Thomas F. Loflin III for defendant appellant.

CAMPBELL, Judge.

At the beginning of trial the defendant stipulated that (1) State's Exhibit #1 was a laboratory report from a Mr. Neal C. Evans of the State Bureau of Investigation Crime Laboratory; (2) that one of the three glassine bags given Evans by J. C. Fuller, a Durham police officer, was tested by Evans in the laboratory; and (3) that if Evans were called to testify, he would testify that the glassine bag contained heroin.

The trial court, in the charge, reviewed the sequence of events by stating that the State's witness, Thompson, told defendant " . . . that he would like to buy three bags of heroin . . . ; that there Mr. Thornton went to the back room; that when he returned he had with him three bags of heroin, or three bags of some substance; that Thompson took the bags and paid to Mr. Thornton the sum of $30.00 and left."

With respect to the stipulation, the trial court further instructed:

> "Now, it was stipulated at the outset of this trial that that material, or some of it, was analyzed by the State Bureau of Investigation, and that the chemist who is a duly qualified expert in the field of qualitative analysis, would testify if he were here that upon the analysis of this material he found it to be the narcotic drug known as heroin.
>
> Now, what his findings would be is not in contest, so if I refer to the contents of the bags as heroin, I do so simply because there is no argument that that is what the analysis would show. We do that simply to avoid the

necessity of bringing the chemist over here to say what he has written in a letter."

[1] Defendant assigned the above portion of the charge as error, and we feel that this assignment of error is well taken. Defendant never stipulated that the substance taken from him was the same substance tested by the State laboratory. While there was sufficient evidence upon which the jury could find that the two substances were in fact the same, still this determination was for the jury. On cross-examination, the State's witness, Thompson, could not remember exactly what he did with defendant's substance before he turned it over to his police contact, and he could not remember whether he made other purchases of heroin from different persons on that day. The court's charge in effect completely removed this doubt from the jury, and stated that the State had proved that the defendant had possessed and distributed heroin.

The court may not assume as true the existence or nonexistence of any material fact in issue, since the credibility of all the evidence tending to establish the crime and the identity of the defendant as the perpetrator of that crime is for the jury to determine. 3 Strong N. C. Index 2d, Criminal Law, § 114.

Because of this prejudicial error a new trial must be conducted.

[2] Another assignment of error by the defendant deserves attention. May the defendant be tried, convicted and punished under both indictments?

The Fifth Amendment to the United States Constitution protects a person from the risks and the harassment inherent in being tried twice for the same crime. This principle is included in the North Carolina Constitution, Article I, Section 19 (formerly Section 17) by judicial construction. *State v. Mansfield,* 207 N.C. 233, 176 S.E. 761 (1934). This constitutional guaranty also protects a defendant from multiple punishment for the same offense. *State v. Summrell,* 282 N.C. 157, 192 S.E. 2d 569 (1972).

In the instant case all of the evidence shows that the distribution of a controlled substance in violation of G.S. 90-95 (a) (1) was shown, and that no "line of demarcation between defendant's" possession and his distribution of the heroin could

be drawn. The possession was in no manner unrelated in point of time to the distribution as alleged in the indictment. Since possession requires control and since transfer of the drug is an exercise of dominion and control over it, whether the transfer be actual or constructive, it is impossible to prove distribution of a narcotic without at least also proving constructive possession of it. Two offenses in point of time and as a matter of law are not shown by this evidence.

Upon the legal principles discussed in *State v. Summrell, supra,* we hold that in the instant case two separate, distinct, and punishable crimes were not established.

The sentences imposed upon the defendant's conviction being consecutive, there is substantial prejudice to him.

Upon a new trial the evidence may be different, and we therefore refrain from any other action other than ordering a new trial on both charges with directions to follow the views herein expressed.

New trial.

Judges BROCK and GRAHAM concur.

STATE OF NORTH CAROLINA v. WILLIAM FRED CAMERON

No. 7214SC771

(Filed 29 December 1972)

1. **Indictment and Warrant § 13— bill of particulars properly denied**

The trial court did not abuse its discretion in denying defendant's motions for a bill of particulars where all of the information sought by defendant was included in the bills of indictment charging defendant with possession and sale of heroin.

2. **Criminal Law § 91— special grand jury — additional bills of indictment — newspaper coverage — no prejudice — continuance denied**

The trial court did not abuse its discretion in denying defendant's motion for continuance where, on the same day that his trial for possession and sale of heroin began, the solicitor called a special grand jury which returned an additional bill charging defendant with "continuing criminal enterprise under the Controlled Substances Act," and where $200,000 bond was set in the courtroom before some of the prospective jurors, and where the grand jury's return of the bill and the setting of bond were reported the same day on the front page of the afternoon paper.

3. Jury § 6— competency of jurors — discretion of trial court

The trial court did not abuse its discretion in disallowing defense counsel's question put to a prospective juror, instructing counsel that similar questions would not be permitted and denying defendant's challenge to the juror for cause.

4. Constitutional Law § 31— identity of confidential informer

The solicitor's objection to the disclosure of the name of a confidential informer was properly sustained where there was no indication that the disclosure of the identity of the informer would be relevant or helpful to the defense.

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

Defendant, William Fred Cameron, was charged in separate bills of indictment, proper in form, with (1) possession of a narcotic drug, to wit: 15 bags of heroin, and (2) sale of 15 bags of heroin to S. H. Conant, Durham Police Officer, for $60.00 on 25 February 1971 in Durham County. Upon defendant's pleas of not guilty, the State offered evidence tending to show that at about 8:30 p.m., 25 February 1971, Stephen H. Conant of the Durham Police Department Vice Squad, accompanied by a confidential informer, went to the residence of the defendant at 1130 Elmo Street, Durham, dressed in "white Levis, a white turtle neck cotton shirt, fatigue jacket, and a wig." Conant stated, "I was dressed in this particular fashion on that evening so that I could attempt to purchase any kind of drug." After being admitted to the premises and conversing with defendant, Conant purchased 15 bindles of heroin for $60.00.

Defendant offered no evidence. The jury found the defendant guilty as charged in each bill of indictment and from judgments imposing consecutive prison sentences totalling 10 years, defendant appealed.

Attorney General Robert Morgan and Assistant Attorney General Henry E. Poole for the State.

Norman E. Williams and William H. Murdock and Felix B. Clayton for defendant appellant.

HEDRICK, Judge.

[1] Defendant assigns as error the denial of his motions for a bill of particulars. The record discloses that on 20 September

1971 defendant made a motion in writing that the State be ordered:

> "[T]o furnish the Defendant with a Bill of Particulars setting forth accurately and in detail the time, place, amount, and price paid and the names of other persons that the State contends were present when the alleged offense was alleged to have been committed."

This motion was denied by Judge McKinnon on 24 September 1971 and the State was ordered "to furnish all names of witnesses." During proceedings prior to trial before Judge Cooper, defendant renewed the motion for a bill of particulars and the motion was again denied. In his brief, defendant argues:

> "[T]he denial of his motion for a Bill of Particulars as to time and place on September 24, 1971, was an abuse of discretion; and . . . the denial of the motion for Additional Bill of Particulars at trial was a separate abuse of discretion as to time and place; and . . . was not consistent with the first order requiring the Solicitor to reveal the names of all witnesses."

The bills of indictment contain all of the information sought by defendant in his motions for a bill of particulars. The record indicates that the names of witnesses which the State intended to use at trial were given to defendant. Defendant has failed to show the court abused its discretion in denying the motions. *State v. Spence,* 271 N.C. 23, 155 S.E. 2d 802 (1967); *State v. Overman,* 269 N.C. 453, 153 S.E. 2d 44 (1967); *State v. Scales,* 242 N.C. 400, 87 S.E. 2d 916 (1955).

[2] Defendant assigns as error the denial of his motion to continue. Defendant's motion to continue was not supported by affidavit; however, from statements in the record made by counsel and the court we glean that the motion to continue was made at about 3:45 p.m. on 12 April 1972. During the morning session of court on that day, the Grand Jury returned an additional bill of indictment against the defendant charging him with "continuing criminal enterprise under the Controlled Substances Act." Upon request of the solicitor, Judge Cooper ordered a capias for the defendant and set bond at $200,000. At that time, "there were not more than five or six of the prospective jurors in the courtroom who heard it." Judge Cooper stated, "Whether they connected it with this man or not,

I do not know. I don't know how many of the jurors have seen the newspaper. It is mighty quick printing, in any event."

An afternoon newspaper, The Durham Sun, published after the capias was issued, contained a front page article under the following headlines:

"$200,000 BOND SET
IN DOPE INDICTMENT

Called 'Organizer'—

Grand Jury
In Special
Session

By James Wicker"

At trial, counsel for defendant stated, "I don't believe that man would get a fair trial under the circumstances . . . . "

While we appreciate the apparent speedy and thorough reporting of the news, we question the action of the solicitor in sending additional bills of indictment for the defendant to a *special session* of the Grand Jury when he knew the present case would be called for trial and when he apparently knew any additional information regarding the defendant would receive such prompt and thorough treatment by the news media. Indeed, the news story referred to in the record strongly indicates that much of the information contained therein could have come only from the solicitor. Nevertheless, there is nothing in this record to indicate that "the circumstances" complained of prevented defendant from receiving a fair trial. Defendant has failed to show that the court abused its discretion in denying the motion to continue or that he was prejudiced thereby. *State v. Stepney,* 280 N.C. 306, 185 S.E. 2d 844 (1972); *State v. Stinson,* 267 N.C. 661, 148 S.E. 2d 593 (1966).

[3] Defendant's fifth assignment of error relates to the *voir dire* examination of a prospective juror by defense counsel. Defendant contends the court abused its discretion in (1) not allowing defendant's counsel to ask a prospective juror whether "he would expect a defendant to come forth and testify before he would vote to acquit"; (2) instructing defense counsel, in the presence of the jury, that the question was improper and would not be allowed; and (3) denying defendant's challenge to the juror for cause.

A trial judge has broad discretion in the *voir dire* questioning of jurors. *Pence v. Pence,* 8 N.C. App. 484, 174 S.E. 2d 860 (1970), cert. denied 277 N.C. 111 (1970). The question of whether a juror is competent is one for the determination of the trial judge in the exercise of his discretion and his rulings thereon are not reviewable on appeal unless accompanied by some imputed error of law. *State v. Blount,* 4 N.C. App. 561, 167 S.E. 2d 444 (1969), cert. denied, 275 N.C. 500 (1969); G.S. 9-14. Defendant has failed to show that the trial judge abused his discretion by disallowing the question, instructing counsel that similar questions would not be permitted, and by denying the challenge for cause.

[4] Next, defendant contends, "The court erred in sustaining the solicitor's objection to the disclosure of the name of the confidential informant."

This contention has no merit since there is nothing in this record to indicate that disclosure of the identity of the informer would be relevant or helpful to the defense. *State v. Moore,* 275 N.C. 141, 166 S.E. 2d 53 (1969); *State v. Daye,* 13 N.C. App. 435, 185 S.E. 2d 595 (1972).

Defendant assigns as error the court's denial of his motions for judgment as of nonsuit.

There was plenary competent evidence to require submission of this case to the jury and to support the verdict.

Defendant has additional assignments of error which we have carefully considered and find to be without merit.

Defendant's trial in Superior Court was free from prejudicial error.

No error.

Chief Judge MALLARD and Judge MORRIS concur.

STATE OF NORTH CAROLINA v. HAZEL CARTER AND ROBERT LEE HART

No. 7227SC813

(Filed 29 December 1972)

1. **Burglary and Unlawful Breakings § 5; Larceny § 7— sufficiency of evidence to withstand nonsuit**

Where the evidence tended to show that a service station was unlawfully entered and items of personal property were unlawfully removed therefrom, that defendants transported the stolen property to the place of business of one Boone and that Boone purchased the merchandise and paid the money to defendant Hart, such evidence was sufficient to withstand nonsuit in a felonious breaking and entering and felonious larceny case.

2. **Criminal Law §§ 42, 102— jury argument — reference to box of cigars and cigarettes — no error**

Reference to a box of cigars and cigarettes by the solicitor in his argument to the jury did not constitute prejudicial error where the box was the subject of testimony by a State's witness in the presence of the jury and where the box was on display before the jury during the presentation of the State's evidence, even though it was not clear from the record that the box was formally introduced into evidence.

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

The trial court's instruction adequately apprised the jury of its responsibility as to each defendant separately.

APPEAL by defendants from *Martin (Harry C.), Judge*, 24 July 1972 Session of Superior Court held in GASTON County.

Each defendant was charged in a bill of indictment with (1) felonious breaking or entering, (2) felonious larceny, and (3) feloniously receiving stolen goods. The two cases were consolidated for trial.

The State's evidence tended to show the following. During the night of 1 March 1971 the Belmont Amoco station operated by Jack Overman in Belmont was unlawfully entered and certain items of personal property were unlawfully removed. At about 11:00 p.m. the night of 1 March 1971 one Earl Boone, the operator of a Swap Shop in Bessemer City, was contacted by defendant Hazel Carter by telephone and advised that she had "some stuff" to sell. Boone told her to bring it up the next morning and he would look at it. The following morning (2 March 1971) defendant Hart and defendant Carter went to Boone's place of business. Hart was driving and Carter was

riding in the car with him. The merchandise which had been taken from the Belmont Amoco station was in a box in the car with defendants. Boone purchased the stolen merchandise for $70.00 and paid the money to Hart.

The jury was instructed upon the doctrine of possession of recently stolen goods, and it found both defendants guilty of felonious breaking or entering and felonious larceny. Defendant Hazel Carter was sentenced to a term of three years on the felonious larceny conviction, which sentence was suspended and defendant placed on probation. On the breaking or entering conviction defendant Hazel Carter was sentenced to an active term of two years. Defendant Robert Lee Hart's convictions of breaking or entering and larceny were consolidated for judgment and he was sentenced to an active term of three to five years. Both defendants appealed.

Attorney General Morgan, by Associate Attorney Ricks, for the State.

Childers & Fowler, by Henry L. Fowler, Jr., and William N. Puett, for defendant Hazel Carter.

Brown & Brown, by Joseph G. Brown, for defendant Robert Lee Hart.

BROCK, Judge.

[1] Each defendant assigns as error the denial of motion for nonsuit. "Possession of stolen property shortly after the property was stolen raises a presumption of the possessor's guilt of larceny of such property." 5 Strong, N. C. Index 2d, Larceny, § 5, p. 189. Where it is established that the larceny was by breaking or entering, the possession of the recently stolen property raises a presumption of the possessor's guilt of the breaking or entering as well as the larceny. *State v. Waddell,* 11 N.C. App. 577, 181 S.E. 2d 737. In our opinion the motions for nonsuit were properly overruled.

[2] Defendant Carter assigns as error the argument of the Solicitor concerning the contents of the box of cigars and cigarettes and his use of the box in the view of the jury. Defendant argues that the box of cigars and cigarettes had not been introduced in evidence and that the Court should have sustained her objection. Apparently the box of cigars and cigarettes defendant refers to in this assignment of error are the boxes, or

one of the boxes, marked as State's exhibits 3, 4, 5, and 6. These exhibits were identified by the State's witness as the same brands and similar to the ones stolen from the Belmont Amoco station on 1 March 1971. It is not clear from the record whether these exhibits were formally introduced in evidence, but it is abundantly clear that they were the subject of testimony by the State's witness in the presence of the jury and were on display before the jury during the presentation of the State's evidence. Clearly, the exhibits had not been excluded from evidence or denied admission. We perceive no prejudicial error in the reference to them by the Solicitor in his argument to the jury. This assignment of error is overruled.

[3] Both defendants assign as error various portions of the trial judge's instructions to the jury. Specifically, they complain that the jury was not permitted to find one defendant guilty and the other not guilty. They argue that the instructions require the jury to find both guilty if they find one guilty. Without attempting to dissect each phrase challenged by defendants, it is our opinion that the instructions adequately apprise the jury of its responsibility as to each defendant separately. This assignment of error is overruled.

We have examined defendants' remaining assignments of error to the trial court's instructions to the jury. In our opinion the defendants had a fair trial and their cases were submitted to the jury under appropriate instructions upon applicable principles of law.

No error.

Judges CAMPBELL and GRAHAM concur.

MARK WILLIS PATTERSON, BY HIS GUARDIAN AD LITEM, F. L. PATTERSON v. W. H. WEATHERSPOON AND W. H. WEATHERSPOON, JR.

No. 7210SC546

(Filed 29 December 1972)

Parent and Child § 8— injury from golf club swung by minor — liability of the father — sufficiency of complaint

In an action by a minor plaintiff to recover for injuries sustained when he was struck in the eye by a golf club swung by defendant's

eight-year-old son, plaintiff's complaint was sufficient to state a claim for relief against defendant based on defendant's alleged negligence in allowing his son to use the golf club unattended, uncautioned and uninstructed at a time when the minor plaintiff was standing close by.

APPEAL by plaintiff from *Canaday, Judge,* 13 March 1972 Session of Superior Court held in WAKE County.

Plaintiff, Mark Willis Patterson, a minor, instituted this action through his guardian ad litem to recover damages for personal injuries suffered when he was struck in the left eye by a golf club. Plaintiff's complaint, except where quoted, is summarized as follows:

On 21 June 1970 at approximately 7:30 p.m., plaintiff saw W. H. Weatherspoon, Jr., age 8, and his father, W. H. Weatherspoon, the defendant, in a vacant lot near his home. The defendant handed a full-sized golf putter and golf ball to his son and told him to "putt around some." While defendant was recovering golf balls some two hundred feet away,

> " . . . the minor plaintiff was standing behind W. H. Weatherspoon, Jr. observing when the minor W. H. Weatherspoon, Jr. drew the club back swiftly into a backswing and then hit or drove the golf ball rather than putt it whereupon as he followed through with his swing the steel head of the putter hit the minor plaintiff directly in the left eye causing that eye to burst open."

Defendant's conduct was alleged to be negligent in that:

> "(a) He wilfully and negligently handed an adult sized golf club to the minor W. H. Weatherspoon, Jr. together with a golf ball and encouraged or directed him to play with these items but at no time instructed him in the use thereof or cautioned him regarding the care to be used in swinging that golf club.
>
> (b) He negligently and carelessly continued to allow his son, W. H. Weatherspoon, Jr. to use the golf club unattended, uncautioned and uninstructed at a time when the minor plaintiff was present and in close proximity to the minor defendant, W. H. Weatherspoon, Jr.
>
> (c) He negligently and carelessly left the area where his son, W. H. Weatherspoon, Jr. had the club and ball and where the minor plaintiff stood and proceeded some

200 feet away to further his own activity and recreation without regard to the safety and care of the minor plaintiff at a time when he knew, or in the exercise of reasonable care should have known that he had created a dangerous situation by leaving his son unattended, uninstructed and uncautioned regarding the use of said golf club with the minor plaintiff standing close by."

Plaintiff appeals from an order of dismissal entered pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure.

Reynolds, Farmer & Russell by Ted R. Reynolds and E. Cader Howard for plaintiff appellant.

Smith, Anderson, Blount & Mitchell by John L. Jernigan for defendant appellee.

HEDRICK, Judge.

"Under G.S. 1A-1, Rule 8(a), detailed fact-pleading is not required. 'A pleading complies with the rule if it gives sufficient notice of the events or transactions which produced the claim to enable the adverse party to understand the nature of it and the basis for it, to file a responsive pleading, and—by using the rules provided for obtaining pretrial discovery—to get any additional information he may need to prepare for trial.' *Sutton v. Duke*, 277 N.C. 94, 104, 176 S.E. 2d 161, 167. 'Under "notice pleading" a statement of claim is adequate if it gives sufficient notice of the claim asserted "to enable the adverse party to answer and prepare for trial, to allow for the application of the doctrine of *res judicata*, and to show the type of case brought."' *Roberts v. Memorial Park*, 281 N.C. 48, 56, 187 S.E. 2d 721, 725. If a complaint meets these basic requirements, and does not show upon its face that there is an insurmountable bar to recovery on the claim alleged, it is not subject to dismissal under G.S. 1A-1, Rule 12(b)(6). *Sutton v. Duke, supra; Cassels v. Motor Co.*, 10 N.C. App. 51, 178 S.E. 2d 12." *Lewis v. Air Service, Inc.*, 16 N.C. App. 317, 192 S.E. 2d 6 (1972).

It is our opinion that when viewed in the light of these principles, the complaint in question is sufficient to withstand defendant's motion to dismiss. The complaint unquestionably

places defendant on notice as to the nature and basis of the claim being asserted against him. The claim is for personal injuries and the basis of the claim is negligence. The events and transactions which give rise to the claim are sufficiently alleged. Our attention has been directed to no insurmountable bar to recovery which appears on the face of the claim alleged. In our opinion there is none. While the relationship alone does not make a father answerable for the wrongful acts of his minor child, a father who is aware, or by the exercise of due care should be aware of the dangerous propensities of his child in the use of the instrumentality and who fails to prohibit, restrict or supervise the child in the use thereof, may be liable based on his own negligence for injury to another caused by the child's misuse of the instrumentality. *Lane v. Chatham,* 251 N.C. 400, 111 S.E. 2d 598 (1959).

Nothing appears upon the face of the complaint which would preclude plaintiff's proving facts sufficient to support a recovery on this, or perhaps other theories.

The order dismissing the complaint is

Reversed.

Judges VAUGHN and GRAHAM concur.

STATE OF NORTH CAROLINA v. WINFRED ALLEN RUMMAGE

No. 7220SC710

(Filed 29 December 1972)

1. **Homicide § 24— intentional killing — presumption of malice — failure to define malice — no error**

In a murder case where the evidence tended to show that defendant intentionally shot and killed deceased, it was unnecessary for the trial court to define malice in its jury instructions since malice is presumed from an intentional killing with a deadly weapon.

2. **Homicide §§ 26, 27— instructions on second degree murder and manslaughter**

The trial court's charge in a murder case correctly defined second degree murder and manslaughter and instructed the jury as to what was required to reduce the crime from second degree murder to manslaughter.

State v. Rummage

APPEAL by defendant from *Webb, Judge,* 15 May 1972 Special Session of Superior Court held in STANLY County.

Defendant, Winfred Allen Rummage, (Rummage) was charged in a bill of indictment, proper in form, with the murder of Noah Franklin Mabry (Mabry). Upon defendant's plea of not guilty, the State offered evidence in material part as follows:

Rummage was "running" a "bootlegger's joint" known as Snipe's Place. On 19 January 1971 several persons, including Mabry, were in the establishment. At about 3:00 or 3:30 p.m., Junior Pierce Almond, a patron, went to Rummage's bedroom and advised him that "he was fixing to have trouble . . . because they was cussing one another." Rummage went into the room and told Mabry, "Noah, I am not having none of this trouble here, this mess." Mabry sat down when Rummage pushed him with a stick then "jumped right back up" approached defendant and said, "I'll knock the goddamn hell out of you." When Mabry was about five feet from him, defendant shot him with a .25 caliber Titan pistol which defendant then "pitched" into a cigar box. Mabry died as a result of a single gunshot wound to the left chest.

Defendant testified that he had twice before asked Mabry to leave Snipe's Place on 19 January 1971 and each time Mabry had returned. Defendant stated that when Mabry started towards him he "backed up against the wall" and that "I shot Mr. Mabry because I was scared of him. I knowed the times before that I had saw him with a gun and he had fired at my feet."

Defendant was found guilty of second degree murder and from a judgment imposing a prison sentence of 10 to 15 years, defendant appealed.

Attorney General Robert Morgan and Associate Attorney John M. Silverstein for the State.

Coble, Morton & Grigg by Ernest H. Morton, Jr., for defendant appellant.

HEDRICK, Judge.

All of the assignments of error brought forward and argued in defendant's brief relate to the court's instructions to the jury.

[1] First, defendant contends the court erred in not defining malice. Malice is presumed from an intentional killing with a deadly weapon. *State v. Parker,* 279 N.C. 168, 181 S.E. 2d 432 (1971). In this case, where the evidence tended to show the defendant intentionally shot and killed Mabry with a .25 caliber pistol, there was no necessity for the court to define malice.

[2] Based on exceptions 3 and 4, defendant contends the court confused the definitions of second degree murder and manslaughter and failed to instruct the jury that the use of excessive force in self defense could reduce this crime from second degree murder to manslaughter. These contentions have no merit for when the charge is considered contextually it is clear the judge correctly defined second degree murder and manslaughter and instructed the jury what was required to reduce the crime from second degree murder to manslaughter.

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

No error.

Judges VAUGHN and GRAHAM concur.

STATE OF NORTH CAROLINA v. LEROY C. WOODCOCK

No. 724SC390

(Filed 17 January 1973)

1. **Warehousemen § 1— issuing false warehouse receipts — indictment — identity of the receipts — ambiguous language**

Indictment for issuing warehouse receipts without knowing them to be true sufficiently notified defendant of the receipts which he was charged with having issued where it identified the receipts by their numbers, and the additional ambiguous language "each said receipt for 112,000 pounds of No. 2 yellow corn and 20,000 bushels of No. 2 yellow corn" did not render the indictment subject to quashal since it was taken from the receipts themselves and served merely to identify the receipts further.

2. **Warehousemen § 1— issuing false warehouse receipt**

A violation of G.S. 106-443 occurs when one issues a warehouse receipt for any amount of grain without knowing that such grain has actually been placed in the warehouse under the control of the manager thereof.

3. **Warehousemen § 1— issuing false warehouse receipts — sufficiency of evidence**

The State's evidence was sufficient for the jury in a prosecution for issuing warehouse receipts without knowing them to be true in violation of G.S. 106-443 where it tended to show that defendant issued receipts calling for corn in excess of the amount then in the warehouse of which he was manager, that defendant at that time knew that the Federal Examiner was present checking the records and measuring the corn in the warehouse, and that shortly prior to issuing the receipts defendant had told the Examiner that he felt like they were "a little short."

4. **Warehousemen § 1— "issuance" of warehouse receipts**

Warehouse receipts were "issued" by a warehouse manager within the meaning of G.S. 106-443 when, after they had been signed by him, they were at his direction delivered to the bank where they were no longer under his control.

5. **Warehousemen § 1— issuing false warehouse receipts — lease to State Warehouse Superintendent not properly executed — admissibility**

Although a written lease of a warehouse from a corporation to the State Warehouse Superintendent was for a term which might run more than three years, did not bear the corporate seal of the lessor and was not properly attested by its secretary, the lease was competent in a prosecution under G.S. 106-443 to show that the warehouse managed by defendant was a facility operated under the provisions of the North Carolina Agricultural Warehouse Act.

State v. Woodcock

APPEAL by defendant from *Copeland, Judge,* 8 November 1971 Criminal Session of Superior Court held in DUPLIN County.

Defendant, manager of Farmer's Grain Elevator in Duplin County, was tried on his plea of not guilty to an indictment which charged that on 6 May 1970 he "did unlawfully, wilfully, and feloniously issue and aid in the issuing of warehouse receipts," which were described in the indictment as bearing Nos. 974 through 986 inclusive, "each said receipt for 112,000 pounds of No. 2 yellow corn and 20,000 bushels of No. 2 yellow corn, without knowing at the time of the issuance of said warehouse receipts that the total amount of No. 2 yellow corn represented by all of said numbered receipts as stored in Farmer's Grain Elevator had actually been placed in the said Farmer's Grain Elevator and under his control," in violation of G.S. 106-443.

The State introduced evidence which, in part, tended to show the following: On 6 May 1970, and for some time prior thereto, defendant was the local manager of the Farmer's Grain Elevator in Duplin County, a facility of the North Carolina Warehouse System. On that date he held a license as such local manager, which had been issued to him on 1 September 1969 by the North Carolina Department of Agriculture pursuant to G.S. Chap. 106, Art. 38, and he was authorized to issue warehouse receipts for grain stored at said facility. He was also the Secretary-Treasurer of Southeastern Farmer's Grain Association, Inc., a position which he had held since October 1968. On the afternoon of 5 May 1970, L. L. Brown, an examiner for the U. S. Department of Agriculture, appeared at the elevator for the purpose of making an examination. Mr. Brown first examined the warehouse receipt book to see how far receipts had been issued. He then, at approximately 2:00 p.m. on 5 May 1970, examined the grain storage bins and from his measurements and computations ascertained that there was a total of 13,126 bushels of No. 2 yellow corn then stored on the premises

On the next morning, 6 May 1970, when Mr. Brown arrived at the elevator at 8:00 o'clock, defendant met him outside the office and said, "Brother Brown, I feel like we're a little short." Brown informed defendant that he would continue his examination of the records and would then call the office of the State Warehouse Superintendent.

Mrs. Connie Carlton, who worked at the grain elevator under defendant as a secretary and bookkeeper, testified that on the

morning of 6 May 1970, after defendant had gone to the bank, he came back and told her to prepare 13 warehouse receipts in denominations of 20,000 bushels of No. 2 yellow corn each. Acting on defendant's instructions, Mrs. Carlton prepared these receipts, using printed forms furnished for that purpose by the North Carolina State Warehouse System, by typing in certain of the blanks. These receipts bore numbers 974 through 986 inclusive. Each receipt was dated 6 May 1970, bore defendant's signature on the line provided for the signature of the local manager, and acknowledged receipt from Southeastern Farmer's Grain Association for storage in the Farmer's Grain Elevator of "One Hundred Twelve Thousand" pounds of No. 2 yellow corn. In the body of each receipt, Mrs. Carlton typed in the words "One Hundred Twelve Thousand" on the blank line immediately preceding the printed words "pounds of grain." On two blank spaces on the printed form, one headed, "pounds of grain: including dockage, if any" and the other headed "net pounds," she typed the figure, "112,000." On two blank spaces on the form, one headed, "gross bushels," and the other headed, "net bushels," she typed the figure, "20,000.00." Mrs. Carlton testified that she put "20,000 bushels (on the warehouse receipts) because he (the defendant) told me to make them for 20,000 bushels. . . . Mr. Woodcock did not tell me the poundage to put in. He just told me the bushels. 20,000 on each receipt." (She testified that she knew there were 56 pounds of corn in a bushel, and that she did the multiplication to obtain the poundage and later learned she had made a mistake.) Mrs. Carlton also typed two notes on forms of Branch Banking & Trust Company, dating each of them 6 May 1970, and typing one in the amount of $142,080.00, showing on the face of this note that it was secured by warehouse receipts Nos. 974-979 for 120,000 bushels, and the other note in the amount of $165,760.00, showing this to be secured by warehouse receipts Nos. 980-986 for 140,000 bushels. These notes were payable to the order of the bank and were signed in the name of Southeastern Farmer's Grain Asso., Inc., by Paul E. Dail, its President, and by defendant, as its Secretary-Treasurer. Still acting on instructions of defendant, Mrs. Carlton, on the morning of 6 May 1970, delivered the two notes and the thirteen warehouse receipts, together with a deposit slip in the amount of the total of the two notes, $307,840.00, to the bank, which credited the account of Southeastern Farmer's Grain Association, Inc., in the amount of $307,840.00. At that time Mrs. Carlton also picked up from the bank certain outstanding warehouse receipts which

the bank then held, which she brought back to the warehouse and canceled. She then, still on the morning of 6 May 1970, showed these canceled warehouse receipts to Mr. Brown, the Federal Examiner. Later, on the afternoon of 7 May 1970, Mr. Brown again examined the warehouse receipt book and learned that thirteen additional warehouse receipts had been issued since he had examined it on 5 May 1970.

The State also introduced evidence that an audit of the warehouse records revealed that no grain was received at the elevator on 5 May 1970 and that the total number of bushels of yellow corn received on 6 May 1970 was 2800.55 bushels. Other evidence will be referred to in the opinion.

The defendant did not introduce any evidence. The jury found him guilty, and from judgment imposing a prison sentence of not less than three nor more than five years, defendant appealed.

Attorney General Robert Morgan by Assistant Attorneys General Millard R. Rich, Jr., and Dale P. Johnson for the State.

Corbett & Fisler by Leon H. Corbett; and White, Allen, Hooten & Hines by Thomas J. White for defendant appellant.

PARKER, Judge.

G.S. 106-443, for violation of which defendant was found guilty, provides as follows:

> "G.S. 106-443. *Issuance of false receipt a felony; punishment.*—The manager of any warehouse, or any agent, employee, or servant, who issues or aids in issuing a receipt for cotton or other agricultural commodity without knowing that such cotton or other agricultural commodity has actually been placed in the warehouse under the control of the manager thereof shall be guilty of a felony, and upon conviction be punished for each offense by imprisonment in the State penitentiary for a period of not less than one or more than five years, or by a fine not exceeding ten times the market value of the cotton or other agricultural commodity thus represented as having been stored."

Despite its caption, the gist of the offense created by the statute is not the issuing of a false warehouse receipt; rather, it is the issuing of a receipt *without knowing it to be true.* Of

course, one way in which the State may show that this had been done is to introduce evidence that the receipt was in fact false, from which it would be a logical inference for the jury to draw that the person issuing the receipt could not have known it to be true. This was, in part, the method followed in presentation of the State's evidence in the present case.

[1, 2] Defendant moved to quash the indictment, contending it to be ambiguous in that it is not clear whether he was charged with issuing thirteen receipts, each for 112,000 pounds of corn (which at 56 pounds to a bushel, the proper conversion factor as shown by the evidence, would be equivalent to 2,000 bushels) or receipts for 20,000 bushels, or receipts for both (2,000 plus 20,000 bushels). The ambiguity, however, was created not by the indictment but by the very warehouse receipts which defendant was charged with having issued and which the State's evidence shows he did in fact sign and issue. The indictment clearly identified these receipts by their numbers. The additional language, "each said receipt for 112,000 pounds of No. 2 yellow corn and 20,000 bushels of No. 2 yellow corn" served merely to identify them further. Violation of G.S. 106-443 occurs when one issues a warehouse receipt for *any* amount of grain without knowing that such grain "has actually been placed in the warehouse under the control of the manager thereof." It was not necessary for the State to allege any exact amount of grain, and the language in the indictment further identifying the receipts by reference to the poundage and bushels therein set forth may well be treated as surplusage. The indictment here clearly notified defendant of the exact receipts which he was charged with having issued in violation of the statute, and if any ambiguity existed as to their meaning, defendant himself created it. "An indictment is sufficient if it charges all essential elements of the offense with sufficient particularity to apprise the defendant of the specific accusations against him and (1) will enable him to prepare his defense and (2) will protect him against another prosecution for that same offense." *State v. Bowden*, 272 N.C. 481, 158 S.E. 2d 493. This, the indictment in the present case did. Defendant's motion to quash was properly denied.

[3] Defendant's motions for a directed verdict of not guilty were also properly denied. The State's evidence showed that on the afternoon of 5 May 1970 the Federal Examiner measured the corn at the warehouse and found 13,126 bushels, no addi-

tional corn was received that day, and only 2800.55 bushels were received during the entire following day. With a total of approximately 16,000 bushels in the warehouse at the close of business on 6 May 1970, defendant, on the morning of that day, issued thirteen warehouse receipts, each of which, if the evidence be considered in the light most favorable to the State, called for 20,000 bushels, or a total of 260,000 bushels for the entire thirteen receipts. Even if the ambiguity in words and figures typed on the receipts be resolved most favorably to defendant, the State's evidence would still show that he issued thirteen receipts, each calling for 112,000 pounds, or 2,000 bushels, making a total of 26,000 bushels, an amount still very substantially greater than was in the warehouse when the receipts were issued. Thus, whatever the correct resolution of the conflicting words and figures on the receipts might be under applicable commercial law, a task which we are not presently called upon to perform, the State's evidence showed that defendant on 6 May 1970 issued receipts calling for corn in a total amount substantially in excess of the amount which was then in the warehouse. There was also evidence that at the time he did this defendant knew that the Federal Examiner was present checking the records and measuring the corn in the warehouse, and that shortly prior to issuing the receipts described in the indictment defendant had told this Examiner that he felt like they were "a little short." From this evidence it was an entirely logical and permissible inference for the jury to draw that defendant issued the receipts without knowing that the grain called for therein had actually been placed in the warehouse under his control.

[4] Defendant's contention that there was no evidence that he "issued" the receipts, since they were typed and were physically delivered to the bank by his secretary, is without merit. The evidence shows that defendant was the licensed manager of the warehouse, that in that capacity he signed the receipts, and that his secretary acted only according to his instructions. We hold that the receipts were "issued" by defendant within the meaning of G.S. 106-443 when, after they had been signed by him, they were at his direction delivered to the bank where they were no longer under his control. The facts that the receipts were made out to Southeastern Farmer's Grain Association, Inc., the entity which owned and operated the warehouse, and that the Association never properly endorsed the receipts to the bank, are immaterial. The evidence shows that defendant,

not the Association, was the licensed manager of the warehouse and as such was the person authorized to issue receipts for the agricultural commodities stored therein. And there was plenary evidence to show that in causing the receipts to be delivered to the bank, the defendant, both in his capacity as licensed manager of the warehouse and as an officer of the Grain Association, fully intended that the bank obtain a security interest in the receipts. We hold these circumstances sufficient to show that defendant "issued" the receipts within the meaning of G.S. 106-443. There was no error in overruling defendant's motions for a directed verdict and in submitting the case to the jury.

[5] Defendant contends that the trial court committed prejudicial error in admitting in evidence over his objection a written lease of the warehouse from Southeastern Farmer's Grain Association, Inc., to the State Warehouse Superintendent. He contends this was error in that the lease was for a term which might run more than three years, did not bear the corporate seal of the lessor corporation, and was not properly attested by its secretary. Even so, this document was relevant in this case, if at all, only to show that the warehouse of which defendant was manager was a facility operated under the provisions of the North Carolina Agricultural Warehouse Act, G.S. Chap. 106, Art. 38, and even though the lease might not have been in all respects properly executed, it was competent in evidence for that purpose. Moreover, W. G. Parham, Jr., the State Warehouse Superintendent, testified without objection from defendant that the Farmer's Grain Elevator at Warsaw, Duplin County, of which defendant was the licensed local manager, was a facility of the North Carolina Warehouse System. In addition, the Local Manager's License issued to defendant, which was also admitted in evidence without objection from him, further tended to establish that the elevator here in question was a warehouse for the storage of grain conducted in accordance with the North Carolina Agricultural Warehouse Act. Defendant suffered no prejudicial error when the lease was admitted in evidence.

We have carefully examined all of defendant's remaining assignments of error which are directed to the trial court's actions in the course of conducting the trial and ruling on the admission of evidence, and find no error sufficiently prejudicial to warrant the granting of a new trial. We do not agree with appellant's contention that the cumulative effect of the trial

judge's rulings and actions amounted to an expression of opinion in contravention of G.S. 1-180.

We find no error in the trial court's denial of the defendant's prayer for special instructions to the jury. The charge, considered contextually and as a whole, was free from prejudicial errors and adequately declared and explained the law arising on the evidence given in the case. After carefully examining all of defendant's assignments of error, we find in his trial and in the judgment appealed from

No error.

Judges BRITT and HEDRICK concur.

BORDEN, INC. v. JAMES C. BROWER, T/A HARVEST MILLING COMPANY

No. 721SC130

(Filed 17 January 1973)

1. **Rules of Civil Procedure § 56— motion for summary judgment — affidavits containing facts inadmissible in evidence**

Affidavits or other material setting forth facts which would not be admissible in evidence should not be considered when passing on a motion for summary judgment. G.S. 1A-1, Rule 56 (e).

2. **Bills and Notes § 19; Evidence § 32— action on note — parol evidence contradicting contents of note**

Where the parties met annually for the purpose of going over the accounts between them and arriving at year-end settlements and, after agreeing upon such an account stated in one such meeting, embodied the results of their agreement in a written note in which defendant unequivocally promised to pay the plaintiff the amount they had agreed defendant then owed, the parol evidence rule prohibits defendant from presenting evidence of a parol agreement that he be credited on his note for the amount of two past due customer notes for ascertained amounts which were in defendant's possession at the time he executed the note to plaintiff, since such evidence would contradict the clear obligation set forth in defendant's written note.

APPEAL by defendant from *Cohoon, Judge,* 9 August 1971 Session of Superior Court held in PASQUOTANK County.

This is a civil action to recover $7,705.94 with interest, which plaintiff alleged was the balance due on a sealed negoti-

able promissory note executed by defendant payable to the order of plaintiff. The note was dated 25 July 1969, was in the original principal amount of $11,970.00, and became due on 1 December 1969. As an affirmative defense and counterclaim, defendant alleged that from 1963 through 1969 he was a salesman for plaintiff or for one of its predecessor corporations; that from 1963 through 1967 one Messersmith was the sales representative and agent for plaintiff and its predecessor corporations for the purpose of making sales and credit arrangements in North Carolina; that on 12 July 1963 said agent made a sale of fertilizer products on credit to one L. C. Parrish and secured from the said Parrish a note in the amount of $5,152.91 with chattel mortgage and agricultural security agreement in favor of plaintiff's predecessor corporation; that in 1967 Messersmith made sales on credit to one Curtis Scott and accepted a note from Scott in the amount of $1,589.81 payable to plaintiff; that plaintiff's said agent, Messersmith, requested defendant's permission to run the Parrish and Scott accounts in under defendant's account with plaintiff, to which the defendant agreed with the understanding that he would not be responsible for these accounts. Defendant alleged "that the plaintiff corporation would periodically prepare notes which the defendant would sign on his account, but that these notes were a part of the plan of bookkeeping of the plaintiff, through its agent, Owen Messersmith, and was with the express understanding and agreement that the Parrish and Scott notes which were made payable to the plaintiff corporation or its predecessor corporations and division corporations would be charged to the plaintiff corporation and would be credited to the defendant's account with the plaintiff corporation whereby the defendant's account would show a credit in the amount of the Parrish and Scott notes without recourse against the defendant." Defendant further alleged that if he was indebted to plaintiff in any amount on the note alleged in the complaint, then he was entitled to judgment against plaintiff in the amount of the Parrish and Scott notes, plus interest, "by virtue of the breach of the plaintiff's contract to accept the notes of L. C. Parrish and Curtis Scott without any recourse to this defendant." Defendant prayed for an accounting of all transactions between him and plaintiff and its predecessor corporations, and that any note or other documents signed by him be corrected "to correct the mutual mistake in the accounting and in the execution of notes, and so as to eliminate the L. C. Parrish and the Curtis Scott

accounts and notes from the defendant's account." In the alternative, defendant prayed that he recover of plaintiff the amount of the Parrish and Scott notes, plus interest.

Plaintiff replied to defendant's counterclaim, pleading that the written agency contract under which defendant had been appointed an agent for the sale on commission of plaintiff's fertilizer products (a copy of which was attached as an exhibit to the reply) and annual settlements between the parties for each of the ten years prior to execution of the note in suit bar defendant's counterclaim and defenses. On the same date on which plaintiff filed its reply, plaintiff moved for summary judgment in its favor, supporting this motion by an affidavit of P. J. Scearce, its branch manager, and by portions of defendant's deposition taken on adverse examination. In his deposition defendant admitted that he had executed the note in suit at the time of his 1969 settlement with the plaintiff company and that the amount of the note, $11,970.00, reflected the amount which plaintiff's records showed he owed at that time, after striking a balance between them as had been done in past years. The affidavit of Mr. Scearce contained the following:

> "1. At all times from 1941 to the present time, he has been Branch Manager for the plaintiff corporation and its predecessors in interest, The Borden Company and Smith-Douglass, Inc., and as such he was the overall supervisor of the defendant in connection with all of his business relations with plaintiff and its predecessors regarding the action in suit. The statements hereinafter set forth are based upon my personal recollection and from records prepared under my direction and supervision.
>
> "2. Annually, from at least 1959 to 1969, plaintiff, or its predecessors, and the defendant, struck a balance owing on the account between them for the prior fiscal year, together with any sum unpaid on the settlement for the previous year and defendant executed under seal and delivered to plaintiff his negotiable promissory note payable to the order of plaintiff in the sum of the balance so agreed upon.
>
> "3. The promissory note executed by defendant in favor of plaintiff's predecessor at the time of the July 1964 settlement covered and included, among other things, debits against defendant's account in connection with all the transactions among L. C. Parrish, the defendant, and

plaintiff's predecessor. This note was paid in full and satisfied by the defendant, ultimately, through the execution and delivery to plaintiff's predecessor of the promissory note covering the balance struck at the July 1965 settlement, which note was paid and satisfied in full by defendant, ultimately, by reason of defendant's payment credited to him on 20 January 1966.

"4. The promissory note executed by defendant in favor of plaintiff's predecessor at the time of the July 1968 settlement, covered and included, among other things, debits against defendant's account in connection with all the transactions among Curtis Scott, the defendant, and plaintiff's predecessor. This note was paid in full and satisfied by the defendant, ultimately, by reason of defendant's payment credited to him on 5 March 1969.

"5. The promissory note involved in this action, executed by defendant at the time of the 1969 settlement between the parties, was payable to plaintiff's order in the sum of $11,970, together with interest. This note covered new purchases of merchandise debited to defendant's account after the time of the July 1968 settlement mentioned in the last paragraph. The balance owing to plaintiff on this note, after defendant has received all credits to which he is entitled, is in the sum of $7,705.94, together with interest thereon at the rate of 6% per annum from 25 July 1970."

In opposition to plaintiff's motion for summary judgment, defendant offered his verified answer and counterclaim, two affidavits of Messersmith, the affidavit of one Hollingsworth, his own affidavit, and portions of his own deposition. These supported defendant's contention that an oral agreement had been made between defendant and plaintiff's agent, Messersmith, to the effect that while defendant would "run" the Parrish and Scott accounts through his business, this was "merely for bookkeeping purposes" and was done with the understanding that defendant would not be personally responsible for these accounts.

The court allowed plaintiff's motion to strike defendant's evidence and granted summary judgment in favor of plaintiff against defendant in the sum of $7,705.94 with interest. Defendant excepted and appealed.

LeRoy, Wells, Shaw, Hornthal & Riley by L. P. Hornthal, Jr., for plaintiff appellee.

H. Wade Yates for defendant appellant.

PARKER, Judge.

If defendant's evidence was properly stricken, there remained no genuine issue as to any material fact and plaintiff was entitled to summary judgment as a matter of law. Thus, the question presented by this appeal is whether the trial court ruled correctly in striking defendant's affidavits. We hold that it did.

[1, 2] Affidavits filed in support of or in opposition to a motion for summary judgment "shall set forth such facts as would be admissible in evidence." G.S. 1A-1, Rule 56(e). The converse of this requirement is that affidavits or other material offered which set forth facts which would not be admissible in evidence should not be considered when passing on the motion for summary judgment. In the present case we hold, as did the trial court, that the material facts set forth in defendant's affidavits were inadmissible in evidence because of the parol evidence rule.

In discussing this rule, Professor Stansbury said:

> "The parol evidence rule, as customarily phrased, prohibits the admission of parol evidence to vary, add to, or contradict a written instrument. Notwithstanding this mode of expression, the rule is in reality not one of evidence but of substantive law. It does not place restrictions on the manner of proving a fact in issue, but declares certain facts to be legally ineffective and therefore not provable at all." Stansbury, N. C. Evidence 2d, § 251, p. 603.

The traditional phrasing of the rule has been much criticized, and the following has been suggested as to a more accurate statement: "Any or all parts of a transaction prior to or contemporaneous with a writing intended to record them finally are superseded and made legally ineffective by the writing." Chadbourn and McCormick, "The Parol Evidence Rule in North Carolina," 9 N.C.L. Rev. 151, at p. 152. However the rule be phrased, where the parties themselves have chosen to bring certainty to their affairs by reducing their agreement to writing, the purpose of the rule is to further that desirable objective.

Troublesome questions may be presented in particular cases as to whether the parties did intend that their entire understanding be embodied in their writing, and it is difficult to reconcile all of the decided cases in this field. In the present case, however, we think that all circumstances, when viewed objectively, make it manifest that in this case the entire agreement of the parties was embodied finally in the note which is the subject of this action.

For years the parties had met annually, customarily in July and shortly after the close of plaintiff's fiscal year, for the purpose of going over the accounts between them and arriving at year-end settlements. "Where parties, who have had business dealings resulting in claims against each other, consider the claims in their entirety and have a complete accounting of all transactions between them, agreeing upon a final balance in favor of one or the other, such an agreement is certainly an account stated." *Teer Co. v. Dickerson, Inc.*, 257 N.C. 522, 126 S.E. 2d 500. Annually, after agreeing upon such an account stated, the parties embodied the results of their agreement in a written note, signed by defendant, in which he unequivocally promised to pay to plaintiff the amount which, by arriving at the account stated, he agreed he then owed. Such was the note here in suit. The obvious purpose of having annual settlement of accounts was to require each party to assert all claims against the other promptly and at a time when memories were fresh and evidence readily available. The obvious purpose of reducing the results of their settlement to writing in the form of a note was to bring certainty to their agreement and to avoid controversy over its terms. These desirable purposes are achieved by application of the parol evidence rule.

It is true that our Supreme Court has stated that "[i]n proper cases it may be shown by parol evidence that an obligation was to be assumed only upon a certain contingency, or that payment should be made out of a particular fund or otherwise discharged in a certain way, or that specified credits should be allowed." *Kindler v. Trust Co.*, 204 N.C. 198, 167 S.E. 811. Cases cited by appellant, such as *Bank v. Winslow*, 193 N.C. 470, 137 S.E. 320 (held, parol evidence properly admitted to show oral agreement that note was to be paid from proceeds of sale of peanuts held in storage by payee) and *Evans v. Freeman*, 142 N.C. 61, 54 S.E. 847 (held, parol evidence should have been allowed to show oral agreement that a note given to purchase

the right to sell a patented automatic stock feeder in Hertford County was to be paid from proceeds of sales of such stock feeders), were of this type. In those cases, however, the payment source was not yet liquidated at the time the notes were signed and the amount of the credits and dates payments would be received was not then known. In the case before us the defendant claims the right by virtue of parol agreement to be credited on his note for the amount of two customer notes, both of which were past due, for amounts ascertained, and which were in defendant's possession at the time he signed and delivered the note in suit. No future event was necessary for defendant to receive the credits to which he now claims by oral agreement he was then entitled. To allow the parol evidence under these circumstances would not supplement but would flatly contradict the clear obligation set forth in his written note.

We make no attempt to reconcile all prior decisions, as each case must of necessity be decided on its own facts. We do hold that where, as in the present case, the actions of the parties clearly manifest their intention that their entire agreement be included in the written note, the promise set forth in the note may not be contradicted or destroyed by parol testimony that the maker thereof would not be called upon to pay in accordance with its terms. This holding is consistent with the more recent expressions of our Supreme Court, such as contained in *Vending Co. v. Turner,* 267 N.C. 576, 148 S.E. 2d 531, and *Bank v. Slaughter,* 250 N.C. 355, 108 S.E. 2d 594.

In passing, we note that defendant's own evidence discloses that Messersmith, the agent of plaintiff with whom defendant alleged he had the oral agreement, was no longer in plaintiff's employ at the time the note in suit was executed. (Second affidavit of Owen Messersmith, filed 6 July 1971.)

The judgment appealed from is

Affirmed.

Judges BRITT and HEDRICK concur.

PERNELL R. MANN v. VIRGINIA DARE TRANSPORTATION COMPANY, INCORPORATED, AND CAROLINA COACH COMPANY AND SALLIE BAUM TILLETT v. VIRGINIA DARE TRANSPORTATION COMPANY, INCORPORATED, AND CAROLINA COACH COMPANY

No. 721SC656

(Filed 17 January 1973)

1. **Negligence § 11— contribution and indemnity**

The rights of contribution and indemnity are mutually exclusive since the former assumes joint fault and the latter only derivative fault.

2. **Negligence § 11— indemnity — joint tort-feasors**

There can be no indemnity among joint tort-feasors when both are actively negligent.

3. **Bailment § 5—liability of bailor for injuries**

A bailor for hire of a motor vehicle has the duty to see that the vehicle is in good condition, and although he is not an insurer, he is liable for injury to the bailee or to third persons proximately resulting from a defective condition of the vehicle of which he has knowledge or which by the exercise of reasonable care and inspection he could have discovered.

4. **Carriers § 19— defective steering mechanism of bus — negligence of bailor — insufficiency of evidence**

The evidence was insufficient to support a finding that defendant bus company was negligent in delivering to its codefendant a bus with a defective steering mechanism in that nuts on two bolts in the mechanism had been tightened to a point beyond the torque so that the threads in the nuts were stripped where there was no evidence that defendant had actual knowledge of any defect in the steering mechanism, and there was no evidence that the steering mechanism had given any difficulty or that the torque of the nuts on the bolts had been altered while the bus was owned or in the possession of defendant.

Judge VAUGHN dissents.

APPEAL by defendant, Virginia Dare Transportation Company, Incorporated, from *Tillery, Judge,* 10 April 1972 Session of Superior Court held in DARE County.

These are civil actions wherein plaintiffs, Pernell R. Mann and Sallie Baum Tillett, seek to recover damages for personal injuries allegedly resulting from the joint and concurring negligence of the defendant, Carolina Coach Company (Carolina) and Virginia Dare Transportation Company, Incorporated (Vir-

ginia Dare) in the maintenance and operation of a passenger bus. Both defendants filed answers denying negligence and Virginia Dare filed a cross-claim in the alternative against Carolina for indemnity or contribution. Evidence adduced at trial tended to show that on 17 September 1968 plaintiffs were passengers on a 1959 GMC bus traveling north on Highway 34 between Manteo and Norfolk, Virginia. The bus was leased by Carolina to Virginia Dare and at the time of the accident was being operated by Robert L. Gibbs, an agent and employee of Virginia Dare. After leaving Coinjock, Gibbs stopped the bus at a service station in Barco where he purchased "a soda and a cake." Plaintiff Mann testified, "after he got through drinking the soda he taken the soda bottle like he was going to throw it out the window and—and the bus ran off the road." Robert L. Gibbs, driver of the bus, stated that after the bus left the paved surface of the road, "it went down the ditch way, approximately 200 feet and hit a culvert, and as it hit the culvert it went completely out of control and went about 200 more feet."

The accident occurred approximately 4½ miles south of the Currituck Courthouse on Highway 34 on a slight left curve in the road. The road was smooth and paved with asphalt. The day was clear, the highway was dry, and the shoulder of the road was also dry and level. B. G. Price, of the North Carolina Highway Patrol, investigated the accident and found that the bus was "sitting partially in the ditch and the front end of it sorta straddled the shoulder of the ditch, the back end was sorta down in the ditch, and the front end was up on the side of the ditch, out of the ditch." Trooper Price also testified that: "This vehicle was damaged on the right front and on the right side, and the windshield was broken out. I went inside the bus. I worked the steering wheel of the bus back and forth and you could turn it all the way around. * * * I turned it almost all the way around, a circle. It did not turn the front wheels of the bus." There were markings leading from the curve which "went off the highway and gradually went to the ditch." Trooper Price stated: "Didn't appear to be any sudden veering to either the right or the left. Looked like it eased off the highway and gradually went to the ditch. . . ."

At the close of plaintiffs' evidence, the motion of Carolina for a directed verdict as to plaintiffs' claims was allowed and the motion of Virginia Dare for a directed verdict as to plaintiffs' claims was denied; whereupon, Virginia Dare offered evi-

dence tending to show that on 15 February 1955, Carolina and Virginia Dare entered into an agreement whereby Carolina would lease buses to Virginia Dare, "said buses to be complete with tires, gas, and oil, or diesel fuel, and complete maintenance including repairs for mechanical road failure." Virginia Dare, under the lease agreement, provided its own drivers and had "full and complete control and direction over its drivers."

Gibbs received delivery of the bus in Norfolk, Virginia, at 6:00 a.m., 17 September 1968 and drove from Norfolk 113 miles to Manteo, arriving at 9:10 a.m. Gibbs testified: "On the trip from the Carolina Coach Company garage in Norfolk, Virginia, to Manteo, North Carolina, I did not have any difficulty or notice any difficulty about the bus or in the operation thereof." Gibbs departed on the return trip to Norfolk at 11:30 a.m. and stated: "As I approached the curve to the left I made my turn as usual with the steering wheel and the wheels would not answer to the steering wheel, and I went off the road, and I kept on turning the wheel to the left but the wheels would not answer to the steering wheel." Gibbs specifically denied the purchase and consumption of a beverage or cake from or after Barco and stated that had the front wheels of the bus responded to the turning of the steering wheel, nothing would have prevented him from keeping the bus on the paved surface of the highway. Another employee of Virginia Dare who arrived at the scene of the accident approximately seven or eight minutes after it happened testified "the front wheels did not turn with the steering wheel."

John C. Jeffries, "an expert mechanic and damage analyst of damage to mechanical devices," testified that on 11 October 1968 he examined the bus involved in the accident. He described the integral role which two square steel flanges play in the steering mechanism of the bus and stated that "[t]he flanges were located to the rear and back, and above the bottom, and below the top of the steel box girder . . . . At the time of my examination, I did not observe any damage to the box girder." Two bolts which came from the "booster flange" were examined by Jeffries, the threads of each bolt being intertwined with small steel rings that were not part of the bolt itself. Jeffries stated: "The intertwined steel rings in the threads of the bolt, in my opinion, were the threads from the nuts that had been on the bolts at one time."

At the close of Virginia Dare's evidence, Carolina's motion for directed verdict as to Virginia Dare's cross-claim for indemnity and contribution was allowed. Virginia Dare's motion for directed verdict as to plaintiffs' claims was denied.

Issues of negligence and damage were submitted to and answered by the jury in favor of plaintiffs against Virginia Dare.

From judgments on the verdicts as to plaintiffs' claims, Virginia Dare appealed and from a judgment directing a verdict in favor of Carolina as to Virginia Dare's cross-claim, Virginia Dare appealed.

No counsel contra for plaintiff appellees.

J. Kenyon Wilson, Jr., and White, Hall & Mullen by Gerald F. White and John H. Hall, Jr., for defendant appellant, Virginia Dare Transportation Company, Incorporated.

James, Speight, Watson and Brewer by W. W. Speight and William C. Brewer, Jr., and Allen, Steed and Pullen by Arch T. Allen III for defendant appellee, Carolina Coach Company.

HEDRICK, Judge.

With respect to the appeal from the judgments in favor of plaintiffs, Virginia Dare states in its brief:

> "It will be observed that defendant Virginia Dare has not carried forward and discussed in its Brief Assignments of Error Nos. 1, 12, 13, 14, 15 and 16, all relating to the verdict and judgment rendered for plaintiffs, defendant Virginia Dare's complaint on this appeal being that it made out a prima facie showing of liability against defendant Carolina Coach on the plea of indemnity and the plea for contribution . . . ."

Virginia Dare has not brought forward and argued any exceptions relating to plaintiffs' judgments against it. Nevertheless, we have examined the face of the record proper which supports the judgments.

The cross-claim of defendant Virginia Dare against defendant Carolina is permitted by G.S. 1A-1, Rule 13(g) of the Rules of Civil Procedure effective 1 January 1970. Compare *Greene v.*

Laboratories, Inc., 254 N.C. 680, 120 S.E. 2d 82 (1961) and *Anderson v. Robinson*, 2 N.C. App. 191, 162 S.E. 2d 700 (1968), affirmed 275 N.C. 132, 165 S.E. 2d 502 (1969).

[1, 2] Virginia Dare's exceptions present the question of whether the evidence, when considered in the light most favorable to it, was sufficient to require submission of the case to the jury as to its cross-claims against Carolina for indemnity or contribution. The rights of contribution and indemnity are mutually exclusive since the former assumes joint fault and the latter only derivative fault. *Edwards v. Hamill*, 262 N.C. 528, 138 S.E. 2d 151 (1964); 6 Strong, N. C. Index 2d, Negligence, § 11, p. 29. "There can be no indemnity among joint *tort-feasors* when both are actively negligent." *Greene v. Laboratories, Inc.*, 254 N.C. at 691, 120 S.E. 2d at 89. "It is a well settled rule of law that there can be no indemnity among mere joint tort-feasors. But this rule does not apply to a party seeking indemnity who did not participate in the negligent act, but is liable only by reason of a duty or liability imposed by law, or where the parties are not *in pari delicto* as to each other." *Newsome v. Surratt*, 237 N.C. 297, 300, 74 S.E. 2d 732, 734 (1953).

As to this case, the jury's verdicts and the judgments entered thereon establish conclusively that Virginia Dare did "participate in the negligent act" which was one of the proximate causes of the bus accident and plaintiffs' injuries. Therefore, no further consideration need be given appellant's cross-claim for indemnity. However, the verdicts and judgments do not preclude further consideration of appellant's cross-claim for contribution. *Pearsall v. Power Co.*, 258 N.C. 639, 129 S.E. 2d 217 (1963).

Virginia Dare's cross-claim for contribution against Carolina is bottomed on the allegation that Carolina was negligent in that it delivered a bus to Virginia Dare's driver in Norfolk when it knew or by the exercise of reasonable care should have known that the bus had a defective steering mechanism and that such negligence upon the part of Carolina was one of the proximate causes of the accident and injury to plaintiffs. Virginia Dare, in its answer, characterized the defect in the steering mechanism of the bus as "latent." The expert witness for Virginia Dare, in his answer to a hypothetical question, related the defect complained of to the failure of the steering mechanism as follows:

"If the jury finds from the evidence and by its greater weight that at about 6:00 a.m. on September 17, 1968, Mr. Robert L. Gibbs obtained this particular bus from the garage of Carolina Coach Company in Norfolk, Virginia, and thereupon drove the same without difficulty to Manteo, North Carolina, a distance of about 113 miles; that thereafter, on the same day, the said Robert L. Gibbs drove said bus from Manteo, North Carolina, on an intended return trip to Norfolk, Virginia, and on said journey approached a left curve, traveling about 55 miles per hour, on highway # 34, about 45 miles from Manteo, North Carolina, he, the said Gibbs, having no difficulty in the operation of said bus on said trip prior thereto, but that upon his attempt to steer said bus around said left curve the front wheels of the bus did not respond to the turning of the steering wheel, and thereupon and immediately thereafter said bus traveled off the hard surface of said highway, along the shoulder, into the ditch, over and past a culvert underneath a private lane in said ditch, and thereafter coming to rest, based upon these assumed facts, and further based upon my findings from my personal examination of the steering system of said bus and the two bolts about which I have just testified, and my observations with respect to said two bolts, and what I found thereon, I have an opinion satisfactory to myself as to what could or might have caused the said steering system to fail when the said Gibbs attemped to steer said bus around said left curve. My opinion is that the nuts, when they were placed on the bolts and tightened, were tightened to a point beyond the torque, or the point of pressure to tighten the bolts that is recommended, and that as a result the thread in the nut stripped, leaving the small pieces of the thread in the nut on the bolt, and the nut therefore became loose and would move back and forth to some extent, the cotter pin, which goes through the small hole at the end of the bolt, would have sheared, it is made of a very soft material, the pressure would shear this cotter pin, it is very small and made of very soft material, shear it off, and the connection is broken. The answer I just gave is my opinion as to whether that could or might have caused the failure of the steering system."

Thus, it is Virginia Dare's contention that Carolina was negligent by delivering the bus to Virginia Dare when it knew, or

by the exercise of reasonable care should have known, that the nuts on the bolts holding the booster flanges together "were tightened to a point beyond the torque."

[3] A bailor for hire of a motor vehicle has the duty to see that the motor vehicle is in good condition, and although he is not an insurer, he is liable for injury to the bailee or to third persons proximately resulting from a defective condition of the motor vehicle of which he had knowledge, or which by the exercise of reasonable care and inspection, he could have discovered. *Roberts v. Memorial Park,* 281 N.C. 48, 187 S.E. 2d 721 (1972); *Hudson v. Drive It Yourself, Inc.,* 236 N.C. 503, 73 S.E. 2d 4 (1952); 1 Strong, N. C. Index 2d, Automobiles, § 23, p. 432. Assuming, arguendo, that the evidence, when considered in the light most favorable to Virginia Dare was sufficient to raise an inference that the defect in the steering mechanism existed when the bus was delivered to the driver in Norfolk on 17 September 1968 and that the defect in the steering mechanism was one of the proximate causes of the accident and injuries to plaintiffs, the question thus presented is whether the evidence was sufficient to raise an inference that the defect complained of was known or should have been discovered by the lessor by reasonable inspection.

[4] There is no evidence that Carolina had any actual knowledge of any defect in the steering mechanism of the bus. There is no evidence that the steering mechanism had given any difficulty whatsoever or that the torque of the nuts on the bolts holding the flanges together had been altered at any time while the bus was owned or in the possession of Carolina. In short, there is no evidence in the record that would put a reasonably prudent person on notice as to any defect in the steering mechanism.

Virginia Dare contends the court erred in excluding certain testimony of its expert witness as to whether the defect complained of could have been discovered by a "competent or qualified mechanic." We have carefully examined all of the excluded testimony of the expert together with all other evidence in the case and while some of the testimony of the expert witness might have been improperly excluded we are of the opinion that all the evidence, when considered in the light most favorable to the cross-claimant, is insufficient to raise an inference that the lessor could have discovered the "latent defect" complained of by reasonable inspection.

For the reasons stated, plaintiffs' judgments against Virginia Dare and the judgment directing a verdict for Carolina as to Virginia Dare's cross-claim for indemnity and contribution are

Affirmed.

Judge GRAHAM concurs.

Judge VAUGHN dissents.

C. D. AYERS AND MRS. C. D. AYERS v. TOMRICH CORPORATION, DEFENDANT AND THIRD PARTY PLAINTIFF v. GEORGE W. SPARKS CONSTRUCTION COMPANY, INC., THIRD PARTY DEFENDANT

No. 7221DC271

(Filed 17 January 1973)

1. **Waters and Watercourses § 1— lower landowner — surface waters — dirt and rocks**

While a lower landowner is required to receive surface waters from higher lands when they flow naturally therefrom, he is not required to receive from the higher land dirt and rocks, or other materials, which have been piled thereon by the upper landowner and which, in the natural condition of the lands, would not be carried by the normal flow of surface waters from the upper to the lower tracts.

2. **Waters and Watercourses § 1— damage to lower land — dirt and rocks — surface water**

Plaintiffs' evidence was sufficient to support their claim for damage to their pasture where it tended to show that water from a heavy rain carried dirt and rocks onto plaintiffs' pasture from a high embankment constructed on defendant's adjoining land; however, plaintiffs' evidence was insufficient to support their claim for destruction of a bridge on their land where it tended to show only that the destruction of the bridge was caused by the flow of water, rather than by the encroachment of mud and rocks, onto plaintiffs' land, and that the flow of surface water onto their land was accelerated by construction of the embankment, but there was no showing that the flow of such water was diverted from its natural flow.

APPEAL by defendant from *Clifford, District Judge,* 8 September 1971 Session of District Court held in FORSYTH County.

This is a civil action to recover for damages to plaintiffs' land allegedly caused by wrongful diversion of water and mud from defendant's adjoining property onto plaintiffs' property. In their complaint, plaintiffs alleged that the diversion of water by defendant caused the destruction of a bridge on plaintiffs' land and caused water and mud from defendant's property to come down onto plaintiffs' pasture.

Defendant filed answer denying the material allegations of plaintiffs' complaint. Defendant also asserted a third party complaint against George W. Sparks Construction Company, Inc. (Sparks) and Great American Insurance Company (Great American), alleging in pertinent part the following: Prior to the date of plaintiffs' alleged damage, defendant entered into a contract with Sparks whereby Sparks agreed to grade defendant's property; that any damage to plaintiffs' property was caused by Sparks. Great American executed a bond indemnifying defendant against all claims arising from the performance of Sparks's contract with defendant. Defendant is entitled to recover from Sparks and Great American any amounts which plaintiffs might recover from defendant, together with expenses, including attorney fees.

Before trial of the action, pursuant to motion and a hearing, summary judgment was entered in favor of Great American; no appeal was taken from that judgment. Following the presentation of all the evidence at trial, the court entered judgment allowing Sparks's motion for dismissal and there is no appeal from that judgment.

Jury trial was waived. The court entered judgment finding as facts that "[d]efendant damaged plaintiffs by piling dirt over 30 feet high approximately two feet from plaintiffs' real property . . . and allowed dirt, water, mud and rocks to come upon plaintiffs' real property when it rained from the said dirt pile and so diverted the natural flow of water so that it came upon plaintiffs' land and damaged plaintiffs' pasture and destroyed plaintiffs' bridge." On these findings, the court adjudged plaintiffs should recover of defendant $1,850.00 plus costs. Defendant appealed.

Billings & Graham by William T. Graham for plaintiff appellees.

Powe, Porter & Alphin, P.A., by William G. Harriss for defendant appellant.

PARKER, Judge.

Defendant assigns as error (1) the failure of the trial court to grant its motions for directed verdict interposed at the close of plaintiffs' evidence and renewed at the conclusion of all the evidence, and (2) the signing of the judgment "due to insufficient evidence to support the findings of fact and the award of damages" set forth in the judgment.

A motion for a directed verdict is proper only in a jury trial. See Rule 50(a). *Bryant v. Kelly,* 279 N.C. 123, 181 S.E. 2d 438. Where, as here, the case is tried without a jury, the appropriate motion by which a defendant may test the sufficiency of plaintiffs' evidence to show a right to relief is a motion for involuntary dismissal under Rule 41(b). *Aiken v. Collins,* 16 N.C. App. 504, 192 S.E. 2d 617. Though defendant's motions were mislabeled, we shall treat them as motions for involuntary dismissal under Rule 41(b). *Mills v. Koscot Interplanetary,* 13 N.C. App. 681, 187 S.E. 2d 372.

> "In ruling on a motion to dismiss under Rule 41(b), applicable only 'in an action tried by the court without a jury,' the court must pass upon whether the evidence is sufficient as a matter of law to permit a recovery; and, if so, must pass upon the weight and credibility of the evidence upon which the plaintiff must rely in order to recover." *Knitting, Inc. v. Yarn Co.,* 11 N.C. App. 162, 180 S.E. 2d 611.

In the instant case, the evidence and admissions in pleadings tended to show:

For some 23 years prior to the trial, plaintiffs had owned and lived on a two and one-half acre tract of land located on the western side of Cherry Street Extension in or near the City of Winston-Salem. Their home faced Cherry Street Extension and back of the home a branch ran through their land in a generally north and south direction. Some 10 or 12 years prior to the trial, plaintiffs had removed the trees from the land across the branch from their home and made a pasture of that portion of their land. Near the branch in the pasture they constructed a small barn and near the barn they constructed a bridge across the branch. The bridge was made of concrete blocks reinforced with iron rods, and galvanized sheet iron covered with dirt provided the top of the bridge. Defendant acquired

title to the land west of plaintiffs' land. The terrain of plaintiffs' land was such that the branch was considerably lower than Cherry Street Extension and approximately fifty feet lower than defendant's adjoining land.

Prior to June of 1970 there was a small ditch on and near the boundary between the lands of plaintiffs and defendant, the ditch being mostly on defendant's land. The ditch was from two and one-half feet to four feet deep and carried water to "the holler and then down in the branch." During 1970 and particularly during June, July and August of that year, defendant was in the process of preparing a large tract of land, including its land adjoining plaintiffs, for a residential subdivision. Defendant filled up the aforesaid ditch and constructed a dirt embankment from 20 to 50 feet high immediately west of plaintiffs' property line. The embankment and elimination of the ditch caused rainwater to run down onto plaintiffs' pasture; the water carried dirt and rocks from the dirt embankment on defendant's land onto plaintiffs' pasture, ruining much of the grass in the pasture and causing a five inch buildup of silt and rocks around plaintiffs' barn.

On 30 October 1970 a very heavy four or five inch rain fell in the area. The branch overran and large quantities of water came down the hill from defendant's property. A part of the water coming from defendant's land gravitated around the barn and onto the edge of the bridge where it eroded dirt on its way to the branch. Early that evening the bridge collapsed and was completely destroyed.

We hold that the evidence was sufficient to survive the defendant's motions for dismissal. Plaintiffs were seeking recovery for damage to their pasture and destruction to their bridge. While, as hereinafter discussed, the evidence was not sufficient to support the claim for destruction of the bridge, it was sufficient to support the claim for damage to the pasture. The defendant's motions were to dismiss plaintiffs' entire claim. Since upon the facts and the law the plaintiffs showed some right to relief, defendant's motions for dismissal were properly denied. However, we further hold that defendant's exception to the judgment was well taken, as the evidence does not support that part of the judgment awarding recovery for destruction of the bridge.

[1, 2] The evidence shows that the damage to plaintiffs' bridge was caused by water, while the damage to their pasture

resulted from the loose dirt, mud, and rocks which were deposited thereon and which came from the high embankment constructed on defendant's land. While, as hereinafter noted, the lower landowner is required to receive surface waters from higher lands when they flow naturally therefrom, he is not required to receive from the higher land dirt and rocks, or other materials, which have been piled thereon by the upper landowner and which, in the natural condition of the lands, would not be carried by the normal flow of surface waters from the upper to the lower tracts. The evidence supports the trial court's finding that this occurred in the present case. This finding in turn supports the judgment insofar as it holds defendant liable for the resulting damage to plaintiffs' pasture. We note that the record in this case presents no question of permanent, as opposed to recurring, damages, as was presented in *Bradley v. Texaco, Inc.*, 7 N.C. App. 300, 172 S.E. 2d 87.

We now turn to that portion of the judgment which allowed recovery for damage to plaintiffs' bridge, which the evidence indicates was caused by the flow of water, rather than by encroachment of mud and rocks, onto plaintiffs' land. On this question, while numerous cases relating to the rights and duties of adjoining property owners regarding surface waters have reached our Supreme Court, it appears that *Davis v. R.R.*, 227 N.C. 561, 42 S.E. 2d 905 is nearest in point to the case at bar. In *Davis*, the jury instructions challenged included the following:

> "I charge you, Gentlemen of the Jury, that under the law when one owns or occupies lower lands, he must receive waters from higher lands when they flow naturally therefrom. There is a principle of law to the effect that where two tracts of land join each other, one being lower than the other, that the lower tract is burdened with an easement to receive waters from the upper tract, which naturally flow therefrom.
>
> "I charge you further that the owner, or one in charge of the higher lands or premises, may increase the natural flow of water, and may accelerate it, but cannot divert the water and cause it to flow upon the lands of the lower proprietor in a different manner, or in a different place from which it would naturally go. . . . "

Finding no error in the trial, the Supreme Court held that the instruction was supported by numerous authorities. For an

excellent Note on "Disposition of Diffused Surface Waters in North Carolina" see 47 N.C.L. Rev. 205 (1968).

Applying the principle approved in *Davis,* while the evidence in the instant case showed that the flow of surface water from defendant's land onto plaintiffs' land was *accelerated* by the construction of the embankment, there was no showing that the flow of said water was *diverted* from its natural flow. Plaintiffs stress the fact that defendant eliminated a ditch that theretofore had kept water from defendant's land from flowing onto plaintiffs' land. It has been held that the word "ditch" has no technical or exact meaning; it may mean a hollow or open space in the ground, *natural* or *artificial,* where water is collected or passes off. *Sherrod v. Battle,* 154 N.C. 345, 70 S.E. 834. Plaintiffs had the burden of showing that the water from defendant's land was diverted from following its *natural* course.

The record on appeal contains some 16 excellent photographs, marked as plaintiffs' exhibits, purporting to show plaintiffs' property and the embankment constructed by defendant. The photographs, however, are of little value to plaintiffs' case. Those identified by the witness, Chris Ayers, were admitted for the limited purpose of illustrating testimony, but there is very little testimony to which they are related. Other photographs were identified but never introduced into evidence.

Although the record contains a statement by the trial court as to the amount awarded for damage to the pasture and the amount awarded for destruction of the bridge, this was not incorporated in the written judgment signed by the trial judge, and in the exercise of our discretion, we set aside the judgment and award a new trial on all issues raised by the pleadings as between plaintiffs and defendant. *Jenkins v. Hines Co.,* 264 N.C. 83, 141 S.E. 2d 1.

New trial.

Judges BRITT and HEDRICK concur.

STATE OF NORTH CAROLINA v. RICHARD DEAN SALEM, AND FRED WOODROW MAUNEY, JR.

No. 7226SC844

(Filed 17 January 1973)

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

The trial court properly consolidated charges of possession of pyrotechnics and felonious possession of marijuana against defendant Mauney with charges of felonious possession of marijuana and felonious assault upon a police officer against defendant Salem. G.S. 15-152

2. **Searches and Seizures § 3— sufficiency of warrant and affidavit**

A search warrant authorizing the search of defendants' premises and the affidavit on which the warrant was based met the requirements of G.S. 15-26 and the Fourth Amendment to the U. S. Constitution.

3. **Constitutional law § 32; Criminal Law § 77— investigatory questions before being taken into custody by officers — admissibility of answers by defendant**

Where defendant Mauney appeared at the apartment in question about ten minutes after the arrival of officers armed with a search warrant, it was not necessary that the officers give Mauney the usual constitutional warnings before asking him general investigatory questions such as his name and whether he lived in the apartment.

4. **Criminal Law § 88— cross-examination of defendant — inquiry about friends — no error**

The trial court properly denied defendant Mauney's motion for mistrial made after the solicitor asked him on cross-examination if he were not a good friend of one Howard Mack Miller where there was no evidence before the jury as to the identity of Howard Mack Miller and there was no showing that any juror might have been prejudiced against one of defendant's friends.

5. **Narcotics § 4— marijuana in defendant's bedroom — constructive possession**

Evidence was sufficient to permit the jury to find that defendant was in constructive possession of marijuana and pyrotechnics where such evidence tended to show that the marijuana was found in a bedroom which defendant told officers was "his room" and the pyrotechnics were found in a closet of the bedroom.

6. **Criminal Law § 80— list of items seized under search warrant — non-contraband items read — no prejudicial error**

Where one of the police officers who conducted the search of defendants' apartment was permitted to read to the jury, over defendant's objection, from a list of items seized during the search, failure of the trial court to limit the officer's testimony to the items

which were relevant to the charges against defendants did not constitute prejudicial error requiring a new trial.

7. **Searches and Seizures § 3— voir dire on sufficiency of affidavit — reliability of informer as question for trial court**

Upon a *voir dire* hearing the trial court properly refused to require a police officer to answer questions designed to attack the credibility of an informer who furnished information relied upon by the officer in applying for a search warrant since the question before the trial court was not whether the informer was in fact reliable, but whether the facts sworn to by the officer in the affidavit as being within his personal knowledge were sufficient to support the magistrate's independent determination that the informer was reliable and that the information given by the informer to the affiant was probably accurate.

ON *certiorari* to review the order of *Friday, Judge,* 3 April 1972 Session of Superior Court held in MECKLENBURG County.

Defendant Mauney appealed from a conviction in district court under a warrant charging the offense of unlawful possession of pyrotechnics in violation of G.S. 14-410. In superior court, this charge was consolidated for trial with a charge against Mauney for felonious possession of marijuana, and charges against defendant Salem for felonious possession of marijuana and felonious assault upon a police officer.

The State's evidence tends to show, among other things, that on 2 October 1971, police officers, armed with a search warrant, went to a Charlotte apartment for the purpose of conducting a search for the narcotic drug marijuana. The officers knocked on the door, rang the doorbell several times, and stated in a loud voice that they were police officers and had a warrant to search the premises. When the officers received no response, they entered the apartment through an unlocked door and again "hollered" in a loud voice that they were police officers and had a warrant to search the premises. In an upstairs bedroom, the officers found defendant Salem and a woman on a mattress that was on the floor. Salem picked up a pistol and pointed it toward one of the officers. The officer pulled his service revolver and Salem put his gun down after the officer told him several times that he was a police officer and to drop the gun. Approximately 18 grams of marijuana were found on a cardboard box that was being used as a nightstand. Salem's watch and wallet were on the box near the marijuana. Approximately 523 grams of marijuana were found in a bedroom which Mauney told the officers was his bedroom. Two boxes of fire-

crackers were found in the closet of that bedroom. Clothes belonging to Mauney were in the closet.

Defendants offered evidence tending to show that two other men also lived in the apartment and that the contraband items belonged to one of the other men.

Defendant Mauney was found guilty of both charges against him. Defendant Salem was found guilty of felonious possession of marijuana. He was acquitted of the charge of felonious assault on a law enforcement officer but was found guilty of assault by pointing a gun. Judgment was entered upon the jury verdicts imposing active prison sentences and both defendants gave notice of appeal. The appeals were not docketed within the time allowed by the rules; however, we allowed defendants' petition for a writ of certiorari in order to consider their appeals on the merits.

Attorney General Morgan by Associate Attorney Kramer for the State.

Lila Bellar for defendant appellant Richard Dean Salem.

Scarborough, Haywood and Selvey by E. Clayton Selvey, Jr., for defendant appellant Fred Woodrow Mauney, Jr.

GRAHAM, Judge.

The 46 exceptions, which are grouped under 9 assignments of error and are set forth on 40 pages of the record, purport to be the exceptions of both defendants. Many of the exceptions are based on the overruling of objections made by only one defendant. For various reasons, some of the assignments of error could not possibly relate to both defendants. It does appear that both defendants contend: (1) the cases should not have been consolidated and (2) the search of defendants' apartment was illegal and the evidence seized in the search should have been excluded. Both of these contentions are without merit.

[1] G.S. 15-152 authorizes the consolidation for trial of separate charges against two or more defendants when the offenses charged are of the same class and are so connected in time or place that most of the evidence at trial upon one of the charges would be admissible at a trial on the others. *State v. Bass*, 280 N.C. 435, 186 S.E. 2d 384. There is nothing in the record to suggest that either defendant was prejudiced by the consoli-

dation, and we hold that the order consolidating the cases for trial was an appropriate exercise of the trial court's discretion.

[2] The search warrant authorizing the search of defendants' premises, along with the affidavit on which the warrant is based, appear in the record. We deem it unnecessary to set them forth in this opinion. Suffice to say, the warrant and affidavit have been carefully scrutinized and we find that they meet the requirements of G.S. 15-26 and the Fourth Amendment to the United States Constitution. The fact that Salem is not named in the search warrant as an occupant of the apartment is without significance under the facts of this case. *State v. Cook,* 273 N.C. 377, 160 S.E. 2d 49.

None of the remaining assignments of error appear to relate to both defendants and we therefore discuss them separately.

CONTENTIONS OF DEFENDANT MAUNEY

[3] Defendant Mauney appeared at the apartment about ten minutes after the arrival of the officers. One of the officers asked Mauney who he was and if he lived there. Mauney told the officer his name, walked into a bedroom, and without being asked, stated that it was his room. Mauney says this evidence should have been excluded because he was not advised of his constitutional rights before making the statements. We disagree. These questions were asked before Mauney was taken into custody and before any contraband substance had been found. It was not necessary that the officers give Mauney the usual constitutional warnings before asking him general investigatory questions such as his name and whether he lived in the apartment. See *State v. Gladden,* 279 N.C. 566, 184 S.E. 2d 249; *State v. Shedd,* 274 N.C. 95, 161 S.E. 2d 477; *State v. Hayes,* 273 N.C. 712, 161 S.E. 2d 185.

[4] Mauney further contends that the court erred in denying his motion for a mistrial made after the solicitor asked defendant on cross-examination if he were not a good friend of one Howard Mack Miller. There was no evidence before the jury as to the identity of Howard Mack Miller and there has been no showing that any juror might have been prejudiced against one of his friends. Moreover, Mauney's objection to the question was sustained by the court. Under these circumstances, the

court was acting well within the bounds of its discretion in denying Mauney's motions for a mistrial.

[5] Mauney assigns as error the denial of his motion for nonsuit and argues that the evidence was insufficient to show that he was in possession of either the marijuana or pyrotechnics. These contentions are overruled. The marijuana was found in a bedroom which defendant told the officers was "his room." The pyrotechnics were found in a closet of the bedroom. This was sufficient to permit the jury to find that defendant was in constructive possession of the items.

Finally, Mauney argues that the court's charge on the law of possession was erroneous. The court instructed the jury thoroughly and accurately as to what constitutes possession, actual and constructive, and we find the charge free from prejudicial error.

CONTENTIONS OF DEFENDANT SALEM

[6] One of the police officers who conducted the search of defendants' apartment was permitted to read to the jury, over Salem's objection, from a list of items seized during the search. Some of the items mentioned were not contraband and Salem contends he was prejudiced in that the jury may have thought that they were. The court should have limited the officer's testimony to the items which were relevant to the charges against defendants. However, we do not regard its failure to do so as error requiring a new trial. The noncontraband items were not introduced in evidence and it does not appear the State contended during the trial that possession of these items was illegal. It is inconceivable that the jury could have been influenced against defendants by evidence that legitimate pills and other non-contraband items were found in the apartment.

Assignment of error number six, which is argued in Salem's brief only, is: "The Court erred in refusing to allow certain answers to questions asked by defendants to be placed in the record. . . . " This assignment of error purports to be based on "Exceptions Nos. 3, 28 (R pp 39, 90)." Exception No. 28 on page 90 of the record is the exception entered by defendant Mauney to the court's denial of his motion for nonsuit made at the conclusion of the State's evidence. No Exception No. 3 appears in the record.

[7] It does appear from page 40 of the record that during a *voir dire* hearing, which defendant requested, the court refused to require a police officer to answer questions designed to attack the credibility of an informer who furnished information relied upon by the officer in applying for the search warrant. This was not error. Defendants were not entitled to a *voir dire* hearing for purposes of conducting a fishing expedition into the credibility of the informer, because the informer's credibility was a matter solely for the magistrate who issued the search warrant. The question before the trial court was not whether the informer was in fact reliable, but whether the facts sworn to by the officer in the affidavit as being within his personal knowledge were sufficient to support the magistrate's independent determination that the informer was reliable and that the information given by the informer to the affiant was probably accurate. *State v. Shirley,* 12 N.C. App. 440, 183 S.E. 2d 880, *cert. denied,* 279 N.C. 729. The affidavit was before the court and a *voir dire* hearing was not required in order for the court to find that the facts contained therein were sufficient to meet constitutional and statutory requirements.

Defendant Salem argues other contentions in his brief. These have been reviewed and are overruled. We are of the opinion and hold that defendants had a fair trial free from prejudicial error.

No error.

Judges HEDRICK and VAUGHN concur.

GLEAT MORRIS TODD, T/A NORTHEAST RIVER ESSO STATION v. NATIONWIDE MUTUAL INSURANCE COMPANY, A CORPORATION

No. 725DC96

(Filed 17 January 1973)

Insurance § 6; Trial § 22— insurance against loss of money — duty of insured to keep records — sufficiency of evidence

In an action to recover on an insurance policy protecting plaintiff against loss of money and securities from his place of business, plaintiff's evidence was sufficient to present a jury question as to whether he had complied with the provision of the policy requiring that he keep records of all the insured property in such manner that the insurer could accurately determine therefrom the amount of loss.

APPEAL by defendant from *Barefoot, District Judge,* 29 July 1971 Session of District Court held in NEW HANOVER County.

Plaintiff brought this civil action to recover $1,790.00 allegedly due him under an insurance policy issued by defendant. Plaintiff's evidence, in pertinent part, tended to show:

On 27 November 1968 plaintiff operated a service station in the City of Wilmington. On or about that date, in consideration of $200.00 premium, defendant issued an insurance policy, effective for one year from and after 27 November 1968, insuring plaintiff against "loss of money and securities by the actual destruction, disappearance or wrongful abstraction thereof within the premises . . . . " Maximum coverage provided by the policy was $3,000.00.

On the morning of 5 February 1969, while at his home, plaintiff "made up" a bank deposit consisting of $1,900.00 in cash and $1,183.63 in checks, a total of $3,083.63; attached to the cash and checks was a Wachovia Bank & Trust Company deposit slip showing plaintiff's name, account number, the amount of cash, amount of checks, and total amount of deposit. Before going to the bank, plaintiff stopped by his service station and, finding his two helpers quite busy, placed the intended deposit in a desk drawer in the station and proceeded to wait on customers. Some two hours later he opened the desk drawer and discovered that $1,790.00 of the cash had disappeared. Plaintiff's brother, who worked for him, proceeded to take the remaining $110.00 in cash and the checks to the bank. Immediately thereafter plaintiff called defendant's agent and reported the loss; he also called police who investigated the loss. No part of the money was ever recovered. Other pertinent evidence is hereinafter reviewed in the opinion.

On issues submitted, the jury found (1) that plaintiff suffered a loss "insured against by the terms and conditions of the policy," (2) that plaintiff complied with the terms and conditions of the policy, and (3) that plaintiff is entitled to recover $1,790.00 from defendant. From judgment rendered on the verdict, defendant appealed.

Brown & Culbreth by Stephen E. Culbreth for plaintiff appellee.

Smith & Spivey by James K. Larrick for defendant appellant.

PARKER, Judge.

Defendant assigns as error the failure of the trial court to allow its motions for directed verdict and for judgment notwithstanding the verdict.

As its reason for its motion for directed verdict at the close of all the evidence, defendant submitted that plaintiff did not comply with the terms and conditions of the policy and particularly with condition number 4 which provides: "The Insured shall keep records of all the insured property in such manner that the Company can accurately determine therefrom the amount of loss."

The evidence disclosed that plaintiff made a bank deposit on 19 January 1969 and that the next deposit was the one made for him by his brother on 5 February 1969. Plaintiff testified that he kept a daily record showing, among other things, total amount of daily sales, amount "paid out of drawer," cash on hand at end of each day, Esso-Matic invoices on hand at end of each day, and the overage or shortage at end of each day. He introduced in evidence sixteen exhibits purporting to provide information as aforesaid for the sixteen days beginning 20 January 1969 and ending 4 February 1969. Typical of the exhibits is the one for 20 January 1969 summarized as follows:

DATE: 1-20-1969

SALES SUMMARY & CASH BALANCE

Motor Fuel	$167.05
Oil & A.T.F.	3.60
Accessories & Parts	2.50
Labor	2.75
TOTAL SALES	$175.90

* * * * *

Paid Out of Drawer	$ 31.80
Cash (End of Day)	53.00
Esso-Matic Invoices (End of Day)	73.51
TOTAL ACCOUNTED FOR	$158.31

CASH	OVER	SHORT
Today		$17.59

The item above set forth and entitled "Esso-Matic Invoices" represented sales on credit cards. In explaining his method of operation, plaintiff testified: "When I made the deposits on January 20, 1969, of $2,457.36, I deposited all the money that I then had on hand. . . . (M)y daily report would reflect the totality of my business for those days including credit cards, checks, nickels and dimes and folding money except for my wrecking money I took in. I didn't show that on my books. . . . That money did go into my deposits. . . . I don't know how much I average a month from the wrecker. It depends on how much I do. As to my average, one week I might make $10.00 or $20.00; next week I might take $200.00, it all depends. . . . These Esso-Matic Invoices were handled by me adding them up and sending them in, and they sent me a check. I don't put that in my daily record as a cash entry. . . . When I get my check back from Humble from my Esso-Matic Invoices, I put it in the bank. At that time, it would go in just as any other cash, but on my daily records it is not reflected as cash. . . . I might get five back in one day. I might not get one a week. . . . If I had received an Esso-Matic check back, I would not have that listed on my daily report, it would not be included. . . . As to whether it was ever reflected in my daily report or my daily records, I say, the only way is through my credit cards. That would be a check unless I had to use it for something and I go cash it. I have done that several times. When I made out my deposit on this morning of the alleged loss, I had $1,790.00 in cash."

Our research fails to disclose that either this Court or our Supreme Court has ever construed an insurance policy proviso identical to condition number 4 in the subject policy. Our Supreme Court has, however, considered the "iron-safe" clause found in many fire insurance policies covering mercantile inventories. Speaking of such a clause in *Coggins v. Insurance Co.*, 144 N.C. 7, 56 S.E. 506, the Court said: "In construing this clause, the better considered authorities seem to be to the effect that it should receive a reasonable interpretation, and that only a substantial compliance should be required." In *Arnold v. Insurance Company*, 152 N.C. 232, 67 S.E. 574, another case in which the "iron-safe" clause was involved, the opinion contains the following:

> " 'Insurance companies write and sign their policies, and where there are doubtful constructions they will be held against the insurer. Policies must be liberally construed in

favor of the insured, so as not to defeat, without a plain necessity, his claim for indemnity.'

* * * * *

"Speaking generally as to the questions presented in this appeal, in Cooley's Insurance Briefs, page 1823, it is said: 'So, where the insured was in business in a little country town in Florida, and his books, kept in most primitive style, were far from being what a good accountant would consider a complete set of books (citation), the Court held that, if the insured kept a set of books which were as good as ordinarily kept in such a store and business, and exercised good faith in the matter, his policy was not avoided merely by the fact that the books were not what an expert would consider a complete set of books. If his books were kept in the manner customary with merchants (citation), and as elaborate and complete as is usually the case in stores of like character (citation), it is sufficient. Whether the books are sufficient within these principles, is a question for the jury (citation).' "

In 45 C.J.S., Insurance, § 658, p. 577, we find: "It is sufficient if the books and records are such that, with the assistance of those who kept them, or understood the system, the amount of the loss can be ascertained, or if a jury, as practical men, can determine the loss from the books and accounts."

It will be noted that in the cases involving "iron-safe" clauses considered by our Supreme Court, the clauses set out in considerable detail the types of records the insured should keep. That is not true in the instant case and the testimony was to the effect that defendant never instructed plaintiff as to the kind of records he should keep. Defendant's witness testified that the records kept by plaintiff were similar to those kept by other service station operators. Considering the nature of plaintiff's business, it would be extremely difficult for him to keep a complete record of money and securities possessed by him at all times. The daily reports for the sixteen days between deposits showed that plaintiff's total sales were $3,479.22 not counting cash received for wrecker service, and that his "paid out of drawer" disbursements during that time totaled $315.52, leaving a balance of $3,163.70. A tabulation of Esso-Matic invoices and cash on hand at end of each of the sixteen days totals $3,082.17, and this does not reflect any receipts

from wrecker service. While the evidence does not show the exact amount plaintiff received for his credit card invoices during those sixteen days, the inference is that those receipts were quite constant, sometimes as often as five times in a single day.

We hold that the evidence was sufficient to present a jury question as to whether plaintiff complied with condition number 4 of the policy, and that his records were sufficient to support his contention that he had $3,083.63 in cash and checks in his possession on 5 February 1969. Although defendant presented testimony of a certified public accountant to the effect that he examined plaintiff's records covering the period from 20 January 1969 through 10 February 1969 and that plaintiff's bank deposits reflected all receipts during that period, this presented a conflict in the evidence for the jury to resolve. It is well settled that discrepancies and contradictions in the evidence are to be resolved by the jury and not by the court. *Naylor v. Naylor,* 11 N.C. App. 384, 181 S.E. 2d 222.

Defendant's remaining assignments of error relate to the trial court's charge to the jury. We have carefully reviewed the charge and when considered contextually as a whole, we conclude that the charge is free from prejudicial error.

No error.

Judges BRITT and HEDRICK concur.

STATE OF NORTH CAROLINA v. RALPH LAND SHADDING

No. 727SC599

(Filed 17 January 1973)

1. Criminal Law § 22— reading of warrant at arraignment — charge of second offense — no error

The solicitor's reading at arraignment of a warrant charging defendant with driving under the influence, second offense was harmless error where the trial court clearly instructed the jury on driving under the influence, first offense and where defendant failed to show that a different result would likely have occurred.

2. **Criminal Law § 73— testimony as to telephone conversation — admissibility to explain witness's actions**

In a drunk driving case, testimony of the arresting officer with respect to a telephone call was admissible, not to prove the truth of the telephone conversation, which was not stated, but to explain the subsequent actions of the witness.

3. **Automobiles § 126— time lapse — consumption of alcohol after arrest — admissibility of breathalyzer test results**

There was no merit in defendant's contention that a breathalyzer test given him two hours after his arrest had no probative value because it was not timely made, nor was there merit in his contention that the test results lacked probative value because defendant testified that he had consumed alcohol after his arrest.

4. **Automobiles § 126— failure to give statutory warnings before administering breathalyzer test — admissibility of results**

Where the State offered no evidence upon the question of whether defendant had been notified of his right to call an attorney and to select a witness to view breathalyzer testing procedures in accordance with G.S. 20-16.2(a), results of the test were inadmissible, and admission of the results over defendant's objection constituted prejudical error.

APPEAL by defendant from *Martin (Harry C.), Judge,* 7 February 1972 Session of Superior Court held in WILSON County.

Defendant was tried on charges in two separate warrants: (1) in case number 71CR2423, operating a motor vehicle while under the influence of intoxicating liquor; and (2) in case number 71CR2435, driving after his license had been revoked by violating the terms of limited driving privileges.

The State's evidence tended to show the following facts. On 9 April 1971 Sgt. Parrish of the Statonsburg Police Department was parked near Highway 58 looking for an automobile being operated by defendant. He observed an automobile he thought was defendant's weaving slightly down the road. After that car passed his position, he pulled out and followed it into the driveway of defendant's home. Sgt. Parrish drove his patrol car into the driveway, got out of his car, and went up to defendant's car. When the defendant-driver got out of his car, he was staggering and unsteady on his feet. He had a strong odor of alcohol on his breath, and his clothes were in a dishabilled condition. At the time Sgt. Parrish followed defendant into the driveway it was 7:30 p.m. In the officer's opinion, defendant was under the influence of some intoxicating bever-

age, and he arrested defendant for operating a motor vehicle while under the influence of intoxicating liquor. Defendant was given a breathalyzer test at 9:28 p.m. and registered point two five percent. On the night in question, defendant had a limited driver's license that prohibited him from driving after 7:00 p.m.

Defendant offered evidence which tended to show the following: On the day in question defendant arrived home from work at about 6:20 p.m.; that he had not been drinking prior to arriving home, but, once home, he took a drink from a bottle of bourbon he kept hidden in an easily accessible place under his house; that he was having a drink in his car when Sgt. Parrish arrived several minutes later; that defendant placed the bottle under his belt, hidden by his shirt; that after being arrested, he was locked into Sgt. Parrish's patrol car for about two hours before being given a breathalyzer test; that while he was in the patrol car alone, he consumed most of the ⅔ of the bottle of bourbon that he had secreted under his shirt; that he was not under the influence of intoxicating liquor at the time he operated his motor vehicle.

Upon a plea of not guilty, defendant was tried by a jury and found guilty of both charges. Defendant appealed.

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

Farris and Thomas, by Robert A. Farris, for the defendant.

BROCK, Judge.

[1] Defendant first assigns as error the Court's refusal to grant a continuance after the Solicitor arraigned defendant upon a charge of second offense of driving under the influence, stating that defendant had previously been convicted of driving under the influence. At arraignment the Solicitor merely read the warrant used in District Court. Defendant contends that this was prejudicial error since he was not convicted of second offense driving under the influence in District Court, and was not on trial for that charge in Superior Court. Assuming, without deciding, that the Solicitor's reading of the warrant was error, it does not constitute prejudicial error in this case. The Court clearly instructed the jury only on driving under the influence, first offense. The instruction, coupled with defendant's

failure to show that a different result would likely have occurred, renders such error harmless.

[2] Defendant assigns as error the Court's allowance of the following testimony by Sgt. Parrish: "at about 7:30 on that evening, we received a call, as a result of a call—"; and ". . . which led us to believe it might have been the car we were after." This evidence was admissible, not to prove the truth of the telephone conversation, which was not stated, but to explain the subsequent actions of the witness. This evidence was admissible to explain the location and observations of the police officer. *See* Stansbury, N. C. Evidence 2d, § 138, 141. This assignment of error is overruled.

[3] Defendant contends it was error for the Court to admit into evidence the results of the breathalyzer test. Defendant argues that the test has no probative value since it was not timely made (given two hours after the arrest) and since defendant testified that he consumed alcohol after his arrest. There is no merit in defendant's contention that a breathalyzer test given two hours after an arrest has no probative value because it is not timely made. Likewise, there is no merit in defendant's contention that the test results lacked probative value because defendant testified he had consumed alcohol after his arrest. Whether defendant drank alcohol after his arrest was a jury question. The trial judge gave a proper instruction to the jury on this assertion. *See State v. Cooke,* 270 N.C. 644, 155 S.E. 2d 165.

[4] Defendant further contends that the breathalyzer test results were inadmissible because there was no evidence that defendant was advised of his right to have counsel or a witness present to view the taking of the test. Defendant does not contend that this is a constitutional right, but argues that it is specifically required by statute. G.S. 20-16.2(a) provides that "the accused person shall be permitted to call an attorney and to select a witness to view for him the testing procedures providing, however, that the testing procedures shall not be delayed for these purposes for a period of over 30 minutes from the time the accused person *is notified of these rights.*" (Emphasis added.) It seems to be the clear legislative intent that the accused be notified of the right to call an attorney and to select a witness to view the breathalyzer test. The test can be delayed 30 minutes from the time of notification to the accused. Such rights of notification, explicitly given by statute, would be

meaningless if the breathalyzer test results could be introduced into evidence despite non-compliance with the statute.

Upon objection by defendant to evidence of the results of a breathalyzer test upon the grounds that he had not been notified of his right to call an attorney and to select a witness to view the testing procedures in accordance with G.S. 20-16.2(a), the trial court must conduct a hearing and find as a fact from the evidence whether defendant was so notified prior to the administering of the breathalyzer test. If it is found that defendant was so notified, the trial court must also find as a fact from the evidence whether the administering of the breathalyzer test was delayed (not to exceed thirty minutes from the time defendant was notified of such rights) to give defendant an opportunity to call an attorney and select a witness to view the testing procedures, or whether defendant waived such rights after being advised of them. If defendant was not notified of such rights, the results of the test are not admissible in evidence. On the other hand, if it is determined that he was advised of such rights, and did not waive them, the results of the test are admissible in evidence only if the testing was delayed (not to exceed thirty minutes) to give defendant an opportunity to exercise such rights.

Defendant specifically objected upon these grounds, but the State offered no evidence upon the question of whether defendant was advised of his rights under G.S. 20-16.2(a). The failure to establish that defendant was accorded his statutory rights rendered the results of the breathalyzer test inadmissible in evidence, and its admission over objection constituted prejudicial error.

No error in case number 71CR2435 (driving after his license had been revoked).

New trial in case number 71CR2423 (operating a motor vehicle while under the influence of intoxicating liquor).

Chief Judge MALLARD and Judge BRITT concur.

STATE OF NORTH CAROLINA v. RONALD EUGENE ALL AND CARLTON OSCAR WEAVER

No. 7215SC777

(Filed 17 January 1973)

1. **Criminal Law § 84; Searches and Seizures § 1— arrest of defendant driver — search preparatory to impounding vehicle — admissibility of arresting officer's testimony**

Testimony by the arresting officer in a breaking and entering and larceny case as to the contents of a truck was admissible where the officer arrested defendant for operating his vehicle while the windshield was covered with cardboard, the officer stepped up onto the wheel of the vehicle to determine the cargo of the truck preparatory to impounding the vehicle, and the officer saw there hams and boxes from Hickory Mountain Farms, a business which he later learned had been the subject of a breaking and entering and larceny.

2. **Criminal Law § 84; Searches and Seizures § 1— bolt cutters seized in unlawful search — admission harmless error**

Where the evidence tended to show that a truck similar to that of defendants was seen driving from the vicinity of a break-in, that unequivocally identified stolen hams were found in defendants' possession a few hours after the break-in, and that fibers found at the crime scene matched those of one defendant's sweater, such evidence was sufficient to support defendants' convictions for breaking or entering and felonious larceny; therefore, any error in admitting into evidence bolt cutters which were the fruit of an illegal confession was harmless beyond a reasonable doubt.

APPEAL by defendants from *McKinnon, Judge,* 8 May 1972 Session of Superior Court held in CHATHAM County.

Defendants were charged in separate bills of indictment with felonious breaking or entering and felonious larceny.

The State's evidence tended to show the following. During the early hours of the morning of 20 March 1971 the premises of Hickory Mountain Farms, Inc., in Siler City, N. C., was unlawfully broken and entered and a large quantity of meat (packaged hams and loose hams) was unlawfully stolen therefrom. At about 2:10 a.m. on 20 March 1971 a "bluish truck" with wooden siding was observed driving away from the vicinity of Hickory Mountain Farms, Inc. At about 7:20 a.m. on 20 March 1971 a trooper with the Virginia State Police observed a blue truck traveling north on Route 220 in Virginia. Except for ten or twelve inches of glass on the driver's side the entire windshield of the truck was covered with cardboard. Driving with

a windshield in such condition constitutes an offense in the State of Virginia, and therefore the trooper stopped the truck. Defendant All was driving and defendant Weaver was riding in the cab on the passenger side. Defendant All was placed under arrest and defendant Weaver disappeared from the scene (he was arrested later in the day). The trooper inspected the load in the bed of the truck by stepping up on the axle or the wheel and looking over the wooden siding—there was no top cover on the bed of the truck. He observed loose hams and boxes with Hickory Mountain Farms, Inc., written on them. Another trooper, who was called to the scene, drove the truck to the Franklin County jail. After defendant All was in custody for the motor vehicle violation, the Virginia State Police received, by radio, information of the theft of hams from Hickory Mountain Farms, and an investigator for the Virginia State Police went to the Franklin County jail to interrogate defendant. While the truck was still parked at the Franklin County jail, the investigator looked through the right side window of the cab of the truck and observed a large set of bolt cutters lying on the floorboard. These bolt cutters were found to have paint chips similar to the paint on the security bars which were cut on the Hickory Mountain Farms, Inc., premises. The fibers from defendant Weaver's sweater were similar to the fibers taken from the glass of the broken window at the Hickory Mountain Farms, Inc., premises.

Statements made by defendant All at the scene after he was arrested were excluded from evidence because he had not been given the Miranda warnings. Statements made by defendant All during interrogation at the county jail were excluded from evidence because a hope of leniency was held out to him by the interrogating officer.

The defendants offered no evidence.

The jury returned verdicts of guilty as charged in both counts as to each defendant. Defendant All was sentenced to an active term of seven to ten years. Defendant Weaver was sentenced to an active term of ten years. Both defendants appealed.

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

Loflin, Anderson & Loflin, by Thomas F. Loflin III and Harris & McEntire, by Mitchell M. McEntire and Laura Jean Guy, for the defendants.

BROCK, Judge.

[1] Defendants assign as error the admission of testimony by the Virginia State trooper of his observation of the load of hams in the cargo bed of the truck. They argue that the hams were not in "plain view" of the trooper because he had to climb up on the wheel or axle of the truck to see over the wooden siding. They argue, therefore, that the hams were discovered by means of a search which was not reasonably related to the offense for which All was arrested, which was not for purposes of protection or prevention of escape, and which was not founded on probable cause; and, consequently, was a search prohibited by the Fourth Amendment to the Constitution of the United States.

It seems to us that the arguments advanced by defendants are wide of the mark. In this instance, the officer knew he must impound the truck until the windshield could be repaired. Under such circumstances it was his duty to take reasonable precautions to protect defendants' cargo from loss or destruction. Also, it was his duty to protect himself and the State from charges of loss of cargo. In order to do these things it was necessary for him to know the nature and quantity of the cargo. His conduct in looking into the cargo bed was both reasonable and necessary under the circumstances. If his action can be classed as a search, it was certainly a reasonable search. It is only unreasonable searches which are prohibited by the Fourth Amendment, *State v. Ratliff*, 281 N.C. 397, 189 S.E. 2d 179. Once the trooper acquired knowledge of the cargo by a reasonable act, he was not required to suppress this knowledge when the police radio bulletin later advised of the theft of a quantity of Hickory Mountain Farms hams.

The numerous cases relied upon by defendants are distinguishable upon the reason for the "search." For cases more comparable to the present case *See* 10 ALR 3d 314-354, § 9 [New] Making inventory of contents of impounded vehicle (Supp. 1972). In our opinion, the trooper's testimony concerning the load of hams was properly admitted in evidence.

[2] Defendants next argue that the bolt cutters taken from the truck were found as a direct result of an illegal confession and, therefore, should have been excluded from evidence as was the confession itself. While there seem to have been sources of knowledge of the bolt cutters equally as clear as that obtained from the excluded confession, we do not feel it is necessary to

dwell upon the question in this case. Conceding, arguendo, that the bolt cutters were the fruit of an illegal confession, their admission in evidence would constitute harmless error beyond a reasonable doubt. The remaining evidence against defendants was more than sufficient to support their convictions: a truck similar to theirs was seen driving from the vicinity of the break-in; the unequivocally identified stolen hams in defendants' possession in Virginia a few hours after the break-in; and fibers found at the scene of the break-in which matched one defendant's sweater. If it were error to admit the bolt cutters in evidence, in view of the total evidence, we hold such error to be harmless beyond a reasonable doubt. *See Harrington v. California,* 395 U.S. 250, 23 L.Ed. 2d 284, 89 S.Ct. 1726; *State v. Doss,* 279 N.C. 413, 183 S.E. 2d 671; *State v. Bell,* 14 N.C. App. 346, 188 S.E. 2d 593.

We have carefully considered defendants' assignment of error relating to the allowance of opinion testimony by one of the State's witnesses. Without belaboring the point, it is our opinion the evidence justified the trial court's finding that the witness was qualified to testify in the field of forensic chemistry. This assignment of error is overruled.

No error.

Judges CAMPBELL and GRAHAM concur.

STATE OF NORTH CAROLINA v. THOMAS LLOYD FOREHAND

No. 721SC746

(Filed 17 January 1973)

1. **Incest— competency of victim's testimony**

Testimony of the fourteen-year-old victim was relevant and competent in an incest prosecution and was not objectionable simply because it tended to implicate both defendant and his wife in the crime charged.

2. **Incest— evidence of defendant's prior relations with victim — admissibility to show quo animo**

In a prosecution for incest, evidence that defendant had had prior sexual relations with his fourteen-year-old daughter was admissible for the purpose of showing *quo animo.*

3. **Criminal Law § 88— cross-examination of defendant**

The trial court did not err in refusing to allow cross-examination of the prosecuting witness in an incest case as to whether she had previously charged another male with rape, cross-examination as to what a friend had told her regarding her personal matters, and cross-examination as to evidence in another case.

4. **Criminal Law § 58— handwriting of defendant — notes allegedly written by defendant — testimony proper**

A witness who testified that she had seen defendant write and could recognize his handwriting could corroborate testimony of the prosecuting witness with respect to a note allegedly left by defendant on the prosecuting witness's pillow, and the witness's testimony reciting the contents of another note was relevant and was not prejudicial to defendant.

5. **Criminal Law § 169— failure to show what testimony would have been — no prejudice — evidence of like import allowed**

Where the record fails to show what a witness would have answered with respect to questions concerning the reputation of the prosecuting witness in an incest case, no prejudicial error is shown, particularly where a defense witness was allowed to give testimony of the same import without objection.

APPEAL by defendant from *Tillery, Judge*, 12 June 1972 Session of Superior Court held in CHOWAN County.

Defendant, Thomas Lloyd Forehand, was charged in a bill of indictment, proper in form, with the felony of incest. Upon defendant's plea of not guilty, the State offered evidence tending to show that on 2 February 1972 the defendant, age 41, had sexual intercourse with his natural daughter, Ernestine Annette Forehand (Ann), age 14. Defendant denied ever engaging in sexual intercourse with his daughter and offered evidence tending to show that he was not at home at the time Ann testified the crime occurred.

Defendant was found guilty as charged and from a judgment imposing an active prison sentence of 15 years, defendant appealed.

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

Pritchett, Cooke & Burch by S. R. Burch for defendant appellant.

HEDRICK, Judge.

[1] Defendant's first three exceptions challenge the admission of testimony of defendant's 14-year-old daughter tending to implicate both defendant and his wife in the crime charged.

Evidence which is otherwise relevant and competent is not objectionable simply because it tends to discredit or prejudice a defendant in the eyes of the jury. Stansbury, N. C. Evidence 2d, § 80. The testimony of the 14-year-old victim of the crime charged challenged by these three exceptions was obviously relevant and competent.

[2] Exceptions 5, 6 and 16 challenge the admission of testimony tending to show that defendant had prior sexual relations with his 14-year-old daughter.

These exceptions have no merit because in a prosecution for incest, evidence of other improper advances by the defendant of a similar nature is admissible for the purpose of showing *quo animo*. *State v. Edwards,* 224 N.C. 527, 31 S.E. 2d 516 (1944).

Defendant's third assignment of error relates to the admission and exclusion of testimony.

[3] Exceptions 8 and 9 challenge the court's ruling sustaining the State's objections to defendant's cross-examination of the prosecuting witness regarding whether she had once charged another male with rape. Clearly the questions called for irrelevant testimony and the objections were properly sustained.

With respect to exception 10, the record discloses the following occurred during the cross-examination of Ann Forehand:

"I know Ann Mizelle and she is a friend of mine in a way. I went to school with her. I have not discussed this case with her.

Q. Has she ever discussed any of her personal matters with you?

A. Yes, she has.

Q. Did she tell you about her—

OBJECTION. OBJECTION SUSTAINED.

EXCEPTION NO. 10."

Obviously the question called for hearsay testimony as to what Ann Mizelle had told the prosecuting witness regarding her personal matters and the objection was properly sustained.

With respect to exception 11, the record discloses the following occurred during the cross-examination of Ann Forehand:

> "When I was baby-sitting for Lois Coltrain I told her I was going to run away and she wanted to know why and I told her it was like the Mizelle case and that gave her an idea right then.
>
> Q. What Mizelle case are you referring to?
>
> OBJECTION.
>
> OBJECTION SUSTAINED as to the form of question.
>
> EXCEPTION No. 11."

The trial court properly sustained the objection to the question for the evidence regarding another case was not relevant.

[4] Defendant's fourth assignment of error, based on exceptions 13, 14 and 15, challenges the competency of Brenda Lou McDonald (Brenda), a 13-year-old witness for the State, to testify that she recognized defendant's handwriting and attacks as irrelevant and prejudicial her testimony as to the contents of a note allegedly written by defendant.

Ann, defendant's daughter, testified that her father would, on occasion, write notes inviting her to engage in sexual intercourse with him and that Brenda had seen, but not read, one such note left on Ann's pillow. Brenda testified, over objection by defense counsel, that she had seen, but not read, a note written to Ann by her father, which was found on Ann's pillow. Brenda testified that she had observed defendant write and could recognize defendant's handwriting. Over defense objection, Brenda testified that defendant wrote and signed a note which she found in a bathroom of defendant's home in which, "He said he was going to bust my cherry . . . ."

"It is well established that genuineness or falsity of disputed handwriting may be proved by a witness, not an expert, who is found to be acquainted with the handwriting of the per-

son supposed to have written it. Stansbury, N. C. Evidence 2d, § 197." *In re Will of Head,* 1 N.C. App. 575, 577, 162 S.E. 2d 137, 139 (1968). It is equally well established that:

> "Evidence of other offenses is inadmissible if its only relevancy is to show the character of the accused or his disposition to commit an offense of the nature of the one charged; but if it tends to prove any other relevant fact it will not be excluded merely because it also shows him to have been guilty of an independent crime." Stansbury, N. C. Evidence 2d, § 91.

Thus, having seen defendant write and having professed the ability to recognize his handwriting, Brenda's testimony was competent and relevant to corroborate the testimony of Ann with respect to the note allegedly left by defendant on Ann's pillow. Moreover, we are unable to perceive that Brenda's testimony reciting the contents of the note left in the bathroom could have been prejudicial to defendant since Brenda previously testified, without objection, that defendant had made similar improper advances to her.

[5] By his sixth assignment of error, defendant challenges the court's sustaining of objections by the State to questions asked a defense witness concerning the reputation of Ann Forehand.

The records fails to show what answer the witness would have given had he been allowed to answer. The exclusion of testimony cannot be held prejudicial when the record fails to show what the answer of the witness would have been had he been allowed to testify. *Spinella v. Pearce,* 12 N.C. App. 121, 182 S.E. 2d 620 (1971); 1 Strong, N. C. Index 2d, Appeal and Error, § 49, p. 200. Additionally, Mrs. Doris Morgan, a defense witness, was allowed to testify, without objection, that "the general reputation of Ann Forehand in the community where she lives . . . is not too good for a teenager." The exclusion of testimony is not prejudicial when it appears that other witnesses are allowed to give testimony of the same import. *Reeves v. Hill,* 272 N.C. 352, 158 S.E. 2d 529 (1968). This assignment of error is overruled.

Defendant has additional assignments of error including exceptions to the court's instructions to the jury which we have carefully considered and find to be without merit.

The trial of defendant in Superior Court was free from prejudicial error.

No error.

Judges VAUGHN and GRAHAM concur.

RICKY GLENN HUFFMAN v. PEERLESS INSURANCE COMPANY

No. 7318SC4

(Filed 17 January 1973)

Insurance § 109— automobile liability insurance — consent judgment in action against insured and his son — no legal obligation to pay

A father and son were not "legally obligated" to pay damages to plaintiff within the meaning of an automobile liability policy issued to the father where a consent judgment was entered in plaintiff's action against the father and son which dismissed with prejudice the action against the father, provided that plaintiff shall recover $20,000 against the son, and further provided that the judgment shall not be a lien upon any of the son's property, shall not be the basis for execution against the son's property and shall be marked satisfied in full after the collection of all insurance proceeds available to the son for the accident in question.

Judge VAUGHN concurs in the result.

APPEAL by plaintiff from *Exum, Judge,* 22 May 1972 Session of Superior Court held in GUILFORD County.

This is a civil action wherein plaintiff, Ricky Glenn Huffman, seeks to recover on a policy of automobile liability insurance issued by defendant, Peerless Insurance Company. The following facts are uncontroverted:

On or about 14 September 1968, defendant issued a policy of automobile liability insurance to John Daniel Johnson (named insured) insuring a 1965 Ford automobile. On 5 October 1969, plaintiff was a passenger in the 1965 Ford automobile which was being operated with the knowledge and consent of the named insured by his son, Roby Daniel Johnson, a member of the household of the named insured. Said automobile was involved in an accident in which plaintiff suffered personal injuries. On 12 November 1970, plaintiff instituted suit against Roby Daniel Johnson and John Daniel Johnson to recover dam-

ages for personal injuries sustained in the accident. For reasons not material to the decision in this case, the defendant, Peerless Insurance Company, denied coverage and refused to defend the action in behalf of Roby Daniel Johnson and John Daniel Johnson. On 24 November 1971 a consent judgment was entered in the Superior Court held in Guilford County providing, among other things, that plaintiff have and recover of the defendant, Roby Daniel Johnson, the sum of $20,000. Pursuant to said judgment, plaintiff has recovered $10,000. Defendant denied liability on the policy and moved, pursuant to G.S. 1A-1, Rule 56 of the North Carolina Rules of Civil Procedure, for summary judgment. On 31 May 1972, the trial court allowed defendant's motion for summary judgment.

From summary judgment in favor of defendant, plaintiff appealed.

Edwards, Greeson & Toumaras by Harold F. Greeson for plaintiff appellant.

Jordan, Wright, Nichols, Caffrey & Hill by William L. Stocks for defendant appellee.

HEDRICK, Judge.

The policy of automobile liability insurance issued by defendant to John Daniel Johnson obligates the insurer "[t]o pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of . . . bodily injury . . . ." By the terms of the policy, insured persons include "the named insured and any resident of the same household . . . ." Thus, the critical question raised by this appeal is whether John Daniel Johnson or Roby Daniel Johnson were "legally obligated" to pay damages to the plaintiff pursuant to the consent judgment entered on 24 November 1971.

With respect to John Daniel Johnson, the consent judgment provides:

> "NOW, THEREFORE, by and with the consent of the parties, IT IS ORDERED, ADJUDGED AND DECREED that this action shall be and the same is hereby dismissed with prejudice as to the defendant John Daniel Johnson . . . ."

As to Roby Daniel Johnson, the consent judgment provides:

> "[T]hat the plaintiffs shall have and recover of the defendant Roby Daniel Johnson the sum of $20,000.00, but this

judgment shall not be a lien upon any property owned or to be owned in the future by the defendant Roby Daniel Johnson, and this judgment shall not be the basis upon which execution can issue against any property of the defendant Roby Daniel Johnson, at present or in the future . . . ."

Additionally, the consent judgment provides "that the plaintiffs shall mark this judgment 'Satisfied in full as to principal, interest and costs' after collecting all of the insurance proceeds available to the defendant Roby Daniel Johnson for the accident giving rise to this action . . . ." Obviously, under the terms of the consent judgment, John Daniel Johnson and Roby Daniel Johnson were not legally obligated to pay damages to plaintiff. The case of *Coblentz v. American Surety Company of New York*, 416 F. 2d 1059 (5th Cir. 1969) cited and relied upon by appellant is not controlling in this jurisdiction.

Summary judgment for the defendant insurer is

Affirmed.

Judge GRAHAM concurs.

Judge VAUGHN concurs in the result.

ZALLAR EASTWOOD YANDLE v. SANFORD NEAL YANDLE

No. 7226DC686

(Filed 17 January 1973)

1. **Appeal and Error § 32— objection to submission of issues to jury**

An objection and exception to the form of an issue or to its submission to the jury comes too late when taken after the jury has rendered its verdict upon the issue.

2. **Appeal and Error § 24— exceptions to paragraphs of instructions — broadside and ineffectual exceptions**

Where each of the exceptions to the trial court's instructions appeared at the end of a paragraph of the instructions without indicating what portions of the instructions were excepted to, such exceptions were broadside and ineffectual.

3. **Divorce and Alimony § 16— wife as dependent spouse — instructions confusing and prejudicial**

Where the jury in an action for permanent alimony requested further instructions on the question of whether plaintiff was the

dependent spouse, the judge's answer with respect to defendant's payment of money to plaintiff under a temporary order was confusing and improper and entitled plaintiff to a new trial.

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

This is an action for alimony, custody, child support, and attorney fees. It appears clear from the testimony of the parties that at some time prior to this trial there was a hearing at which an order for alimony pendente lite, custody, child support, and counsel fees pendente lite was entered. This trial was on the merits before a jury in District Court.

By its answers to the issues the jury (1) found that plaintiff and defendant were husband and wife; (2) found that defendant abandoned plaintiff on or about 7 March 1971; (3) found that defendant maliciously turned plaintiff out of doors on or about 7 March 1971; (4) found that defendant was not an excessive user of alcohol so as to render plaintiff's condition intolerable and her life burdensome while living together; (5) found that plaintiff was not the dependent spouse of defendant; and (6) found that defendant was not the supporting spouse of plaintiff. Based upon this verdict the trial judge entered an order denying permanent alimony to plaintiff. Plaintiff appealed.

Hamel & Cannon, by Thomas R. Cannon, for plaintiff.

Walter C. Benson for defendant.

BROCK, Judge.

[1] Plaintiff undertakes to assign as error the submission of the fifth and sixth issues to the jury. The record is bare of objection to the issues until after they were answered by the jury. An objection and exception to the form of an issue or to its submission to the jury comes too late when taken after the jury has rendered its verdict upon the issue. 1 Strong, N. C. Index 2d, § 32, p. 170. These assignments of error are overruled.

[2] Plaintiff undertakes to assign as error portions of the judge's instructions to the jury. Each of the exceptions to the instructions merely appears at the end of a paragraph of the instructions without indicating what portions of the instructions are excepted to; nor do the assignments of error set out the por-

tions of the instructions excepted to and assigned as error. It appears that each exception is taken to all of the instructions that went before it. This is at best a broadside exception. For these reasons each of the assignments of error to the charge is overruled. *State v. Bennett,* 5 N.C. App. 662, 169 S.E. 2d 31.

[3] Plaintiff assigns as error the answer given by the trial judge to a question posed by the foreman of the jury after the jury had deliberated for some period of time. This exception and assignment of error are well taken and are sustained.

Defendant testified that his monthly income was just over $600.00, and that out of this he paid for each of his two children the sum of $108.32, and paid to plaintiff each month the sum of $108.32. After the jury had deliberated for some period of time, it returned to the courtroom and its foreman posed a question and the trial judge answered as follows:

> "FOREMAN: The other question is question number 5, 'Is the plaintiff the dependent spouse of the defendant, as alleged in the plaintiff's complaint?' Does the fact that she is receiving $108.00 a month now from him enter into that at all?
>
> "The COURT: Nothing at all, don't enter into it at all."

It seems clear to us that this was an improper answer and probably created confusion among the jurors. The trial judge should have explained that the $108.32 was being paid under a temporary order which would terminate with the conclusion of this trial, and that the jury should consider the testimony about the payment in the light of this explanation. The jury was properly concerned and was entitled to have the effect of the testimony explained.

New trial.

Chief Judge MALLARD and Judge BRITT concur.

ROBERT L. ELLIS v. ALLEN STANLEY GILLIS, CATHY JO GILLIAM, MINOR, HAZEL OWEN STINES AND PATRICIA GAIL RICE JONES, MINOR

No. 7228SC804

(Filed 17 January 1973)

Automobiles § 95— minor driver — no imputation of negligence to parent-passenger

Negligence of the minor driver of an automobile will not be imputed to her mother where the evidence discloses that the mother was simply a passenger in the automobile, there was no evidence to support allegations that the mother was giving driving instructions to her daughter at the time of the accident, and there was no evidence of any other relationship which would permit the negligence of the daughter to be imputed to the mother.

ON *certiorari* to review the order of *Thornburg, Judge,* 7 February 1972 Session of Superior Court held in BUNCOMBE County.

Civil action by plaintiff to recover damages for personal injuries sustained when he was struck by an automobile operated by defendant Jones, the daughter of defendant Stines. The automobile was owned by defendant Gillis and had been loaned to Jones by Gillis's daughter, defendant Cathy Jo Gilliam.

At the conclusion of plaintiff's evidence the court allowed the motion of defendant Stines for a directed verdict. Plaintiff excepted and gave notice of appeal. The record does not show the disposition of the claims against Gillis and Gilliam, but issues were submitted to the jury only as to the claim against defendant Jones. The jury answered the issues in favor of plaintiff and judgment was subsequently entered against Jones for $21,166.00. Plaintiff now seeks a reversal of the directed verdict entered for defendant Stines.

Cecil C. Jackson, Jr. and W. Paul Young for plaintiff appellant.

Uzzell and DuMont by Harry DuMont for defendant appellee Hazel Owen Stines.

GRAHAM, Judge.

We hold that the trial court was correct in allowing the motion of defendant Stines for a directed verdict and therefore

do not consider the several procedural questions that have been raised in a motion by appellee to dismiss the appeal.

There is no evidence to support allegations in the complaint that defendant Stines was giving driving instructions to her daughter at the time of the accident, nor is there evidence of any other relationship which would permit the negligence of the daughter to be imputed to her mother. The evidence discloses that defendant Stines was simply a passenger in the automobile. In the case of *Cox v. Shaw,* 263 N.C. 361, 139 S.E. 2d 676, Justice Sharp quoted with approval from the case of *Silverman v. Silverman,* 145 Conn. 663, 145 A. 2d 826, to the effect, " '[t]he negligence of a child is not imputed to a parent who does not control, or have the right and duty to exercise control of, the child's conduct in the operation of a vehicle; . . . unless the parent owns the vehicle and has the child drive it for him; . . . or the child was the agent of the parent in the operation of the vehicle at the time.' " *Id.* at 365, 139 S.E. 2d at 679.

While there is no allegation in the complaint charging defendant Stines with independent negligence, plaintiff now suggests that she negligently participated in the actual operation of the automobile. The only evidence to this effect is testimony by Stines that she took hold of the steering wheel and tried to steady the car when it went out of control and into a ditch after striking plaintiff. No inference of actionable negligence arises from this testimony.

Affirmed.

Judges HEDRICK and VAUGHN concur.

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

SPRING SESSION 1973

STATE OF NORTH CAROLINA v. JAMES EVERETT BARNWELL

No. 7230SC671

(Filed 24 January 1973)

1. **Constitutional Law § 29; Jury § 7— jury list — absence of persons 18-21 years old**

The trial judge in a first degree murder case properly refused to quash the array where the evidence was insufficient to show a systematic and arbitrary exclusion of persons from 18 to 21 years of age from the jury list.

2. **Jury § 5— conferences between sheriff and solicitor during jury selection — no prejudice**

Conferences among the sheriff, his chief deputy and the solicitor with respect to individual jurors during the jury selection did not constitute a fatal defect in the selection process where there was no allegation or showing that the activity of the sheriff and his deputy resulted in the selection of any juror who was biased or prejudiced against defendant.

3. **Homicide § 21— death by shooting — involuntary manslaughter properly submitted to jury**

Where defendant's own version of how the shooting occurred presented a jury question as to his guilt of involuntary manslaughter, nonsuit as to that lesser included offense was properly denied.

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

Where the evidence tended to show that deceased was killed by a shot from defendant's shotgun while it was in defendant's hands, that the shooting occurred in a remote mountain area, that defendant was the only eyewitness, that defendant rolled deceased's

body off a steep embankment immediately after the shooting, that defendant removed traces of blood from his car and that defendant denied having been in deceased's presence on the night of the shooting, such evidence was sufficient to take the case to the jury on the issue of intent.

5. **Criminal Law § 77— self-serving declaration — later incriminating statement — admissibility of one without the other**

Defendant's self-serving written declaration dated 27 September 1971 concerning the shooting under consideration and his oral admission to the sheriff on 30 September 1971 that the gun shown him was the gun with which he shot deceased were statements entirely separate and not connected in any way; therefore, it was not error for the trial court to permit the State to place in evidence defendant's statement of 30 September 1971 without also offering his written statement of 27 September 1971.

6. **Criminal Law § 33— evidence of presence of attorney with defendant after crime — admissibility**

The trial court did not err in permitting testimony that defendant was seen in the presence of his attorney on the morning following the shooting where such evidence was relevant in view of defendant's position that his psychological reaction prevented his acceptance of the fact he was involved in the shooting.

7. **Criminal Law § 43; Homicide § 20— photographs of deceased — admissibility for illustative purposes**

The trial court did not err in allowing into evidence a photograph of deceased while alive and wearing the same shirt and glasses she wore on the night of her death and a photograph of the body of deceased since the photographs were used by witnesses to illustrate their testimony.

8. **Homicide § 24— sufficiency of evidence to support instruction on motive**

Though evidence tending to establish motive in a first degree murder case was weak, it was sufficient to justify the court's refusal to charge the jury that there was no evidence at all of motive.

9. **Homicide § 21— insufficiency of evidence to require submission of voluntary manslaughter to jury**

Where there was no evidence that defendant killed deceased in the heat of passion or in self-defense, the trial court did not err in failing to submit to the jury a possible verdict of voluntary manslaughter.

APPEAL by defendant from *Ervin, Judge,* 17 February 1972 Regular Criminal Session of Superior Court held in JACKSON County.

Defendant was brought to trial upon a bill of indictment charging him with the first degree murder, on 13 September

1971, of June Love Barker. At the conclusion of all the evidence, the court allowed defendant's motion for nonsuit as to the capital charge and submitted to the jury the possible verdicts of guilty of second degree murder, guilty of involuntary manslaughter or not guilty. The jury returned a verdict of guilty of second degree murder. Defendant appeals from judgment imposing an active prison sentence of not less than 14 nor more than 20 years.

Evidence offered by the State tends to show the following:

On 13 September 1971, June Love Barker, 22 years of age, and defendant, 24 years of age, were employed as teachers at Sylva-Webster High School in Jackson County. They planned to get married when they received their next paycheck. About 8:00 on the evening of that date, Miss Barker left the home of her parents, where she resided, to meet defendant at the school. About 10:00 p.m. defendant called the Barker home and requested to speak to Miss Barker. When advised that she was supposed to be with him at the school, defendant stated, "I know, I drove my Jeep up there where she could see it, and she never did come, so I come back home." About half an hour later, defendant and his father went to the home of Miss Barker's parents. Defendant asked if Miss Barker had a church meeting, and although advised that she did not and was not dressed for church, he insisted on going to the Tuckasegee Baptist Church, three miles away, to look for her. When he returned with his father, defendant stated: "We finally found her car. When I got to the church, I got thirsty and I asked daddy to drive out to the powerhouse, to the spring, to get a drink of water. . . . Just as we went around the curve, out there by the little lake, we found her car, and it's locked, and I can't understand why June locked her car." The powerhouse, referred to as the Thorpe Powerhouse, is located on N. C. Highway No. 107 three and one-half miles beyond the Tuckasegee Baptist Church. The car was found near Tuckasegee Dam and lake, a short distance from the powerhouse.

Defendant and his father remained at the Barker home until 5:30 a.m. the following morning. During this time defendant appeared upset and incoherent. He took at least four aspirin and vomited once. On two occasions, defendant stated that he would like to know who was riding around the school in a brown Chevelle while he was there.

At approximately 7:50 a.m. on 14 September 1971, an envelope containing a letter addressed to defendant was found on the trail to the spring near the Thorpe Powerhouse. A red substance on the envelope was later identified as human blood. Miss Maureen Gilligan of Granite Falls, Minnesota, testified that she wrote the letter. She said that she met defendant on 6 July 1971 and was acquainted with him for five weeks in Boston where they participated in a summer institute for science teachers. Miss Gilligan stated that she had corresponded with defendant four or five times and that she had also written other members of the institute. When defendant saw the letter in the hands of the sheriff, he shouted, " . . . [W]here did you find that letter?" Defendant later explained to a State's witness that Miss Barker had come into his office on 13 September 1971 while he was reading the letter. He stated that he had told her he had nothing to hide from her; that he would like for her to take the letter home, read it, and that they would discuss it later.

At around 10:00 a.m. on 14 September 1971, defendant went to the lake near where Miss Barker's car was found. The lake was being searched and defendant remarked, "Oh, my God, I hope she's not in that lake." Defendant was later seen at the lake with Tom Jones, a lawyer, and was heard to say that he had Jones with him because he was a friend and as a lawyer had a more trained eye to assist in looking for Miss Barker.

On the afternoon of 14 September 1971, an off-duty highway patrolman was driving north along N. C. Highway #107. Approximately three miles south of the Thorpe Powerhouse, and near the Bo Wilson curve, the officer observed a large red spot in a gravel pulloff on the left shoulder of the road. A smeared red solution led from the red spot across a grassy area and toward an embankment 12 to 13 feet away. Upon further investigation, the officer found the body of Miss Barker at the foot of the bank. She had died from a gunshot wound that entered her body directly below the armpit in the right side and extended through the ribs, heart, one lung, and into the other lung. A physician estimated that she had been dead at least 12 hours.

Deceased's brother asked defendant if he could account for his time between 8:05 and about 10:05 or 10:10 on the night of 13 September 1971. Defendant replied that he could, except

for 45 minutes and that " . . . he would like to see somebody do what had to be done in 45 minutes."

At approximately 9:30 on the evening of 13 September 1971, a big two-tone car with a "big whippin' aerial" on the back bumper was seen parked a few feet off the pavement near the Bo Wilson curve. A person's shoulder was observed leaning against the window on the passenger side. At around 9:45 or 10:00 p.m. on that date, defendant was seen with his car, a 1971 two-tone Buick with a long whip-type antenna attached to the rear bumper, in a self-operated car wash in Sylva. The car wash is about 13 or 14 miles from the Bo Wilson curve. On 22 September 1971, an S.B.I. agent examined defendant's car pursuant to a search warrant. Evidence of blood was found on the left door panel below the armrest and on the outside of the driver's side where the vinyl top joins the metal portion of the body of the automobile.

On 27 September 1971, defendant signed a written statement in the presence of his counsel, the solicitor and the sheriff. On 30 September 1971, one of defendant's attorneys delivered to the sheriff a .12 gauge double barrelled shotgun and the sheriff displayed the gun to defendant on 30 September 1971 and asked him " . . . [I]f this was the gun he shot June Love Barker with?" Defendant replied, "Yes."

Defendant's evidence tended to show the following:

Defendant testified that he was a teacher and an athletic coach at Sylva-Webster High School for a little over two years. He met deceased, a home economics teacher, near the end of the 1970-71 school year. After a period of preliminary dating, they made plans to get married as soon as it was economically possible. The couple met at the school at about 8:30 p.m. on 13 September 1971 to discuss repairing athletic equipment, which was to be a project of deceased's home economics class. They decided to ride up toward Glenville Lake. Deceased was to follow defendant in her car so that it could be left nearer her home. Defendant testified that he had planned to leave deceased's car at the Thorpe Powerhouse in the lighted area. However, he got confused about his distances, and upon realizing that the farther they drove, the farther Miss Barker would have to drive back to her home, he stopped at a major turnoff. Miss Barker parked her car there, locked it, and got into defendant's car. Defendant testified, " . . . I did not know at that time, but as it turned

out later, it was right at the Tuckasegee Dam." The powerhouse was just around the next turn.

The couple joked about defendant having misjudged the distance to the powerhouse, and as they rode along, defendant started talking about the upcoming hunting season and bragging about his shooting ability. He jokingly told deceased that he could hit a can at night by sound. Deceased said, " . . . [Y]ou know, you can't do this sort of thing." They stopped at a pulloff and defendant got his shotgun out of the trunk to demonstrate. He told deceased to pick up a can. Deceased was standing in the area of the open front door on the driver's side and they were joking and laughing. Defendant dropped two shells in the gun and turned toward deceased to tell her to throw the can, ". . . but I never got it said."

Defendant testified further: "I don't know how the gun went off, it just went off. She didn't say anything. . . . In the blast I saw it hit her. I don't know what happened, I called to her, the exact words I don't remember, the only thing I could see was sticking under the door was, well from her ankle down she had on white tennis shoes. That's all I could see. She had fallen in the dark and I reached and I just jerked and the next thing I remember is I hit the ground. We were both over the bank, the exact, how we got there, I don't know. . . . I didn't push her, like, I say, 44 feet. She must have just rolled. I didn't deliberately, I just panicked, that is the only word I know to say. I threw the gun back into the trunk of the car, pulled the keys out of the tailgate and I started down the mountain."

Defendant further testified that he remembered stopping at the powerhouse and walking toward the spring. When he started to get back in the car he saw from the light in the powerhouse area that blood was streaked down the side of his car. In defendant's words, he "just totally lost it." Defendant tried to remove the blood with an athletic sock. He denied remembering the trip to Sylva, but stated that he recalled stopping at the first lighted area that he recognized. This was the Sylva Car Wash. He looked and saw nothing on the car. Defendant stated, "I was scared to death, I was panicky, I just got in the car and went on home." Defendant contended that he had no awareness of his involvement, perhaps because of " . . . the light, the fear and the panic, I don't know." Sometime during the second week following the shooting defendant realized what had happened and made a statement to his attorney on 23

September 1971, the day following the S.B.I. inspection of his car. The statement was later reduced to writing and was signed and delivered to the sheriff on 27 September 1971.

Defendant admitted that he was familiar with the shotgun in question and that he was experienced in the care of weapons. Firearms are one of his hobbies and in September of 1971 he owned 15 to 20 firearms. He stated he assumed he had his fingers on the trigger when the gun discharged and believes both barrels went off.

Defendant denied that his relationship with Maureen Gilligan was anything other than that of a casual friend and presented several witnesses whose testimony tended to support that contention. Defendant also denied that Miss Gilligan's letter, which he had shown to deceased, had upset deceased in any way.

Dr. M. J. Hornowski, a psychiatrist, testified that he consulted with defendant on two occasions in January of 1972 for periods of one hour. Based upon testing and the conferences, Dr. Hornowski made two diagnoses. His first diagnosis was that defendant suffered a severe reactive depression or grief reaction in response to the death of deceased. His second diagnosis was that defendant also suffered a disassociative reaction. The latter was explained as a reaction which causes a person who has experienced a severe injury or trauma to his personality or psychic to experience a splitting off of emotion and reason "until such time as they are able to integrate into their personality the experience that upset them without having a frank psychotic or insane break." In the opinion of Dr. Hornowski, defendant's reactions were triggered by the sight of blood after the shooting, and made defendant " . . . become almost completely paralyzed, insofar as rational thought was concerned." In answer to a hypothetical question, the doctor expressed the opinion that defendant's denial of his involvement in the shooting for a period of some nine days could or might have been caused by his reaction to the events following the shooting.

Defendant presented numerous witnesses who testified as to his good character and reputation in the community. Several witnesses described defendant's general condition and conduct between the time of the shooting and the time he first admitted his involvement. On cross-examination the football coach of

Sylva-Webster High School stated that defendant attended football practice on Wednesday and Thursday following the Monday on which Miss Barker was killed, and that on the Friday following her death, defendant scouted a future football opponent and rendered a good scouting report.

Attorney General Morgan by Associate Attorney Maddox and Associate Attorney Baxter for the State.

Coward, Coward & Jones by Thomas W. Jones and Riddle and Shackelford by Robert E. Riddle for defendant appellant.

GRAHAM, Judge.

[1] On 9 February 1972, eight days before the beginning of the trial, Judge Ervin ordered that a special venire of three hundred jurymen be drawn from Cherokee County. The order recited that attorneys for defendant and the solicitor agreed " . . . that because of the widespread publicity and discussion of said case in Jackson County and because the alleged victim was a resident of Jackson County, and the accused is a resident of Jackson County, that it would be virtually impossible to select a jury from within Jackson County." The order was consented to by defendant and the State and provided that the proper authorities of Cherokee County furnish defendant's counsel a copy of the venire selected as soon as it was drawn.

At the opening of court, defendant, through counsel, challenged the jury array. No grounds were stated for the challenge and the only evidence offered in support thereof was testimony by the sheriff of Cherokee County. Defendant's counsel examined the sheriff concerning the method used to summons the jurors, but did not question him about the source of the names of the prospective jurors, or about the method used to compile the jury list in Cherokee County. In response to a question concerning 18 year olds, however, the sheriff expressed an opinion that "[t]hey just haven't had time to comply with the new law . . there is no young people in there." Defendant says that this statement by the sheriff required the trial judge to quash the array for the reason it did not contain persons in the age group of 18 to 21. We disagree.

In 1971 the General Assembly amended G.S. 9-3, effective 21 July 1971, reducing the minimum age for persons qualified to serve as jurors from 21 to 18. However, an absence from jury

lists of the names of persons between the ages of 18 and 21 for a short period of time after the effective date of the amendment is not unreasonable, and does not constitute systematic and arbitrary exclusion of this age group from jury service. *State v. Cornell,* 281 N.C. 20, 187 S.E. 2d 768; *State v. Harris,* 281 N.C. 542, 189 S.E. 2d 249; *State v. Kirby,* 15 N.C. App. 480, 190 S.E. 2d 320; *State v. Long,* 14 N.C. App. 508, 188 S.E. 2d 690. Conceding *arguendo* that the time involved here was reasonably sufficient to permit the jury commission to restructure its lists so as not to improperly exclude any group of eligible persons, we are of the opinion that the evidence offered was insufficient to show that the commission failed to do so. Under G.S. 9-2, the jury commission was required, at least 30 days before 1 January 1972, to prepare a list of prospective jurors qualified to serve in the ensuing biennium. The casual opinion expressed by the sheriff is insufficient to show that the jury commission failed to perform this statutory duty, or that in doing so, it systematically excluded persons of any age group. Unless there has been a systematic exclusion, defendant has no right to complain. *See State v. Spencer,* 276 N.C. 535, 173 S.E. 2d 765, and the cases cited therein.

[2] After the jury was selected the sheriff of Cherokee County was questioned by defendant's counsel about having assisted the solicitor during the selection process. The sheriff admitted that he and his chief deputy sat near the solicitor while the jury was being selected and conferred with him about individual jurors. Defendant contends this constitutes a fatal defect in the jury selection process. However, it is not alleged, nor does the record show, that the activity of the sheriff and his deputy resulted in the selection of any juror who was biased or prejudiced against defendant. In *State v. Perry,* 277 N.C. 174, 176 S.E. 2d 729, the defendant complained about the method of jury selection. In rejecting his complaint, the Supreme Court noted that the panel did not contain any juror to which defendant had objection. The same is true here. Defendant does not allege that he exhausted his preemptory challenges. This assignment of error is overruled.

Defendant assigns as error the denial of his motion for nonsuit made at the conclusion of the State's evidence and renewed at the close of all of the evidence.

[3] Defendant's own version of how the shooting occurred presents a question for the jury as to his guilt of involuntary

manslaughter and nonsuit as to that lesser included offense was clearly not warranted. "It seems that, with a few exceptions, it may be said that every unintentional killing of a human being proximately caused by a wanton or reckless use of firearms, in the absence of intent to discharge the weapon . . . and under circumstances not evidencing a heart devoid of a sense of social duty, is involuntary manslaughter." *State v. Foust,* 258 N.C. 453, 459, 128 S.E. 2d 889, 893.

[4] The question of whether the evidence was sufficient to support a second degree murder charge presents more difficulty. An unlawful killing with malice is murder in the second degree, and when it is shown that a defendant intentionally shot the deceased with a deadly weapon and thereby caused his death, presumptions arise that the killing was unlawful and that it was done with malice. *State v. Barrow,* 276 N.C. 381, 172 S.E. 2d 512. However, for the presumptions of malice and unlawfulness to arise from a killing with a deadly weapon, the defendant must admit or the State must prove beyond a reasonable doubt that the killing was intentional. *State v. Woods,* 278 N.C. 210, 179 S.E. 2d 358. Defendant strenuously contends that the evidence here will not support a finding that he intentionally shot deceased. While there is no direct evidence of intent, we are of the opinion and so hold that the circumstances shown by the State, when considered together, were sufficient to take the case to the jury on this issue.

When considered in the light most favorable to the State, the evidence tends to show that deceased was killed by a shot from defendant's shotgun, while it was in defendant's hands. The shooting occurred in a remote mountain area. There were no eyewitnesses other than defendant. Defendant immediately rolled the body of deceased some 12 to 13 feet and off a steep embankment. He removed traces of blood from his car, denied repeatedly for nine days that he had been in deceased's presence on the night she was killed, and sought through various statements to remove suspicion that he might have some knowledge of the shooting. It was only after the investigation of law enforcement officers pointed convincingly to defendant as a suspect that he conceded any involvement in the tragedy. His exculpatory statement that the shooting was an accident was not a part of the State's evidence. Intent can seldom be proved by direct evidence, and only defendant knows beyond all doubt the condition of his mind when the shotgun discharged and ended the life of the girl he contends he planned to marry.

But the circumstances surrounding the shooting, and defendant's conduct at that time and subsequently, will support a reasonable inference that the shooting was intentional. Ordinarily, intent must be shown, if at all, by circumstances from which it may be inferred. 2 Strong, N. C. Index 2d, Criminal Law, § 2, and cases cited.

[5] Defendant assigns as error the precluding of questions asked the sheriff on cross-examination about the written statement of 27 September 1971. His position is that his oral admission to the sheriff on 30 September 1971 that the gun shown him was the gun with which he shot deceased was a connected and an integral part of his exculpatory written statement of 27 September 1971. Ordinarily, when the prosecution introduces a part of a confession, the defendant may bring out on cross-examination all that was said, including any statements favorable to him. *See State v. Fowler,* 230 N.C. 470, 53 S.E. 2d 853; *State v. Patterson,* 63 N.C. 520, Annot., 2 A.L.R. 1017 (1919), Annot., 26 A.L.R. 541 (1923).

A *voir dire* examination was held to determine the connection, if any, between defendant's written statement of 27 September 1971, and his concession regarding the gun, made on 30 September 1971. The court made extensive findings of fact, including findings that had the sheriff not received the statement of 27 September 1971, and had defendant's counsel not delivered the shotgun to him, the sheriff would have continued his efforts to find the gun which he had reasonable cause to believe was used in inflicting the fatal wound. From these and other findings, all of which are supported by evidence elicited on *voir dire,* the court concluded that the two statements were entirely separate and not connected in any way. This conclusion is supported by the findings, and we therefore hold that it was not error to permit the State to place in evidence defendant's statement of 30 September 1971 without also offering his written statement of 27 September 1971, or to prohibit defendant's various attempts to get his self-serving declarations of 27 September 1971 before the jury through cross-examination of the sheriff.

[6] Defendant insists that the court erred in permitting testimony that he was seen in the presence of his attorney on the morning following the shooting. This evidence was relevant in view of defendant's position that his psychological reaction prevented his acceptance of the fact he was involved in the

shooting. There is no suggestion in the record that any accusation had been made against defendant at the time he sought the attorney to accompany him to the area where a search was in progress for deceased. While certainly no inference of guilt should arise from the presence of the attorney, the fact defendant was mentally capable of seeking his attorney's assistance has some bearing on the question of whether his contentions regarding his mental state on that occasion are accurate.

[7] Miss Barker's mother testified that her daughter was wearing a long-sleeved blue shirt, blue jeans, and glasses with navy blue frames when she left home on the evening of 13 September 1971. She was permitted, over defendant's objection, to illustrate her testimony by reference to a photograph taken of deceased while alive and wearing the same shirt and glasses that she wore on the night of her death. The introduction of this photograph in evidence over defendant's objection is assigned as error. The glasses and shirt identified by the witness were later introduced in evidence. "As a general rule, photographs are competent to be used for the purpose of illustrating anything it is competent for the witness to describe in words." *Smith v. Dean,* 2 N.C. App. 553, 563, 163 S.E. 2d 551, 557. There was no error in the admission of this photograph or in the admission of a photograph of the body of deceased, which is also the subject of an assignment of error. The photograph of deceased's body was used by physicians to illustrate their testimony as to the position of the gunshot wound on the body and was admissible for this purpose. See *State v. Frazier,* 280 N.C. 181, 185 S.E. 2d 652, and cases cited.

Defendant brings forward and argues several assignments of error which challenge the admission of the testimony of various witnesses tending to place defendant at the scene of the shooting and connect him therewith. In view of defendant's defense which concedes that he was present at the scene but contends the shooting was an accident, it is difficult to see how he could be prejudiced by any of this testimony. We have nevertheless examined each of these assignments of error and find them without merit.

The final three assignments of error brought forward, all having to do with the court's charge to the jury, are overruled.

[8] Defendant says the court erred in refusing to instruct the jury, as requested in writing, that the State had failed to show

a motive for the killing and that the absence of evidence of a motive is "a circumstance which you should consider bearing on the innocence of the defendant." Motive is not an essential element of murder, G.S. 14-17. However, "[w]hile not necessary to be proven, motive or the absence of motive is a circumstance to be considered." *State v. Coffey,* 228 N.C. 119, 127, 44 S.E. 2d 886, 892. The State undertook to show a motive with evidence that defendant, while engaged to be married to deceased, was closely associated with Maureen Gilligan for a period of five weeks shortly before the shooting, corresponded with her, and received a letter from her on the day deceased was killed. Defendant apparently considered his relationship with Miss Gilligan important enough to call it to the attention of deceased by showing her a letter from Miss Gilligan and telling her that they would "discuss it later." The letter, found stained with blood on the morning after the shooting, was admitted in evidence. Various inferences may be legitimately drawn from its contents, including an inference that Miss Gilligan was unaware defendant was planning to marry June Love Barker, and that the relationship between defendant and Miss Gilligan was much closer than defendant contended. Although evidence tending to establish motive was weak, we think it was sufficient to justify the court's refusal to charge the jury that there was no evidence at all of motive.

Secondly, defendant says there was no evidence to support certain portions of the court's charge on the issue of involuntary manslaughter. We disagree. Furthermore, the jury did not reach the issue of involuntary manslaughter.

[9] Finally, defendant complains of the failure of the court to submit to the jury a possible verdict of voluntary manslaughter. There was no evidence that defendant killed deceased in the heat of passion or in self-defense. Indeed, he makes no contention that he did. Consequently, the issue of defendant's guilt of voluntary manslaughter does not arise. *State v. Moore,* 275 N.C. 198, 166 S.E. 2d 652.

It is apparent from the record that defendant was ably represented at the trial by skillful counsel of his own choosing. His appeal has been well presented and ably argued. In our opinion he has had a fair trial free from prejudicial error.

No error.

Judges HEDRICK and VAUGHN concur.

STATE OF NORTH CAROLINA v. WILLIE LEE SATCHELL

No. 734SC103

(Filed 31 January 1973)

1. **Constitutional Law § 30— speedy trial — delay between arrest and trial — unavailability of State's principal witness**

Defendant was not denied his constitutional right to a speedy trial by the delay between his arrest for the crime of rape on 22 July 1971 and his trial at the 8 May 1972 session of court where defendant was committed to a State hospital for psychiatric examination on motion of his counsel on 7 September and was returned for trial in November, there was insufficient time at the November criminal session of court in which to conduct defendant's trial, and the prosecutrix was injured in an accident on 22 December and was unavailable as a witness until the 8 May session of court.

2. **Rape § 11— sufficiency of State's evidence**

The State's evidence was sufficient to be submitted to the jury on the issue of defendant's guilt of rape and to support a verdict of guilty of assault with intent to rape where it tended to show that defendant attacked the prosecutrix outside her motel room, choked her, threatened to kill her unless she kept quiet, and had sexual intercourse with her against her will outside the motel and several times in her motel room, that the next morning the prosecutrix had a cut over her eye, numerous abrasions and scratches about her lower extremeties, bruises on her neck, red marks on both sides of her windpipe, and her coat was torn and her knees were muddy, that at the spot where the prosecutrix said she was first attacked, leaves and twigs from the bushes had been broken off, portions of the ground had been pushed up and the grass was matted down, and that defendant admitted to officers that he had had intercourse with the prosecutrix in her motel room but contended that this had been at her invitation.

3. **Criminal Law § 75— in-custody statements made in presence of counsel**

Defendant's in-custody statements to police officers were properly admitted in his trial for rape where the *voir dire* evidence shows that defendant had been fully advised of his rights by the officers and that he made the statements to the officers in the presence of his attorney and after he had talked with her.

4. **Criminal Law § 169; Rape § 10— rape trial — cross-examination of victim as to previous intercourse**

While the trial court in a rape prosecution erred in refusing to allow defendant to elicit testimony from the prosecutrix on cross-examination that she had previously had intercourse "over several dozen times," such error was harmless beyond a reasonable doubt in light of the corroborating evidence given by other witnesses as

to the physical condition of prosecutrix on the morning after the intercourse and the physical conditions on the grounds where the prosecutrix testified she was first assaulted.

ON *Certiorari* to review defendant's trial before *Rouse, Judge,* at the 8 May 1972 Session of Superior Court held in DUPLIN County.

Defendant was tried on his plea of not guilty to an indictment charging him with the crime of rape. The jury found him guilty of assault with intent to commit rape. From judgment imposing prison sentence, defendant gave notice of appeal. To permit him to perfect his appeal, this Court subsequently allowed his petition for certiorari.

Attorney General Robert Morgan by Assistant Attorney General Raymond W. Dew, Jr. for the State.

E. C. Thompson III for defendant.

PARKER, Judge.

[1] Defendant asserts error in denying his motions for a speedy trial. The record discloses that defendant was arrested on 22 July 1971, the same day on which the warrant was issued against him and on which he was alleged to have committed the offense charged. After counsel was appointed to represent him and after preliminary hearing in the district court, an order was entered 7 September 1971 on motion of defendant's counsel committing him to the State Hospital at Goldsboro for psychiatric examination. This examination was completed and defendant was returned from the hospital to Duplin County on 3 or 4 November 1971. At the November 1971 criminal session of Superior Court held in Duplin County, defendant moved for a speedy trial and in event trial could not be had at that session that he be permitted bond. This motion was denied by Judge Copeland upon his determination that there was insufficient time available at that session of court in which to conduct defendant's trial. On 22 December 1971 the principal witness for the State, the victim of the crime with which defendant was charged, was severely injured in an accident in which she sustained a compound fracture of her leg. At the 10 January 1972 special session of Superior Court, defendant renewed his motion for a speedy trial. This motion was denied upon the court's determination that the prosecutrix, because of her injuries, was unavailable as a witness. However, by order of 13

January 1972 appearance bond in the sum of $10,000.00 was fixed for defendant. At the 28 February 1972 regular criminal session of Superior Court defendant again moved that his case be tried, which motion was again denied upon the solicitor's affidavit that the prosecutrix, by reason of her injuries, was still unavailable as a witness. The next succeeding session of Superior Court for the trial of criminal cases in Duplin County was the session which commenced Monday, 8 May 1972, and defendant's trial was held at that session.

> "The possibility of unavoidable delay is inherent in every criminal action. The constitutional guarantee does not outlaw good faith delays which are reasonably necessary for the State to prepare and present its case. . . . The proscription is against purposeful or oppressive delays and those which the prosecution could have avoided by reasonable effort." *State v. Johnson,* 275 N.C. 264, 167 S.E. 2d 274.

Nothing in the record indicates that such delay in trial as occurred in the present case resulted from any purposeful or oppressive act of the prosecution or that it could have been avoided by reasonable effort on the part of the prosecution. On the contrary, the record indicates that under all of the circumstances the prosecution moved with reasonable dispatch. The burden was on defendant to show that the delay was due to the neglect or willfulness of the prosecution, *State v. Johnson, supra,* and this the defendant has failed to do. Defendant does not contend nor does anything in the record indicate that such delay as occurred in his trial in any way prejudiced him in his defense. Defendant's assignments of error directed to denial of his motions for a speedy trial are without merit and are overruled.

[2] Defendant assigns error to denial of his motions for nonsuit and to set aside the verdict. Examination of the record reveals ample evidence to justify denial of these motions. The prosecutrix testified and positively identified defendant as the man who attacked her in the early morning hours of 22 July 1971 as she was returning to her motel room from a personal errand. She testified that defendant had grabbed her by the neck, choked her, thrown her to the ground between the bushes, threatened to kill her unless she kept quiet, and had then had intercourse with her against her will. The prosecutrix testified that she screamed, but no one came to her rescue, and on defend-

ant's threat to take her to a more secluded spot she went with him into her motel room, where he remained about four hours and where he several times again had intercourse with her against her will. A motel employee, to whom the prosecutrix went for help early next morning after defendant left, testified that she had a cut over her eye, her coat was torn, her knees were muddy, she was "just mussed up all over," and "was terrified." The doctor who examined her at 5:30 o'clock in the morning testified that she was rigid, there was a laceration over her left brow, numerous abrasions and scratches about her lower extremities, bruises on her neck, red marks on both sides on her windpipe, and in his opinion she had recently had sexual intercourse. An S.B.I. agent testified that at the spot where the prosecutrix said she had first been attacked, he observed that leaves and twigs from the bushes had been broken off, portions of the ground had been pushed up, and the grass was matted down. Defendant was arrested on the morning of 22 July 1971 after he was seen by the prosecutrix and the officers walking along the highway some two blocks from the motel. After his arrest he admitted to the officers that he had been in the prosecutrix's motel room on the preceding night and had there had intercourse with her, but contended this had been at her invitation. When the officers asked him why, if this were true, did the prosecutrix have bruises about her neck and scratches on her leg, and why the area between the bushes was torn up, defendant dropped his head and said nothing. Defendant did not testify before the jury and presented no evidence at his trial. There was no error in denying his motions for nonsuit and to set aside the verdict.

[3] Before admitting evidence of the statements which defendant made to the officers following his arrest, the trial judge conducted a *voir dire* hearing in which the State's evidence showed in substance the following: Immediately upon arresting the defendant after they observed him walking along the highway, the officers told him they wanted to talk to him about an alleged rape which had taken place the night before and advised him of his constitutional rights, but they asked him no questions at that time. They took him to the police station, where they read the Miranda "Rights Form" to him. Defendant then told the officers he wanted to talk to his attorney, Mrs. Winnie Wells, before talking to the officers. The officers asked him no further questions, and sent for Mrs. Wells, who came to the police station and talked with defendant and again ad-

vised him of his rights and told him he did not have to tell the officers anything if he did not want to. The officers then questioned defendant in Mrs. Wells's presence concerning his whereabouts on the preceding night. It was then that defendant told the officers that he had gone to the motel room and had had intercourse with the prosecutrix, but had done so at her invitation. Defendant testified at the *voir dire* hearing and admitted that he had been fully advised of his rights by the officers and that he had made his statement to the officers only in the presence of Mrs. Wells and after he had talked with her. It was stipulated that on 22 July 1971 Mrs. Winifred Wells was, and for a number of years had been, a practicing attorney in Duplin County and that at the time of defendant's trial she was serving as a Judge of the Superior Court. Upon completion of the *voir dire* hearing, the trial judge made full findings of fact, all of which are fully supported by the evidence and which in turn support his conclusion that the statement which defendant made to the officers was voluntarily, knowingly and understandingly made, with full understanding on his part as to his constitutional rights. The record reveals that defendant's rights were in all respects meticulously safeguarded. There was no error in admitting before the jury evidence as to the statement which he made to the officers.

[4] During cross-examination, defendant's counsel sought to question the prosecutrix as to whether she had ever had intercourse before with another male and as to how many times she had had intercourse. The trial judge sustained the solicitor's objections to these questions. Had the witness been permitted to answer, she would have testified that she had had intercourse "over several dozen times." It was held error to exclude similar evidence in *State v. Murray,* 63 N.C. 31, and while in our view the evidence would appear to have been competent as bearing on the question of the prosecutrix's consent, Wigmore, Evidence (3d Ed. 1940) § 200; Note, Specific Acts of Unchastity of Prosecutrix in Rape Prosecution, 38 N. C. Law Review 562, we hold that its exclusion under all of the circumstances of this case was not sufficiently prejudicial to warrant another trial. All of the evidence of independent witnesses as to the physical condition of the prosecutrix on the morning after the intercourse occurred and as to the physical conditions on the grounds outside of the motel room completely corroborate her testimony that she had been brutally assaulted outside of her motel. In

our opinion, beyond any reasonable doubt the excluded testimony could not have affected the result of defendant's trial.

We have carefully examined all of defendant's remaining assignments of error and find them without merit. A review of the entire record reveals that from the moment of his arrest to the entry of the judgment all of defendant's rights were carefully safeguarded. His counsel, both at his trial and on this appeal, has been diligent in his behalf. In his trial and in the judgment entered we find no error sufficiently prejudicial to warrant granting a new trial.

No error.

Judges BRITT and VAUGHN concur.

STATE OF NORTH CAROLINA v. RICHARD M. MARTIN AND LEON JACKSON SMITH

No. 7317SC87

(Filed 31 January 1973)

1. **Criminal Law § 83— rape of wife by husband — competency of wife's testimony**

   Where defendant Smith physically restrained his wife and forced her to have sexual intercourse with defendant Martin, Smith was subject to indictment for rape, and his wife was a competent witness for the State against her husband in a prosecution for that felony perpetrated or attempted to be perpetrated on her.

2. **Criminal Law § 124— verdict in improper language — rephrasing by clerk — no error**

   The verdict that defendants were guilty of "attempt of rape on a female and assault on a female," though phrased in improper language, was made perfect when the clerk rephrased the verdict as guilty of "assault with intent to commit rape" and asked the jury if that was their verdict.

APPEAL by defendants from *Crissman, Judge,* 26 June 1972 Criminal Session of ROCKINGHAM Superior Court.

Defendants Martin and Smith were tried on separate bills of indictment charging them with the rape of Eva Mae Smith, the wife of defendant Leon Jackson Smith.

The evidence presented by the State tended to show that on the night of 27 February 1972 Smith and his friend, Martin, had been drinking; that they went to Smith's house, wherein Smith's wife, the prosecuting witness, and their three children were residing; that Smith held his wife and threatened to harm her if she did not submit to having sexual intercourse with defendant Martin; and that she resisted, but being fearful of her husband, and physically restrained by him, Martin engaged in sexual intercourse with her.

The jury having found both defendants guilty, judgment was entered reciting that both defendants had been found guilty of assault with intent to commit rape. Defendant Martin was sentenced to imprisonment for a term of five years; defendant Smith was sentenced to imprisonment for a term of twelve years.

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

Gwyn, Gwyn & Morgan by Melzer A. Morgan, Jr., for defendant appellant Martin.

Benjamin R. Wrenn for defendant appellant Smith.

CAMPBELL, Judge.

[1] Defendant Smith contends that the court erred in allowing his wife to testify as a witness against him in the criminal prosecution. While it is true that one spouse may not be a competent witness against the other in a criminal prosecution *(State v. Alford,* 274 N.C. 125, 161 S.E. 2d 575 (1968)), there are both common law and statutory exceptions to this common law rule, which exceptions have arisen out of unusual factual circumstances.

The instant case is just such an unusual factual circumstance. One who is present, aiding and abetting in a rape actually perpetrated by another is equally guilty with the actual perpetrator of the crime. *State v. Overman,* 269 N.C. 453, 153 S.E. 2d 44 (1967). Thus, a woman, who is physically incapable of committing rape upon another woman, may be convicted of rape where she aids and abets a male assailant in the rape of another woman. *State v. Jones,* 83 N.C. 605 (1880).

Just as a woman is *physically* incapable of raping another woman, but may still be convicted of the rape of a woman, so

a husband is *legally* incapable of raping his wife, but may be convicted of the rape of his wife. A husband who counsels, aids, or abets, assists or forces another to have sexual intercourse with his wife, or forces her to submit to sexual intercourse with another, is guilty of rape. *Elliott v. State,* 190 Ga. 803, 10 S.E. 2d 843 (1940); *People v. Damen,* 28 Ill. 2d 464, 193 N.E. 2d 25 (1963); *State v. Drope,* 462 S.W. 2d 677 (Mo. 1971); *Cody v. State,* 376 P. 2d 625 (Okla. Crim. 1962); *State v. Blackwell,* 407 P. 2d 617 (Or. 1965); *Kitchen v. State,* 101 Tex. Crim. 439, 276 S.W. 252 (1925); *State v. Digman,* 121 W.Va. 499, 5 S.E. 2d 113 (1939); Annot., Rape By Husband, 84 A.L.R. 2d 1017 (1962).

In *State v. Dowell,* 106 N.C. 722, 11 S.E. 525 (1890), there is found the following:

> ". . . It is true that [the husband] may enforce sexual connection, and, in the exercise of this marital right, it is held that he cannot be guilty of the offense of rape. But it is too plain for argument, that this privilege is a personal one only. Hence if, as in *Lord Audley's case,* 3 Howard State Trials, the husband aids and abets another to ravish his wife, he may be convicted as if he were a stranger. The principle is thus tersely expressed by Sir Matthew Hale: 'For though in marriage she hath given up her body to her husband, she is not to be by him prostituted to another.' . . . " 106 N.C. 722 at 724, 11 S.E. 525 at 525.

The full text of Lord Hale's statement, part of which was set out in the cited passage from *State v. Dowell, supra,* is found in 84 A.L.R. 2d, *supra,* at 1023:

> "As set forth by Lord Hale, 'A. the husband of B. intends to prostitute her to a rape by C. against her will, and C. accordingly doth ravish her, A. being present, and assisting to this rape: in this case these points were resolved, 1. That this was a rape in C. notwithstanding the husband assisted in it, for tho in marriage she hath given up her body to her husband, she is not to be by him prostituted to another. 2. That the husband being present, aiding and assisting, is also guilty as a principal in rape, and therefore, altho the wife cannot have an appeal of rape against her husband, yet he is indictable for it at the king's suit as a principal. 3. That in this case the wife may be a witness against her husband, and accordingly she was ad-

mitted, and A. and C. were both executed.' 1 Hale PC 629, 630, citing Lord Audley's Case (1631, Eng) 3 How St Tr 401, where the defendant, having by force compelled his wife to submit to intercourse with his servant, was convicted of rape." [Footnote omitted.]

Lord Audley's Case was mentioned with approval in *State v. Hussey,* 44 N.C. 123 (1852), in which the Supreme Court observed that the case involved "an atrocious felony" upon the wife, distinguishing that situation from a simple assault. The Court then held that the rule is that a wife may be a witness against her husband for felonies perpetrated, or attempted to be perpetrated on her. Rape is certainly a felony, as is assault with intent to commit rape, and when it is a criminal injury inflicted upon the wife by her husband under circumstances which make him subject to indictment, the wife is a competent witness for the State against her husband in a prosecution for the rape.

[2] Both defendants contend that the court committed prejudicial error in accepting the jury's verdict, which event transpired in the following manner:

"CLERK: (To jury) Members of the jury, have you reached a verdict?

FOREMAN: We have.

CLERK: How do you find the defendant, Leon Jackson Smith, guilty of rape with a recommendation for life imprisonment, Two, guilty of an assault with intent to commit rape, Three, guilty of an assault on a female, or Fourth, not guilty?

FOREMAN: *We find the defendant guilty of attempt of rape on a female and assault on a female.*

CLERK: That is the second charge. You find the defendant, Leon Jackson Smith, guilty of assault with intent to commit rape?

FOREMAN: That is correct.

CLERK: That is your verdict, so say you all?

JURY: Yes, sir." (Emphasis added.)

With regard to Martin's verdict, the jury foreman responded that "We found them both guilty of the same charge."

In *State v. Adams,* 214 N.C. 501, 199 S.E. 716 (1938), defendant was tried on a bill of indictment charging him with assault with intent to commit rape. The jury returned a verdict of ". . . guilty of an assault on a female with attempt to commit rape, as charged in the bill of indictment." In finding no error, the Supreme Court held:

> "In *S. v. Hewett,* 158 N.C., 627 (629), we find: 'Thus we see that practically all definitions of an attempt to commit a crime, when applied to the particular crime of rape, necessarily imply and include "an intent" to commit it. There may be offenses when in their application to them there is a distinction between "attempt" and "intent", but that cannot be true as applied to the crime of rape. There is no such criminal offense as an "attempt to commit rape." It is embraced and covered by the offense of "an assault with intent to commit rape," and punished as such.' " 214 N.C. 501, 503, 199 S.E. 716, 718 (1938).

We hold that the verdict in the instant case, that the defendants are guilty of "attempt of rape on a female and assault on a female," while phrased in improper language, was not incomplete, insensible, or repugnant, and that it was made perfect by permissible inquiry by the clerk.

The jury foreman, having in effect, but not in proper language, rendered a verdict of guilty of assault with intent to commit rape, it was proper for the clerk to rephrase the verdict in the proper language, and to ask the jury if that was their verdict. "What transpired simply spelled out what the jury had agreed upon as its verdict." *State v. Sears,* 235 N.C. 623, 626, 70 S.E. 2d 907, 910 (1952).

Rather than suggesting a verdict, the clerk merely made an inquiry as to what form of verdict the jury had previously agreed upon. All the jurors answered that inquiry in the affirmative. A verdict should be taken in connection with the issue being tried, the evidence, and the charge. The record contains no proof that the clerk dictated or suggested what the verdict should be; there is sufficient evidence to have sustained a conviction of the rape charge; and the court's instructions are free from prejudicial error. *Davis v. State,* 273 N.C. 533, 160 S.E. 2d 697 (1968). That the jury was not polled is not reversible error because there was no irregularity in the taking of the verdict.

Upon consideration of the defendants' other assignments of error, we find no prejudicial error.

No error.

Judges BROCK and GRAHAM concur.

RANDY LEON PRIDDY v. COOK'S UNITED DEPARTMENT STORE; DARRELL NIFONG; AND CHARLES A. MADDREY

No. 7321SC5

(Filed 31 January 1973)

1. **Assault and Battery § 2; False Imprisonment § 2— one year statute of limitation applicable**

Plaintiff's complaint and affidavit affirmatively showed that his claim for assault and false imprisonment arose more than one year before suit was instituted; therefore, those claims were barred by the applicable one-year statute of limitation. G.S. 1-54(3).

2. **Malicious Prosecution §§ 1, 4— probable cause — conviction in district court — conclusiveness on issue of probable cause**

Absent a showing that it was obtained by fraud or other unfair means, conviction of plaintiff in district court for misdemeanor larceny under the warrant that was the basis for this later claim of malicious prosecution conclusively established the existence of probable cause, an essential element of malicious prosecution, even though plaintiff was afterwards acquitted of the larceny charge in superior court.

APPEAL by plaintiff from *Gambill, Judge,* 24 July 1972 Session of Superior Court held in FORSYTH County.

Civil action instituted 5 May 1972 for assault, false imprisonment and malicious prosecution.

Plaintiff alleged in his complaint that on 27 February 1971, the individual defendants, while acting as agents for Cook's United Department Store, accused plaintiff of stealing articles from the store, physically detained him against his will, and thereafter caused a warrant to issue for his arrest on a charge of misdemeanor larceny. The complaint further alleged that plaintiff was brought to trial in the Superior Court of Forsyth County upon the warrant, and that his motion for nonsuit was allowed at the conclusion of the State's evidence.

In their answer, defendants denied the essential allegations of the complaint, pleaded the statute of limitations in bar of plaintiff's claims for assault and false imprisonment, and alleged plaintiff's conviction in district court for the offense charged in the warrant as a bar to his claim for malicious prosecution.

Defendants moved for summary judgment and filed an affidavit showing that plaintiff was convicted in the District Court of Forsyth County for the larceny charged, and that he gave notice of appeal to superior court.

In opposition to defendants' motion, plaintiff filed an affidavit which tends to show the following: On 27 February 1971, plaintiff purchased some dust caps and a battery from Cook's United Department Store. When plaintiff got outside the store, defendant Nifong, a salesman, and defendant Maddrey, a security officer, accused plaintiff of the theft of some lug nuts and demanded that he produce them. Plaintiff tried to explain that he had paid for everything that he purchased from the store and made efforts to gain his freedom. The individual defendants physically took plaintiff to an office in the store and repeatedly accused him of stealing. A warrant for the alleged larceny was served on plaintiff and he was convicted in the district court. He appealed, and upon trial in superior court, judgment of nonsuit was granted.

The court allowed defendants' motion for summary judgment and plaintiff appealed to this Court.

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

Womble, Carlyle, Sandridge & Rice by Allan R. Gitter for defendant appellees.

GRAHAM, Judge.

[1] The complaint and plaintiff's affidavit affirmatively show that the claims for assault and false imprisonment arose more than one year before the suit was instituted. These claims are therefore barred by the one-year statute of limitation applicable to both claims. G.S. 1-54(3).

The only question presented on appeal is whether the trial judge correctly concluded that no genuine issue of fact exists

as to plaintiff's claim for malicious prosecution. We hold that he did and affirm his order granting defendants' motion for summary judgment.

[2] Want of probable cause is an essential element of malicious prosecution. 5 Strong, N. C. Index 2d, Malicious Prosecution, § 1. The affidavit offered by defendants, and also plaintiff's admission in his own affidavit, established that plaintiff was convicted in the District Court of Forsyth County under the warrant that is the basis of his claim that he was prosecuted maliciously. This conviction, in the absence of a showing that it was procured by fraud or other unfair means, conclusively establishes the existence of probable cause, even though plaintiff was afterwards acquitted of the charge in superior court. *Moore v. Winfield,* 207 N.C. 767, 178 S.E. 605. See also *Overton v. Combs,* 182 N.C. 4, 108 S.E. 357; *Smith v. Thomas,* 149 N.C. 100, 62 S.E. 772; *Price v. Stanley,* 128 N.C. 38, 38 S.E. 33; *Griffis v. Sellars,* 19 N.C. 492.

In *Moore v. Winfield, supra,* the Supreme Court pointed out that in some states a conviction is only *prima facie* evidence of probable cause if a new trial is granted or the judgment is reversed upon appeal; while in other states, including North Carolina, the conviction remains conclusive evidence unless shown to have been procured by artifice or fraud. The court cited the case of *Haddad v. Chesapeake and O. Ry. Co.,* 77 W.Va. 710, 88 S.E. 1038, for the following proposition: "A judgment of conviction for larceny, although reversed on writ of error, and the accused discharged from further prosecution on remand of the case, is conclusive evidence of probable cause for believing the accused guilty of the offense charged to him, unless the conviction was procured by fraud; and on plaintiff in an action for malicious prosecution *devolves the duty of averring and by convincing proof showing such fraud or other undue means.*" (Emphasis added.) *Moore v. Winfield, supra* at 770, 178 S.E. at 606-07.

Here, there are no allegations in plaintiff's complaint nor averments in his affidavit tending to show that he is prepared to offer evidence at trial that his conviction in district court was obtained by fraud or other unfair means.

Affirmed.

Judges CAMPBELL and BROCK concur.

FRANK C. AUSBAND AND VIRGINIA C. AUSBAND v. WACHOVIA BANK AND TRUST COMPANY, N.A.

No. 7321SC36

(Filed 31 January 1973)

Usury § 1— forbearance agreement — legal rate of interest

A forbearance agreement secured by a second deed of trust and executed after the effective date of G.S. 24-1.1(3) was not usurious in providing for interest of 9% per annum, notwithstanding the note to which the forbearance agreement related was executed prior to the effective date of that statute and at a time when the maximum rate of interest was 6%.

APPEAL by plaintiffs from *Gambill, Judge,* 25 September 1972 Session of Superior Court held in FORSYTH County.

This is an action by plaintiffs wherein they allege that defendant is attempting to collect interest in excess of that allowed by law. Plaintiffs alleged that they had tendered the full sum due, after deducting the credits to which they were entitled by reason of the usurious transaction, but that the tender had been refused by defendant who threatens to foreclose under a second deed of trust on plaintiffs' property. Plaintiffs sought judgment directing defendant to accept the sums so tendered as full satisfaction of the debt and asked that defendant be restrained from foreclosing under the deed of trust.

Defendant denied the allegations of usury and counterclaimed for the balance it contends is due on the debt.

The facts were not in dispute. On 24 March 1969, Reynolds Ranches, Inc., executed a note to defendant in the sum of $23,000.00 which was due on 1 July 1969. After maturity, interest was to be paid at the rate of 6% per annum. Plaintiff Frank C. Ausband signed the note as endorser and plaintiff Virginia C. Ausband executed a guaranty agreement for the payment thereof. The note was not paid when due and demand was made upon plaintiffs for payment.

Plaintiffs requested defendant to refrain from requiring plaintiffs' immediate payment of their obligations under the terms of the note and guaranty agreement. Consequently, on 12 September 1969, the parties entered into a forbearance agreement. The agreement provided that plaintiffs would pay the

debt in monthly installments commencing in October 1969 with payment in full due on or before 12 March 1971. The agreement further provided " . . . that as between Ausbands and Wachovia the unpaid principal balance of the indebtedness represented by the aforesaid $23,000.00 note shall bear interest from August 7, 1969, at the rate of nine percent (9%) per annum until paid, as though Ausbands had paid off said note and executed their personal note, bearing interest at the rate of nine percent (9%) per annum, in substitution therefor, secured by their second deed of trust."

Plaintiffs and defendant filed motions for summary judgment. Plaintiffs contended that if given proper credit for the amounts to which they claimed they were entitled by reason of the usurious nature of the transaction, the amount tendered by plaintiffs would constitute full payment of the debt. Defendant contended that the transaction was not usurious and that it was entitled to judgment for the principal sum plus interest at the rate of 9% per annum as called for in the forbearance agreement. Summary judgment was entered in favor of defendant.

Eugene H. Phillips for plaintiff appellants.

Womble, Carlyle, Sandridge & Rice by W. F. Womble for defendant appellee.

VAUGHN, Judge.

The only question presented is whether the trial court erred when it failed to hold that the provision in the forbearance agreement for the payment of 9% per annum interest called for the payment of usury. We hold that it did not.

On 24 March 1969, when the note was executed and was endorsed by Frank C. Ausband and guaranteed by Virginia C. Ausband, the maximum lawful rate of interest thereon was 6% per annum. G.S. 24-1.

On 2 July 1969, a new section, G.S. 24-1.1, became effective. Among other things this section provides that " . . . the parties to a loan, purchase money loan, advance *or forbearance* (emphasis supplied) may contract in writing. . . " for the payment of interest not in excess of the rates therein set forth. The maximum rate for a loan or forbearance as set out in the forbearance agreement involved in this law suit is 9% per annum. G.S. 24-1.1(3).

The forbearance agreement having been executed after the effective date of G.S. 24-1.1, the provision calling for the payment of interest at the rate of 9% per annum is not usurious. Plaintiffs contend that the note they guaranteed was executed prior to 2 July 1969 and that G.S. 24-1.1 has no application to loans made prior to that date. In this they are correct. The suit here, however, involves a new agreement entered into after the effective date of G.S. 24-1.1 and the lawful interest allowed is governed by that section.

Affirmed.

Judges BRITT and PARKER concur.

STATE OF NORTH CAROLINA v. JOHNNY MARSH

No. 7310SC145

(Filed 31 January 1973)

Larceny § 7— larceny of automobile — sufficiency of evidence

There was sufficient evidence to go to the jury in a felonious larceny case where the evidence tended to show that the victim's 1966 Chevrolet was stolen from a public street, that defendant purchased the frame and body of a 1966 Chevrolet from a salvage dealer, that the junked body was later found with its public serial number removed, that the victim's vehicle was found in front of defendant's residence with the serial number from the junked vehicle soldered to it, that the vehicle was towed to a garage where it was identified by the victim as his, that the defendant took one Edgerton to the garage to pick up the vehicle, and that a wallet containing several identification papers of defendant was found in the glove compartment of the stolen vehicle.

ON *certiorari* to review a trial before *Brewer, Judge,* 18 October 1971 Session of Superior Court held in WAKE County.

Defendant was convicted of felonious larceny of an automobile. From judgment imposing an active prison sentence of not less than 5 nor more than 10 years, defendant gave notice of appeal.

Attorney General Robert Morgan by William F. Briley, Assistant Attorney General for the State.

Pearson, Malone, Johnson & DeJarmon by C. C. Malone, Jr. for defendant appellant.

VAUGHN, Judge.

Defendant's only assignments of error are to the effect that there was insufficient evidence to go to the jury and that, there being no evidence that defendant was ever in possession of the stolen vehicle, it was error to instruct the jury on the law as to possession of recently stolen property.

The State's evidence tended to show that on 11 January 1969, Donald William Panko's 1966 blue Chevrolet convertible automobile, bearing public serial number 168676T218595 was stolen from a public street in Raleigh. A dealer in automobile salvage testified that on 9 January 1969, the defendant, using the name Robert Newman, purchased the frame and battered body of a 1966 Chevrolet convertible automobile bearing serial number 164676D156735. A District Supervisor of the License Theft Enforcement Division of the Department of Motor Vehicles testified that he inspected a junked chassis and part of the body of a 1966 Chevrolet left near a wooded area two miles outside of Lillington. Although the public serial number had been removed from the body of this automobile, it was identified by a confidential serial number, 164676D156735, located in the place known only to authorized personnel. This was the same serial number that was on the vehicle purchased by defendant from the salvage dealer and registered in the name of Robert Newman. The investigator from the Department of Motor Vehicles went to a Raleigh residence where defendant answered his knock and where he found a 1966 blue Chevrolet convertible parked on the street in front of the residence. The vehicle bore a registration plate issued in the name of Robert Newman. The public serial number on this vehicle was 164676D156735 and the confidential number was 6T218595, the serial number of the stolen vehicle. The plate containing the public number appeared to have been soldered rather than riveted to the vehicle and was easily detached. The vehicle was towed away to Price's garage. Another witness, Jackie Edgerton, testified that he knew defendant and that sometime in January he had ridden in a 1965 or 1966 blue Chevrolet convertible driven by defendant. A day or two after taking this ride he was picked up by defendant and driven to Price's garage where he was supposed to go in and pick up Robert Newman's automobile. When Edgerton went in to get the vehicle, he was detained by detectives. The owner identified the impounded vehicle at the garage as his own. A wallet, containing several identification papers includ-

ing a motor vehicle operator's license and a social security card in the name of defendant, was found in the glove compartment of the stolen vehicle. That this evidence is ample to prove defendant's theft and possession of the vehicle is so plain as not to require discussion. See, for example, *State v. Reagan,* 185 N.C. 710, 117 S.E. 1, where the court held that the fact that the defendant's overcoat and letter were in a stolen car was evidence that the car had come into his possession and that such possession was evidence for the jury.

No error.

Judges BRITT and PARKER concur.

STATE OF NORTH CAROLINA v. BOBBY LEE TUGGLE

No. 7317SC80

(Filed 31 January 1973)

1. **Criminal Law § 138— evidence considered in imposing sentence**

The trial judge is not required to identify the various factors that may have influenced him in arriving at a sentence; therefore, it was not error for the court in a drunken driving case to consider defendant's driving record without indicating which part of the record, if any, was being considered in imposing sentence, particularly where defense counsel had an opportunity to address the court after furnishing the record.

2. **Criminal Law § 138— greater sentence imposed upon appeal from district to superior court — no error**

It was not error in a drunken driving case for the superior court to impose a sentence in excess of the one imposed in the district court where the six month sentence imposed was within the maximum limit allowed by law. G.S. 20-179(a)(1).

APPEAL by defendant from *Fountain, Judge,* 21 August 1972 Session of Superior Court held in ROCKINGHAM County.

Defendant was tried and convicted in the District Court of Rockingham County upon a warrant charging him with operating a motor vehicle upon a public highway while under the influence of intoxicating liquor. Judgment was entered imposing a jail sentence of four months and defendant appealed to Superior Court where he tendered a plea of guilty. His plea

was accepted after the court adjudged it "freely, understandingly and voluntarily made, without undue influence, compulsion or duress, and without promise of leniency." Judgment was entered imposing a jail sentence of six months and defendant appealed to this Court.

Attorney General Morgan by Assistant Attorney General Melvin and Assistant Attorney General Ray for the State.

C. Orville Light for defendant appellant.

GRAHAM, Judge.

Defendant directs his only complaints toward the sentence imposed.

[1] First, defendant argues that it was error for the court to consider his driving record without indicating which part of the record, if any, was being considered in imposing sentence. This argument is without merit. We know of no requirement that a trial judge identify the various factors that may have influenced him in arriving at a sentence. Moreover, the record shows that counsel who represented defendant at trial furnished the written record to the judge and thereafter addressed the court. His remarks are not a part of the record, but he certainly had full opportunity to call to the court's attention any inaccuracy in defendant's driving record and to present any circumstances in mitigation of the sentence.

[2] Secondly, defendant contends that it was impermissible for the Superior Court to impose a sentence in excess of the one imposed in the District Court. Similar contentions made in other cases have been repeatedly rejected. *State v. Speights,* 280 N.C. 137, 185 S.E. 2d 152; *State v. Spencer,* 276 N.C. 535, 173 S.E. 2d 765; *State v. Sparrow,* 276 N.C. 499, 173 S.E. 2d 897; *State v. Oakley,* 15 N.C. App. 224, 189 S.E. 2d 605; *State v. Coffey,* 14 N.C. App. 642, 188 S.E. 2d 550. Also, see especially *Colten v. Kentucky,* 407 U.S. 104, 92 S.Ct. 1953, 32 L.Ed. 2d 584.

The six month sentence imposed was within the maximum limit allowed by law. G.S. 20-179(a)(1). No error appears on the face of the record and we find,

No error.

Judges CAMPBELL and BROCK concur.

CHARLES WADE FREEDLE v. FOY WILBUR MOOREFIELD AND L. A. REYNOLDS COMPANY

No. 7321SC55

(Filed 31 January 1973)

Judgments § 9— repudiation of settlement by one party — jurisdiction of court to enter judgment

Where plaintiff instituted an action for personal injuries against defendant, defendant offered a sum in settlement which plaintiff's counsel accepted pursuant to oral authority given him by his client, plaintiff advised his counsel that he did not want to settle for the amount offered and plaintiff refused the settlement check tendered by defendant, the trial court was without power to sign a judgment based upon the settlement of the parties.

APPEAL by plaintiff from *Collier, Judge,* 4 September 1972 Session of FORSYTH Superior Court.

The undisputed facts appear to be as follows:

On 14 January 1971 plaintiff instituted this action to recover for personal injuries received in a two-truck collision on 24 February 1969. The case was calendared and scheduled for trial in Forsyth Superior Court on 20 March 1972. On Friday, 17 March 1972, following considerable negotiations, counsel for defendants communicated to counsel for plaintiff an offer of $10,250 and the costs of court in complete settlement of all matters in controversy between plaintiff and defendants. Pursuant to oral authority given him by his client, plaintiff's counsel advised defendants' counsel that the offer was accepted. On Saturday, 18 March 1972, plaintiff called his counsel and advised that he did not wish to settle his case for the amount offered. Plaintiff's counsel immediately contacted defendants' counsel and advised him of plaintiff's position.

On Monday, 20 March 1972, settlement check was tendered plaintiff's counsel and on being advised of the facts, the trial judge continued the case for the term. On 7 July 1972, defendants' counsel filed a motion setting forth facts substantially as above stated and asked the court for an order directing plaintiff to comply with the terms of the settlement or, in the alternative, dismissing the action.

Following a hearing on the motion, the court found facts as contended by defendants and entered judgment that plaintiff

recover of defendants the sum of $10,250 and the costs of court in complete settlement of all matters in controversy between the parties in this action. Plaintiff appealed.

Craige, Brawley by C. Thomas Ross for plaintiff appellant.

Hudson, Petree, Stockton, Stockton & Robinson by W. F. Maready for defendant appellees.

BRITT, Judge.

We think this case is controlled by *Lee v. Rhodes,* 227 N.C. 240, 41 S.E. 2d 747 (1947) and *Highway Commission v. Rowson,* 5 N.C. App. 629, 169 S.E. 2d 132 (1969). No worthwhile purpose would be served in repeating the reasoning and citing again the authorities set forth in those opinions.

Appropriate to this case are the following comments by Justice (later Chief Justice) Denny in *Lee v. Rhodes, supra:* "The conduct of the plaintiff, if considered in its most favorable light, does not appeal to the conscience of the Court. Even so, the record presents for our consideration and determination a question of law rather than one of ethics. * * * . . . [The court] was without power to sign a judgment, based upon the consent of the parties, after one of the parties repudiated the agreement and had withdrawn his consent thereto."

The judgment appealed from is vacated and this cause is remanded to the superior court for further proceedings.

Judgment vacated and cause remanded.

Judges PARKER and VAUGHN concur.

STATE OF NORTH CAROLINA v. GEORGE PARROTT

No. 7315SC187

(Filed 31 January 1973)

Criminal Law § 146—appeal from guilty plea

Where defendant pled guilty to assaulting a public officer while the officer was attempting to discharge a duty of his office, the only question presented on appeal was whether error appeared on the face of the record proper.

State v. Parrott

ON *Certiorari* to review judgment of *Godwin, Judge,* entered at the 12 June 1972 Session of Superior Court held in ALAMANCE County.

Defendant was charged by warrant with assault on a public officer while such officer was attempting to discharge a duty of his office, a violation of G.S. 14-33(c)(4). In the district court he was tried, convicted and sentenced. On appeal to superior court, he tendered a plea of guilty. Before accepting the plea, the trial judge questioned defendant and defendant signed and swore to a written transcript of the plea. Thereupon the trial judge entered an order making findings of fact as to the circumstances under which the plea was entered and adjudicating that defendant's plea of guilty was freely, understandingly and voluntarily made. From judgment imposing prison sentence of 12 months, defendant gave notice of appeal. This Court subsequently granted his petition for certiorari to perfect his appeal. Having been found to be indigent, defendant was represented in district court, in the superior court, and in this Court, by court-appointed counsel.

Attorney General Robert Morgan by Associate Attorney George W. Boylan for the State.

John H. Snyder for defendant.

PARKER, Judge.

Defendant having pled guilty, the sole question presented is whether error appears on the face of the record proper. *State v. Roberts,* 279 N.C. 500, 183 S.E. 2d 647. We have carefully examined the record, and no error appears. The judgment of the superior court is

Affirmed.

Judges BRITT and VAUGHN concur.

STATE OF NORTH CAROLINA v. BILL HALL, PAUL RAY HALL AND ROGER EVANS

No. 7319SC164

(Filed 31 January 1973)

ON *Certiorari* to review judgments of *Johnston, Judge,* entered at the 8 May 1972 Session of ROWAN Superior Court.

In separate warrants issued in Rowan District Court defendants were charged with assaulting a police officer while discharging a duty of his office. They were convicted in district court and from judgments imposed, they appealed to superior court.

In superior court the cases were consolidated for trial, defendants pleaded not guilty, a jury found them guilty as charged and from judgments imposing prison sentences, they gave notice of appeal to the Court of Appeals. For good cause shown as to why they were unable to docket their appeal within the time provided by our rules, we allowed defendants' petition for certiorari.

Attorney General Robert Morgan by James E. Magner, Assistant Attorney General, for the State.

Carlton & Rhodes by Graham M. Carlton and Gary C. Rhodes for defendant appellants.

BRITT, Judge.

After a careful review of the record on appeal, with particular reference to the questions raised in defendants' brief, we conclude that defendants received a fair trial free from prejudicial error.

No error.

Judges PARKER and VAUGHN concur.

FOOD FAIR, INC. v. CITY OF HENDERSON, N. C., AND MEMBERS OF THE HENDERSON CITY COUNCIL, LOUIS D. HORNER, MAYOR, DR. M. W. WESTER, J. LEE LASSITER, THURSTON EDWARDS, W. D. CHAMPION, DAVID MIMS, OWEN GUPTON, CHARLES ROSE

No. 729SC507

(Filed 14 February 1973)

1. **Intoxicating Liquor § 2— statute requiring issuance of license to sell wines — local act granting authority to refuse license**

The statute requiring the mandatory issuance of a license to sell fortified and unfortified wines for consumption off premises to all persons complying with statutory requirements, G.S. 105-113.82, did not repeal by implication Chapter 936 of the 1945 Session Laws, which grants discretionary authority to the governing bodies of municipalities in Vance, Scotland and Moore Counties to refuse to issue a license for the sale of wines within the corporate limits of such municipalities.

2. **Intoxicating Liquor § 2; Constitutional Law § 12— refusal of license to sell wines — unconstitutionality of local act — regulation of trade**

Chapter 936 of the 1945 Session Laws, which purports to grant discretionary authority to the governing bodies of municipalities in Vance, Scotland and Moore Counties to refuse to issue a license for the sale of fortified and unfortified wines within the corporate limits of such municipalities, is a local act regulating trade in violation of Art. II, § 24(1)(j) of the N. C. Constitution.

APPEAL by defendants from judgment of *Webb, Judge,* dated 16 March 1972 entered in Superior Court held in VANCE County.

This is a civil action in which plaintiff seeks a mandatory injunction requiring defendants, the City of Henderson and the members of its City Council, to issue a license to plaintiff for the retail sale of fortified and unfortified wines for consumption off premises. Upon the hearing before the judge pursuant to a show cause order, the following facts were established by the pleadings or were admitted: On 18 November 1971 plaintiff applied to defendant City Council for a license to sell fortified and unfortified wines for consumption off premises, said application being made in compliance with G.S. 105-113.80. Prior to making this application, plaintiff complied with all pertinent sections of G.S. Chap. 18A and with all rules and regulations of the North Carolina Board of Alcoholic Control, obtained permits for the retail sale of fortified and unfortified wines for consumption off premises, and submitted

its check to the City of Henderson in sufficient amount to cover the license fee. On 22 November 1971 the City Council denied plaintiff's application. At a meeting held on 21 October 1971 the City Council had adopted a policy pursuant to Chap. 936, 1945 Session Laws of refusing to issue a license for sale of wine in Henderson, N. C. to anyone. Such a license had been issued by the City to the Vance County A.B.C. Store No. 1, located in Henderson, N. C., from at least 1969 to the date of the hearing.

Upon these facts, the trial judge concluded as a matter of law that pursuant to G.S. 105-113.82 plaintiff "has a clear legal right to have a license issued by the City of Henderson, N. C. for the retail sale of fortified and unfortified wines off premises and that the City of Henderson, N. C. has no discretion in the said issuance of the said license and it is clearly a ministerial duty only." From judgment ordering defendants to issue the license applied for to the plaintiff, defendants appealed.

Rogers & Senter by Bobby W. Rogers for plaintiff appellee.

Perry, Kittrell, Blackburn & Blackburn by Charles F. Blackburn for defendant appellants.

PARKER, Judge.

[1] As their authority for refusing to issue to plaintiff the license applied for, appellants rely upon Chap. 936 of the 1945 Session Laws. Section 2 of that Act reads as follows:

> "Sec. 2. The governing body of any municipality in Vance, Scotland and Moore Counties in their discretion are hereby authorized to refuse to issue a license for the sale of wine within the corporate limits of said municipality."

In its complaint, plaintiff attacked the constitutionality of this Act. In the judgment appealed from the trial court expressly made "no findings or determination as to the constitutionality" of Chap. 936, 1945 Session Laws, but rested its judgment upon its conclusion that G.S. 105-113.82 "requires the mandatory issuance of a license for the sale of fortified and unfortified wines off premises to all persons who have complied with the provisions of Chap. 18A of the General Statutes of North Carolina and NCGS 105-113.80." In so holding, it is apparent that the trial judge was of the opinion that G.S. 105-113.82 superseded and in effect repealed Chap. 936 of the 1945

Session Laws. We first examine this basis for the trial court's judgment.

G.S. 105-113.82, as enacted by Section 2 of Chap. 872 of the 1971 Session Laws, provides in part as follows:

> "§ 105-113.82. *Issuance of license mandatory.*—Except as herein provided, it shall be mandatory that the governing body of a municipality or county issue a license to any applicant when such person shall have complied with requirements of this Article and Chapter 18A: . . . . "

While we have found no Act of our General Assembly expressly repealing Chap. 936 of the 1945 Session Laws, a logical argument can be made that enactment of G.S. 105-113.82 did so by clear implication. However, repeals by implication are not favored, and "[o]rdinarily, a special or local statute is not repealed by a subsequent general statute of statewide application, but the special or local statute will be given effect as an exception to the general statute, notwithstanding a general repealing clause in the general statute." 7 Strong, N.C. Index 2d, Statutes, § 11, p. 85; see, *Bland v. City of Wilmington,* 278 N.C. 657, 180 S.E. 2d 813. Moreover, the evolutionary history leading to enactment of G.S. 105-113.82 in its present form fails to reveal any clear legislative intent to repeal Chap. 936 of the 1945 Session Laws. Present G.S. 105-113.82 had its genesis in Section 513 of the Beverage Control Act of 1939, which was one of the Articles of the Budget Revenue Bill of that year, Chap. 158 of the 1939 Session Laws. Section 513 of that Act contained the following:

> "Sec. 513. It shall be mandatory that the governing body of a municipality or county issue license to any person applying for the same when such person shall have complied with requirements of this article: . . . . "

Subsequently in the 1939 Session of the General Assembly this section was amended by adding provisos authorizing the governing bodies in certain named counties or of any municipality therein in their discretion to decline to issue the "on premises" licenses provided for in the Beverage Control Act and to prohibit sale of beer and/or wine on Sundays. When the General Statutes were enacted in 1943, the Beverage Control Act of 1939 as then amended was placed under Chap. 18, entitled "Intoxicating Liquors," Section 513 appearing as G.S. 18-77. At the 1945 Session of the General Assembly, G.S. 18-77 was amended by

adding additional provisos and by adding Vance and Macon Counties and the City of Greensboro to the list of localities, the governing bodies of which were granted discretionary authority to refuse to issue the "on premises" licenses. These 1945 amendments were enacted by Chap. 708, Section 6, and by Chaps. 934, 935 and 1037 of the 1945 Session Laws. It is noteworthy that two of these, Chaps. 934 and 935, were enacted on the same day and immediately before the enactment of Chap. 936 of the 1945 Session Laws, the very Act upon which the defendants in the present case rely. It is manifest, therefore, that the 1945 General Assembly which enacted Chap. 936 intended that it be construed together with G.S. 18-77 as then enacted in such manner as to give effect to both. G.S. 18-77 was again amended in 1947, but simply to add Bertie to the list of counties named therein. Chap. 932, 1947 Session Laws. As thus amended, G.S. 18-77 remained unchanged until enactment of Chap. 872 of the 1971 Session Laws, entitled "An Act to Rewrite General Statutes Chapter 18, Rewrite and Transfer to Chapter 105 the Revenue Statutes Formerly in Chapter 18 and to Repeal Certain Inconsistent Sections." This Act repealed Chap. 18 and certain other sections of the General Statutes, enacted a new chapter designated 18A and entitled "Regulation of Intoxicating Liquors," and by Section 2 amended Chap. 105 of the General Statutes by inserting therein a new Article 2C entitled "Intoxicating Liquors Tax." As part of this Article present G.S. 105-113.82 was enacted, thus returning this Statute to its birthplace among the statutes dealing with taxation.

Important in the foregoing history is the fact that G.S. 105-113.82 as enacted in 1971 is in every respect which is material to the question now before us identical with the provisions of former G.S. 18-77 as that Statute existed in 1945 when Chap. 936 of the 1945 Session Laws was enacted. By merely moving this Statute from former Chap. 18 and placing it in Chap. 105 of the General Statutes without making any significant change in its language, the 1971 General Assembly failed to manifest any clear legislative intent to repeal by implication Chap. 936 of the 1945 Session Laws. In our opinion Chap. 936, 1945 Session Laws, has not been repealed.

[2] Having concluded, contrary to the opinion of the trial court, that Chap. 936, 1945 Session Laws has not been repealed, we now consider plaintiff's contention that in any event Section 2 of that Act is unconstitutional as being in violation of Article

II, Section 24(1)(j), of the Constitution of North Carolina which provides that the General Assembly shall not enact any local, private or special act regulating trade. In our opinion, Section 2 of Chap. 936, 1945 Session Laws is violative of this provision of our Constitution. *Smith v. County of Mecklenburg,* 280 N.C. 497, 187 S.E. 2d 67. By its terms it applies only to the governing bodies of municipalities in three counties. In relation to the purpose of the Act the affected counties and the municipalities therein do not rationally differ from the remaining ninety-seven counties and the municipalities located therein. There is thus no question but that it is a local Act within the meaning of that term as employed in Article II, Section 24(1)(j) of our State Constitution. The selling of wine is a trade, *Smith v. County of Mecklenburg, supra,* and the Act purports to grant discretionary authority to the governing bodies of municipalities in the three affected counties to refuse to issue a license for conducting this trade within the corporate limits of such municipalities. It is, therefore, clear that Section 2 of Chap. 936 of the 1945 Session Laws is a local Act regulating trade. The fact that it is permissive and takes effect only when invoked by the governing body of some municipality in one of the three named counties does not make it any the less an Act regulating trade. *Surplus Co. v. Pleasants, Sheriff,* 264 N.C. 650, 142 S.E. 2d 697.

For the reasons stated above, we agree with the trial court's ultimate conclusion that defendants have no discretion to refuse to issue to the plaintiff the license applied for, and the judgment appealed from is

Affirmed.

Judges VAUGHN and GRAHAM concur.

IN THE MATTER OF: BALLARD C. COLLINGSWORTH, APPELLEE
— AND —
CONE MILLS CORPORATION, APPELLANT
— AND —
EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA, APPELLANT

No. 7318SC15

(Filed 14 February 1973)

Master and Servant § 108— unemployment compensation — refusal to wear ear protective devices — discharge for misconduct

Claimant's discharge for wilful refusal to wear ear protective devices as required by employer policy made mandatory by the Occupational Safety and Health Act of 1970 constituted a discharge for misconduct connected with his employment within the meaning of G.S. 96-14(2), and the Chairman of the Employment Security Commission properly concluded that claimant was disqualified from receiving unemployment compensation for five weeks by reason of such discharge.

APPEAL by Cone Mills Corporation and the Employment Security Commission of North Carolina from *Exum, Judge,* at the 6 March 1972 Civil Session of GUILFORD Superior Court.

This action arises from a claim for unemployment compensation filed with the Employment Security Commission of North Carolina (Commission) by Ballard C. Collingsworth (claimant), formerly employed by Cone Mills Corporation (Cone Mills).

A hearing was held before the Chairman of the Commission following claimant's appeal from the Appeals Deputy's decision that claimant be disqualified for unemployment benefits for five weeks from 24 August 1971 through 27 September 1971 "because of separation." An appeal had been taken to the Appeals Deputy from a decision of the Claims Deputy who determined that claimant was disqualified from unemployment benefits for eleven weeks from 24 August 1971 through 8 November 1971 "because of separation."

The Commission chairman made the following findings of fact: Claimant had been employed by Cone Mills as a loom fixer at a $3.14 hourly wage for just over one year on 23 August 1971, the date of his discharge. He filed a claim for benefits on 24 August 1971 and this claim continued for one week. Throughout all its plants in compliance with a federal requirement, Cone Mills had adopted a policy whereby all

employees who worked in an area having a noise level of 90 decibels or more were required to wear some type of an ear protection device. Cone Mills provided four different types of ear protectors: a soft plastic insert, an ear muff, a silicone plug, and swedish wool. Climaint inserted soft plastic plugs in his ears for some thirty minutes and found them unsatisfactory. Terming the earplugs a "bunch of foolishness" he then refused to utilize any type of ear protection device. Cone Mills exempted an employee from this requirement if medical authority determined that the ear protectors "would be detrimental to a particular individual." Claimant refused to have a medical evaluation at Cone Mills' expense from an ear specialist of his choice. Cone Mills then offered to transfer claimant to a plant area where the noise level would be below 90 decibels. Claimant refused the transfer because his wages might be less than those of a loom fixer. Cone Mills' supervisor personnel held conferences with claimant and told him he would be discharged unless he wore ear protection devices or secured medical exemption. Claimant refused all suggested alternatives and was discharged.

The Commission chairman concluded as a matter of law that claimant was discharged for misconduct connected with his employment because he willfully and deliberately violated a company rule reasonably and necessarily imposed. The Commission chairman determined that pursuant to G.S. 96-14(2) such misconduct subjected claimant to disqualification from receiving unemployment insurance benefits for five weeks beginning 24 August 1971 through 27 September 1971.

Claimant appealed to the superior court which adopted *in toto* the findings of fact made by the Commission chairman but concluded that the discharge "resulted from an honest difference over company policy and not from any misconduct on the part of this employee." From judgment reversing the Commission chairman's decision, Cone Mills and the Commission appealed.

Eugene G. Shaw, Jr., for claimant appellee.

McLendon, Brim, Brooks, Pierce & Daniels by Thornton H. Brooks; H. J. Elam III, and Charles P. Younce for Cone Mills Corporation appellant.

Howard G. Doyle, H. D. Harrison, Garland D. Crenshaw and D. G. Ball for Employment Security Commission of North Carolina appellant.

BRITT, Judge.

By their assignments of error appellants contend the superior court erred in concluding that claimant's discharge was not due to misconduct and reversing the decision of the Commission chairman.

The facts found by the Commission chairman are supported by competent evidence and therefore are binding upon review. *In re Abernathy,* 259 N.C. 190, 130 S.E. 2d 292 (1963). Pursuant to G.S. 96-15(b)(2)(i) the superior court adopted these facts but concluded that upon the facts found claimant's behavior did not constitute "misconduct" within the meaning of G.S. 96-14(2) which in pertinent part provides: "An individual shall be disqualified for benefits . . . if it is determined by the Commission that such individual is, at the time such claim is filed, unemployed because he was discharged for misconduct connected with his work. . . ."

"Misconduct" is not defined within the statute and our research does not disclose a North Carolina decision defining the term in its industrial sense. In the case of *In re Stutts,* 245 N.C. 405, 95 S.E. 2d 919 (1957), the Supreme Court affirmed a superior court ruling which in turn had affirmed the Commission's conclusion that a claimant who had willfully disobeyed an employer's rule that he (claimant) not make weight changes in the machine he operated was discharged for misconduct connected with his work. "Misconduct" was not specifically defined in *Stutts* although presumably claimant's willful disobedience of his employer's rule amounted to misconduct.

Appellants contend that claimant's refusal to wear a protective ear device amounted to an intentional, willful violation of his employer's policy and interests and that such behavior must be termed "misconduct" as used in the industrial sense. We agree.

In their briefs, which indicate thorough research, appellants point out that their research failed to disclose a decision which has ruled on a discharge resulting from employee refusal to comply with employer policy made mandatory by the Occupational Safety and Health Act of 1970 (pursuant to which Cone Mills instituted its ear protection policy).

Our research, likewise, fails to reveal such a decision from any jurisdiction but apparently jurisdictions which have con-

sidered what constitutes "misconduct" sufficient to disqualify a discharged employee from receiving unemployment compensation " . . . sustain the rule that in order to constitute 'misconduct' . . . an act must show a wanton or wilful disregard for the employer's interests, a deliberate violation of the employer's rules, or a wrongful intent." *Sturges v. Administrator,* Unemployment Comp. Act, 27 Conn. Sup. 215, 234 A. 2d 372 (1966); *Abex Corp. v. Todd,* 235 A. 2d 271 (Del. Sup. 1967); *Earp v. Florida Department of Commerce, et al.,* 241 So. 2d 422 (Fla. App. 1970); *Oliver v. Creamer Heating & Appliance,* 91 Idaho 312, 420 P. 2d 795 (1966); *American Steel Foundaries, Inc. v. Review Bd. of Ind. E.S.D.,* 143 Ind. App. 12, 237 N.E. 2d 263 (1968); *Hall v. Doyal,* 191 So. 2d 349 (La. App. 1966); *Fresta v. Miller,* 7 Mich. App. 58, 151 N.W. 2d 181 (1967); *Barnum v. Williams,* 84 Nev. 37, 436 P. 2d 219 (1968); Claim of Heitzenrater, 19 N.Y. 2d 1, 224 N.E. 2d 72 (1966); *Harp v. Administrator, Bureau of Unemployment Comp.,* 12 Ohio Misc. 34, 230 N.E. 2d 376 (1967); *Troutt v. Carl K. Wilson Company,* 219 Tenn. 400, 410 S.W. 2d 177 (1966); *Fitzgerald v. Globe-Union, Inc.,* 35 Wis. 2d 332, 151 N.W. 2d 136 (1967). Annot., 146 A.L.R. 243 (1943).

Many cases have held or recognized that where an employee was discharged for disobeying "a reasonable directive" of his superior such behavior amounted to "insubordinate disobedience" or "misconduct" sufficient to prohibit an award of unemployment compensation. *Sayers v. American Janitorial Service, Inc.,* 162 Colo. 292, 425 P. 2d 693 (1967); *Rankin v. Doyal,* 223 So. 2d 214 (La. App. 1969); *Carter v. Michigan Employment Security Comm.,* 364 Mich. 538, 111 N.W. 2d 817 (1961); *Simonetta v. Catherwood,* 30 App. Div. 2d 1008, 294 N.Y.S. 2d 130 (1968); *Fritsche v. Unemployment Compensation Board of Review,* 196 Pa. Super. 574, 176 A. 2d 186 (1961); *Smolensky v. Unemployment Compensation Board of Review,* 183 Pa. Super. 344, 132 A. 2d 698 (1957). Annot., 26 A.L.R. 3d 1333, 1341 (1969).

One of the most widely quoted definitions of "misconduct" as it relates to unemployment compensation statutes was stated by the Wisconsin Court in *Boynton Cab Co. v. Neubeck,* 237 Wis. 249, 296 N.W. 636 (1941) and we quote it with approval:

> " * * * [T]he term 'misconduct' [in connection with one's work] is limited to conduct evincing such wilful or wanton disregard of an employer's interest as is found in deliberate

violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his employer. * * *"

Cone Mills' imposition of the rule in the case at bar was not arbitrary but was in compliance with a federal requirement and must be considered reasonable since promulgated for health and safety purposes. Claimant does not argue that his violation of the rule was unintentional; the findings of fact fully support the conclusion that his refusal to obey the rule was deliberate.

For the reasons stated, we hold that the judgment of the superior court was erroneous and must be

Reversed.

Judges PARKER and VAUGHN concur.

CORA RAE KANOY v. THOMAS LINDLEY KANOY

No. 7321DC29

(Filed 14 February 1973)

Husband and Wife § 10— deed of separation — proper acknowledgment by wife — necessity for acknowledgment by husband

Where plaintiff wife acknowledged execution of a deed of separation before a justice of the peace who certified that he privately examined plaintiff and found that the transaction was not unreasonable or injurious to her, the requirements of G.S. 52-6 were met and the deed of separation was valid despite the fact that defendant husband did not acknowledge the deed before a proper certifying officer.

APPEAL by defendant from *Clifford, Judge,* 24 July 1972 Session of FORSYTH District Court.

Plaintiff instituted this action to recover from defendant sums allegedly due her under a deed of separation. The evidence tended to show: Plaintiff and defendant were married to each other in August 1944. In February 1967 they entered

into a deed of separation which provided, among other things, that defendant would pay plaintiff $240 per month beginning 1 March 1967. Defendant has made no payment since 1 August 1971.

Plaintiff acknowledged execution of the deed of separation before a justice of the peace who certified that he privately examined plaintiff and made findings, all as provided by G.S. 52-6. Defendant acknowledged execution of the instrument before a notary public.

A jury answered the issues submitted in favor of plaintiff and from judgment ordering defendant to pay plaintiff $1,680 plus court costs, defendant appealed.

Bailey and Thomas by George S. Thomas for plaintiff appellee.

Wilson and Morrow by John F. Morrow for defendant appellant.

BRITT, Judge.

Defendant assigns as error the failure of the trial judge to direct a verdict for defendant either at the close of plaintiff's evidence or at the close of all the evidence for the reason that the separation agreement upon which plaintiff's action was brought is void. Defendant contends that the agreement is void for all purposes because it was not acknowledged by defendant before a proper certifying officer in compliance with the requirements of G.S. 10-4 and G.S. 52-6.

G.S. 10-4 pertinent to our consideration provides:

"(a) Subject to the exception stated in subsection (c), a notary public commissioned under the laws of this State acting anywhere in this State may —

(1) Take and certify the acknowledgment or proof of the execution or signing of any instrument or writing *except a contract between a husband and wife governed by the provisions of G.S. 52-6.*" (Emphasis added.)

We interpret the emphasized statutory language to mean that in contracts (which includes separation agreements, see *Bolin v. Bolin,* 246 N.C. 666, 99 S.E. 2d 920 [1957]) between husband and wife, G.S. 10-4 must be construed in light of and governed by the language of G.S. 52-6.

G.S. 52-6 *in February 1967* provided in pertinent part:

"(a) . . . nor shall any separation agreement between husband and wife be valid for any purpose, *unless such contract or separation agreement is in writing, and is acknowledged before a certifying officer who shall make a private examination of the wife according to the requirements formerly prevailing for conveyance of land.*" (Emphasis added.)

(b) The certifying officer examining the wife shall incorporate in his certificate a statement of his conclusions and findings of fact as to whether or not said contract is unreasonable or injurious to the wife. The certificate of the officer shall be conclusive of the facts therein stated but may be impeached for fraud as other judgments may be.

(c) Such certifying officer must be a justice of the Supreme Court, a judge of the superior court, a judge of the district court, a clerk, assistant clerk, or deputy clerk of the superior court, or a justice of the peace, or a magistrate, or the equivalent or corresponding officers of the state, territory or foreign country where the acknowledgment and examination is made. (Note: This subsection was rewritten in 1969.)

Defendant contends that the emphasized portion of subsection (a) above requires that the husband as well as the wife must acknowledge the execution of a deed of separation before one of the officials listed in subsection (c). We reject this contention.

Being cognizant of the fact that at common law all transactions between husband and wife regarding *her* separate property were void, *Sims v. Ray,* 96 N.C. 87, 2 S.E. 443 (1887), *Trammell v. Trammell,* 2 N.C. App. 166, 162 S.E. 2d 605 (1968), the purpose behind legislative enactment of G.S. 52-6 is relevant to our determination. G.S. 52-12 (now G.S. 52-6) was enacted to protect the wife from her husband's influence and control which were presumed by virtue of the marital relation. *Caldwell v. Blount,* 193 N.C. 560, 137 S.E. 578 (1927); Lee, *North Carolina Family Law,* § 110, p. 32. The statute (G.S. 52-6) was designed to validate transactions void at common law and to prevent fraud. *Perry v. Stancil,* 237 N.C. 442, 75 S.E. 2d 512 (1953); Lee, *North Carolina Family Law, supra.*

This court in *Trammell v. Trammell, supra,* quoted the following from *Caldwell v. Blount, supra:*

> "C.S., 2515, (now G.S. 52-6) is an enabling statute; but for the statute the deed of a wife conveying land to her husband would be void. Such deed is valid only when the statute has been strictly complied with. The law is stated in 30 C.J., at page 757, sec. 379, as follows:
>
> " 'Since a married woman's power to convey is wholly statutory, all the requirements of enabling statutes must be strictly complied with to render her deed valid, and her deed will be held invalid where there is a failure to comply with statutory requirements as to execution or acknowledgment. Where, however, there has been a substantial compliance with statutory requirements, her deed may be enforced, but there must be a substantial compliance with every requisite of the statute.' "

The Supreme Court of North Carolina has uniformly held that contracts (including deeds and separation agreements) in which the wife either directly or indirectly conveys land to her husband is void unless the certifying officer who examines the wife incorporates in his certificate a finding that the transaction is not unreasonable or injurious to her. *Combs v. Combs,* 273 N.C. 462, 160 S.E. 2d 308 (1968); *Davis v. Davis,* 269 N.C. 120, 152 S.E. 2d 306 (1967); *Tripp v. Tripp,* 266 N.C. 378, 146 S.E. 2d 507 (1966); *Brinson v. Kirby,* 251 N.C. 73, 110 S.E. 2d 482 (1959).

On the other hand, a husband may convey to his wife any right, title or interest in real estate which he owns. *Hendley v. Perry,* 229 N.C. 15, 47 S.E. 2d 480 (1948). The husband does not have to comply with the requirements of G.S. 52-12 (now G.S. 52-6) to validate the transaction. It has been held (See *Woolard v. Smith,* 244 N.C. 489, 94 S.E. 2d 466 [1956]) that a husband can by conveying land directly to himself and his wife create an estate by the entirety. Since the transaction was not a conveyance by the wife to her husband, presumably the statutory requisites of G.S. 52-12 (now G.S. 52-6) did not have to be complied with. Lee, *North Carolina Family Law,* § 110, p. 36.

G.S. 52-6(b) sets forth certain requirements of the certifying officer as far as the wife is concerned; subsection (c) then enumerates officials that are authorized to serve as "such

certifying officer." We think "such certifying officer" in subparagraph (c) refers directly to the certifying officer in subparagraph (b) and relates only to the officer taking the wife's acknowledgment to the deed of separation or other instrument covered by the statute.

Keeping in mind the purpose of G.S. 52-6, we review several authorities dealing with construction of statutes. In 7 Strong, N. C. Index 2d, Statutes, § 5, p. 70, we find: "The courts will not adopt a construction that results in palpable injustice when the language of the statute is susceptible to another reasonable construction which is just and is consonant with the purpose and intent of the act." The following cases are cited in support of this statement: *Little v. Stevens,* 267 N.C. 328, 148 S.E. 2d 201 (1966); *Puckett v. Sellars,* 235 N.C. 264, 69 S.E. 2d 497 (1952); *Young v. Whitehall Co.,* 229 N.C. 360, 49 S.E. 2d 797 (1948).

In *Galligan v. Chapel Hill,* 276 N.C. 172, pp. 176-177, 171 S.E. 2d 427 (1970), we find: "The intent of the Legislature controls the interpretation of the statute. To ascertain this intent the courts should consider the language of the statute, the spirit of the Act and what it sought to accomplish, the change or changes to be made and how these should be effected. It should be construed contextually and harmonized if possible to avoid absurd or oppressive consequences. (Citations)"

Applying the stated principles to the construction of G.S. 52-6, we hold that the limitation imposed by subsection (c) as to who may serve as a certifying officer applies only to the official taking the acknowledgment of the wife. Consequently, we hold that the deed of separation involved in this case was valid and binding on defendant.

No error.

Judges PARKER and VAUGHN concur.

STATE OF NORTH CAROLINA v. EDDIE KING TENNYSON

No. 7319SC122

(Filed 14 February 1973)

1. **Criminal Law § 84— marijuana seized under valid warrant — admissibility**

Envelopes of marijuana found as a result of a search of defendant and his automobile were admissible in evidence where the search and seizure were by authority of a duly issued and executed search warrant.

2. **Criminal Law § 99— questions by trial court — clarification of testimony**

In defendant's trial for felonious possession with intent to distribute more than five grams of marijuana, questions put to a witness by the trial judge with respect to the weight of packages of marijuana seized from defendant and his automobile did not constitute prejudicial error.

3. **Criminal Law § 169— evidence of marijuana residue — subsequent introduction of similar testimony**

Admission into evidence of testimony concerning marijuana residue taken from a trash can in defendant's motel room did not constitute prejudicial error where possession of the residue was not the basis of the charge against defendant and where defendant elicited evidence of the same import upon cross-examination of the witness.

4. **Criminal Law § 99— questions by trial court — clarification of testimony**

Questions by the trial judge put to a witness during cross-examination regarding marijuana residue found by the witness in defendant's room were for the purpose of clarifying the witness's testimony and did not constitute an expression of opinion on the evidence.

APPEAL by defendant from *McConnell, Judge,* 11 September 1972 Session of Superior Court held in ROWAN County.

Defendant, Eddie King Tennyson, was charged in a bill of indictment, proper in form, with felonious possession with intent to distribute more than five grams of marijuana in violation of the North Carolina Controlled Substances Act. Upon defendant's plea of not guilty, the State offered evidence tending to show that on 9 June 1972 Officer J. P. Davis of the Salisbury Police Department stopped an automobile owned and operated by defendant at the intersection of Horah Street and Concord Road in the City of Salisbury. Within "just moments" or "two minutes" Officer C. W. Whitman and S.B.I. agent Richardson, armed with a search warrant for the defendant and his auto-

mobile, arrived at the scene. After Agent Richardson read the search warrant to defendant, Officer Whitman went to the automobile and found a small manila envelope containing marijuana on the seat. Whitman found another envelope containing marijuana on top of defendant's shoe; and when Officer Whitman reached down to recover this envelope, another envelope containing marijuana "fell out of the pants leg." The three envelopes, admitted into evidence as exhibits 3, 4 and 5, contained more than five grams of marijuana.

Defendant testified and denied possession of the marijuana. Defendant offered the testimony of a passenger in the automobile that the marijuana belonged to him.

Defendant was found guilty as charged and from a judgment imposing a prison sentence of 2-5 years, which sentence was suspended and defendant placed on probation, defendant appealed.

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

Robert M. Davis for defendant appellant.

HEDRICK, Judge.

[1] Based on assignments of error 1 and 3 (exceptions 1 and 3) defendant contends the court erred in admitting into evidence, over defendant's objection, the marijuana (State's exhibits 3, 4 and 5) found as a result of the search of defendant and his automobile.

These assignments of error have no merit. The record discloses that the police officers searched defendant and his automobile and seized exhibits 3, 4 and 5 by authority of a duly issued and executed search warrant.

[2] Defendant assigns as error: "[t]he action of the Court in asking the weight of the three envelopes and then allowing the Solicitor to ask the witness to answer that the total exceeded five grams."

A trial judge may ask questions of a witness to clarify his testimony. *State v. Freeman,* 280 N.C. 622, 187 S.E. 2d 59 (1972). The record reveals that the witness first testified as to the weight of two of the three packages of marijuana. The trial judge merely asked the witness to give the weight of each

of the three packages. Thereafter, the witness was permitted to testify as to the total weight of the three packages. Obviously, the purpose of the court's questions was to clarify testimony of the officer as to the weight of each package of marijuana. No prejudicial error is shown.

[3] By assignments of error 4 and 5, based on exceptions 4 and 5, defendant contends the court erred in allowing into evidence "marijuana residue" taken from a trash can in defendant's motel room and in refusing to strike testimony that "marijuana residue was found in a trash can" in defendant's motel room.

Assignment of error number 4 has no merit since there is nothing in the record to indicate that the "marijuana residue" was offered or admitted into evidence. While the record indicates that defendant duly excepted to the court's refusal to strike the testimony complained of in assignment of error number 5, it is not clear that defendant objected to the question eliciting the testimony. An objection does appear in the record immediately prior to the testimony complained of, but the exception noted therein (exception 4) purportedly is the basis of another assignment of error. A motion to strike testimony to which no objection was timely raised, is addressed to the sound discretion of the trial judge and his ruling thereon will not be reviewed on appeal absent a showing of abuse of discretion. *State v. Hunt,* 223 N.C. 173, 25 S.E. 2d 598 (1943). We do not perceive that the testimony complained of was prejudicial to defendant or that the trial court abused its discretion in denying the motion since possession of the marijuana residue was not the basis of the charge against defendant. Furthermore, the admission of the testimony could not have been prejudicial since defendant elicited evidence of the same import by his extensive cross-examination of the witness. *State v. Colson,* 262 N.C. 506, 138 S.E. 2d 121 (1964); 1 Strong, N. C. Index 2d, Appeal and Error, § 48. Assignments of error 4 and 5 are overruled.

[4] By his sixth assignment of error, defendant contends the court expressed an opinion on the evidence in violation of the provisions of G.S. 1-180 when it asked the witness, "Don't you know marijuana?" and "What is it, then?"

These questions were asked by the judge during defendant's extensive cross-examination of the officer regarding the material described as "marijuana residue" which he found in

defendant's motel room. The questions clearly were for the purpose of clarifying the witness's testimony and did not amount to an expression of opinion on the evidence by the judge. Assignment of error number 6 is not sustained.

Next defendant contends the court erred in admitting into evidence, over his objection, the search warrant and affidavit used by the officers to search the defendant and his automobile. Defendant and the State stipulated that it was not necessary that the search warrant and affidavit be included as part of the record on appeal. Prejudicial error, therefore, is not made to appear. *State v. Culbertson,* 6 N.C. App. 327, 170 S.E. 2d 125 (1969).

Defendant contends the court erred in denying his motions for judgment as of nonsuit. There was sufficient competent evidence to require submission of the case to the jury and to support the verdict.

Finally, defendant contends the court erred in its instructions to the jury. After carefully examining each exception upon which these assignments of error are based, we find no prejudicial error in the charge.

Defendant had a fair trial free from prejudicial error.

No error.

Judges CAMPBELL and MORRIS concur.

STATE OF NORTH CAROLINA v. TERRY WOOD

No. 7318SC97

(Filed 14 February 1973)

1. Criminal Law § 30— nolle prosequi with leave as to co-conspirator — effect on case against defendant

A *nolle prosequi* with leave is not tantamount to an acquittal but allows the solicitor to have the case restored for trial without additional order; therefore, entry of *nolle prosequi* with leave against the alleged co-conspirator in a prosecution charging defendant with conspiracy to violate the North Carolina Controlled Substances Act did not require dismissal of the indictment against defendant.

2. Criminal Law § 114— jury charge — expression of opinion — prejudicial error

In a prosecution for conspiracy to violate the North Carolina Controlled Substances Act, the trial court committed prejudicial error in violation of G.S. 1-180 when it inadvertently expressed an opinion that evidence offered by the State was sufficient to show the existence of a conspiracy.

APPEAL by defendant from *Seay, Judge,* 4 September 1972 Session of Superior Court held in GUILFORD County.

Defendant, Terry Wood, was charged in a bill of indictment, proper in form, with feloniously conspiring with William Frank Clark to violate the North Carolina Controlled Substances Act.

Defendant, Terry Wood, was placed on trial alone on 4 September 1972; and upon his plea of not guilty, the State offered evidence tending to show the following:

On 22 May 1972, at about 9:00 p.m., L. R. Mylan, an undercover officer with the vice division of the Greensboro Police Department, met William Frank Clark (Clark) in the Jokers Three parking lot on Tate Street in the City of Greensboro. The officer knew Clark from having purchased heroin from him a few days before. On this occasion, Officer Mylan gave Clark "$75.00 for the purchase of fifteen bags of heroin." Clark did not have the heroin on him and, "[h]e walked up to the front of my vehicle to . . . some type of van automobile, and he gave the money to Mr. Wood." At about 11:00 p.m. that evening, Clark came to the automobile and gave Officer Mylan "four tinfoil envelopes" containing the narcotic drug heroin (State's Exhibit 1) and $35.00. About five minutes later, defendant came to the automobile where Officer Mylan and Clark were sitting and the officer asked defendant why the price of heroin had increased and why he was able to purchase only four bags. Officer Mylan testified:

> "I asked Mr. Wood why this unknown substance had cost so much, and he stated to me that he had to go down into the black community here in Greensboro to purchase it, and while he was at this location—while Mr. Wood was at this location to make the purchase, a street pusher had come into the location and objected to him buying fifteen bags of heroin and that the supplier would only sell him four or five bags of heroin."

When defendant came to the automobile, he had another tinfoil bag which he offered to sell to Clark and the officer. They both refused. Officer Mylan testified:

> "I was told by Mr. Wood and Mr. Clark both that they would have a half—this is referring to fifteen bags of heroin, the next night which would be the 23rd of May. After this, I left the area."

Defendant testified, denying the existence of any conspiracy and denying participation in the sale of the narcotic drug heroin to Officer Mylan.

Defendant was found guilty as charged and from a judgment imposing an active prison sentence of 3-5 years, he appealed.

Attorney General Robert Morgan and Assistant Attorney General R. S. Weathers for the State.

Smith, Moore, Smith, Schell & Hunter by Jack W. Floyd for defendant appellant.

HEDRICK, Judge.

[1] Defendant assigns as error the denial of his motion to dismiss the bill of indictment made before plea and renewed at the close of the State's evidence.

In his brief defendant asserts:

> "Entry of a *nol pros* against William Frank Clark, the only co-conspirator named in the bill of indictment, requires dismissal of this case."

The record reveals that before the present case was called for trial, "the State took a nol pros with leave" in the case charging Clark with conspiring with defendant to violate the North Carolina Controlled Substances Act, and that Clark was allowed to plead guilty to the bill of indictment charging him with the sale of heroin to Officer L. R. Mylan on 22 May 1972 in the Jokers Three parking lot.

Defendant contends the "nol pros with leave" of the case against the alleged co-conspirator was tantamount to an acquittal of the co-conspirator and required a dismissal of the indictment against defendant Wood. We do not agree.

In *State v. Clayton,* 251 N.C. 261, 268, 111 S.E. 2d 299, 304 (1959) we find the following:

> "'In *S. v. Thornton,* 35 N.C. 256 (257-258): "A *nolle prosequi* in criminal proceedings, is nothing but a declaration, on the part of the prosecuting officer, that he will not at that time prosecute the suit further. Its effect is to put the defendant without day—that is, he is discharged and permitted to leave the court, without entering into a recognizance to appear at any other time—(citation omitted); but it does not operate as an acquittal, for he may afterwards be again indicted for the same offense, or fresh process may be issued against him upon the same indictment, and he be tried upon it. (citations omitted)"'"

After a nolle prosequi has been taken, the solicitor may replace the cause on the docket only with consent of the court; whereas, a nolle prosequi with leave implies consent of the court, and the solicitor may have the case restored for trial without additional order. 2 Strong, N. C. Index 2d, Criminal Law, § 30. This assignment of error is overruled.

Defendant assigns as error the denial of his motions for judgment as of nonsuit.

There was sufficient competent evidence to require submission of this case to the jury.

[2] Defendant excepted to and assigns as error the following portion of the court's instructions to the jury:

> "Now, members of the jury, the evidence supporting a conspiracy is generally circumstantial, and it is not necessary to prove any direct act or even any meeting of the conspirators as the facts of the conspiracy may be connected from the collateral circumstances in the case. It is for the Court to say whether or not such connection has been sufficiently shown. When this is done, the doctrine applies that each party is agent for all the others so that an act is done by one in the furtherance of an unlawful design is the act of all, and a declaration made by one at the time is evidence against all."

Defendant contends the judge inadvertently expressed an opinion that evidence offered by the State was sufficient to show the existence of a conspiracy. We agree.

While the judge in passing on a motion for judgment as of nonsuit necessarily determines whether the evidence is sufficient to require submission of the case to the jury, by enunciating this rule in the challenged instruction the trial judge inadvertently expressed an opinion, in violation of G.S. 1-180, that the State's evidence was sufficient to show the existence of a conspiracy.

We do not discuss defendant's other assignments of error since they are unlikely to occur on retrial.

For prejudicial error in the charge, defendant is entitled to a

New trial.

Judges CAMPBELL and MORRIS concur.

STATE OF NORTH CAROLINA v. DAN L. HENDRICKSON AND ANN SAYERS HENDRICKSON

No. 7321SC92

(Filed 14 February 1973)

Constitutional Law § 31— refusal to require disclosure of informant's identity

In a trial for possession of marijuana with intent to distribute, the trial court did not err in refusing to require the State to disclose the identity of an informant who told the police that defendants would receive packages containing marijuana mailed to them at a certain post office, where defendants did not contend that they did not know the contents of the packages, and defendants failed to show how such disclosure would be helpful or relevant to their defense.

APPEAL by defendant from *Collier, Judge,* 7 August 1972 Session of Superior Court held in FORSYTH County.

Defendants were charged separately in bills of indictment with the felony of possession of more than five grams of marijuana with intent to distribute the same.

The State's evidence tended to show the following: At approximately 10:50 a.m. Deputy E. P. Oldham, of the Narcotics Division of the Forsyth County Sheriff's Office, received a telephone call from a confidential informant. As a consequence of the information received, Deputy Oldham and three other offi-

cers went immediately to Walkertown and began surveillance of the Walkertown Post Office. At approximatetly 11:57 a.m. the defendants, Ann and Dan Hendrickson, drove into the parking lot of the Post Office. They were riding in a 1960 green pickup truck with a green canvas covering and Alabama license tags. Both defendants went into the Post Office and came out carrying four or five packages. Defendants then went into the Northwestern Bank before returning to their truck. The male defendant deposited some package wrappings in a trash can and they drove away. As defendants drove into the parking lot of a grocery store a short distance from the Post Office, the officers drove in beside them and advised defendants they were under arrest for possession of marijuana. A search of the female defendant's pocketbook revealed an aluminum foil packet containing vegetable matter which was later identified as marijuana.

Prior to the admission of the above evidence defendant moved that the identity of the confidential informant be revealed, or, in the alternative, that the evidence be suppressed. A *voir dire* was conducted in the absence of the jury and the following information was elicited from the officer. The officer had previously relied upon the informant and found his information to be correct. He had made approximately two arrests previously on information received from this same informant. The officer made no independent investigation of the facts prior to arresting defendants because he did not have time.

The testimony on *voir dire* further disclosed that the informant knew the names of defendants, the description of the vehicle they would be riding in, the fact that the vehicle had an Alabama license, the approximate time they would arrive at the Walkertown Post Office, and the manner in which the package would be addressed. The wrapper was found in defendant's truck bearing an address exactly as the informant had described.

No statements attributed to defendants were offered in evidence by the State, and defendants offered no evidence. Their renewed motion to suppress the evidence or reveal the identity of the informant was denied.

The jury found each defendant guilty as charged.

Attorney General Morgan, by Associate Attorney Poole, for the State.

Hamilton C. Horton, Jr., for defendants.

BROCK, Judge.

Defendants assign as error the court's refusal to require disclosure of the informant's identity, or, in the alternative, its refusal to suppress the evidence obtained from the search incident to the arrest. Defendants contend that either the State should reveal the identity of its informant or the evidence should be suppressed.

Defendants argue that the disclosure of the informant's identity was an essential prerequisite to the preparation of their defense. Defendant's counsel questions how the informant knew in specific detail the size and precise address of the marijuana package, and suggests that the defendants were "framed" by the unidentified informant. However, this contention is mere supposition which finds no support in the evidence.

The general rule concerning disclosure of the identity of an informant is as follows:

> "The privilege of nondisclosure must give way and disclosure of the identity of an informer is required where disclosure is essential or relevant (material) and helpful to the defense of an accused, or lessens the risk of false testimony, or is necessary to secure useful testimony, or is essential to a fair determination of the cause. Contrariwise, the privilege of nondisclosure will be upheld where disclosure of the identity of an informer does not aid defendant in regard to his defense, and is not essential nor relevant (material) for that purposse or for the fair disposition of the case. Important factors in this connection are that the accused admits or does deny guilt, or makes no defense on the merits or that there is independent evidence of accused's guilt." 76 A.L.R. 2d, at p. 282.

See also Roviaro v. United States, 353 U.S. 53, 1 L.Ed. 2d 639, 77 S.Ct. 623; *State v. Moore,* 275 N.C. 141, 166 S.E. 2d 53. This rule also is cited with apparent approval in *State v. Fletcher* and *State v. St. Arnold,* 279 N.C. 85, 181 S.E. 2d 405.

Defendants did not contend to the officers at the time of their arrest that they did not know what was in the package, nor did they make such a contention at trial. Their plea of not guilty denies every element of the offense charged, but it does not of itself suggest that defendants received the package without knowing its contents. Defendants have failed to show how

the disclosure of the informant's identity would be helpful or relevant to their defense. Therefore, they have failed to show in what way they were prejudiced by the refusal of the trial court to require disclosure of the informant's identity.

No error.

Judges CAMPBELL and GRAHAM concur.

CHARLIE H. MARTIN, EMPLOYEE PLAINTIFF v. BAHNSON SERVICE COMPANY, EMPLOYER, HARTFORD ACCIDENT AND INDEMNITY CO., CARRIER, DEFENDANTS

No. 7321IC21

(Filed 14 February 1973)

Master and Servant § 72— workmen's compensation — permanent and total disability from burns on legs

The evidence was sufficient to support the Industrial Commission's determination that plaintiff is totally and permanently disabled by reason of extensive burns sustained on both legs when he set fire to his trousers while using an electric welder's torch.

APPEAL by defendants from an order of the Industrial Commission entered 1 May 1972.

On 1 February 1971, plaintiff sustained injury by accident in the course of and arising out of his employment. Defendants admitted liability and made payments for temporary total disability.

On 1 May 1972, the Commission entered an opinion and award ordering the payment of compensation for permanent total disability as a result of the accident. Defendants appealed.

No counsel for plaintiff appellee.

Hudson, Petree, Stockton, Stockton & Robinson by W. F. Maready and James H. Kelly, Jr., for defendant appellants.

VAUGHN, Judge.

The question is whether the Commission erred in finding and concluding that plaintiff sustained total and permanent disability as a result of the accident.

At the time of the accident, plaintiff was approximately 68 years of age and had suffered from emphysema for six or seven years. Several years prior to the accident, plaintiff hurt his knee while working. He missed one or two days of work because of the injury to his knee but did not receive any compensation for the injury to his knee.

In the accident which is the subject of this claim, plaintiff, a welder using an electric torch, set fire to his trousers, causing extensive third degree burns on both legs. He was first hospitalized in Williamston and was later transferred to Forsyth Memorial Hospital where he was seen by a surgeon. The surgeon testified, in part, as follows:

> "When I first saw Mr. Martin about a week after his injury, he was quite ill, had third degree burns, a great deal of edema and swelling of both legs. He was suffering from mental confusion, some difficulty in breathing, and rather severe abdominal distention. The third degree burns on his legs were just below his knees to his ankles. There were no other burns on other parts of the body. His treatment consisted of intravenous fluids, multiple enemas, antibiotics, elevation of the extremities, multiple surgical debridements, removing dead skin, and cleaning up the wound. Mr. Martin was a patient from February 10, 1971, and was discharged from my service on May 10, 1971. He did not undergo plastic surgery. Mr. Martin reached his maximum improvement on the date of discharge. At the time of discharge Mr. Martin had received two skin grafts and we had a great deal of trouble with the swelling of his legs. Without proper elevation and use of the proper supportive dressings, the legs would swell in the grafts and the skin grafts would blister and ulcerate. At the time of his discharge, I did not feel that he would be able to return to work."

The surgeon rated plaintiff as being 100% disabled. He testified that standing for long periods could cause swelling and ulceration of plaintiff's legs. On cross-examination he stated that when he referred to plaintiff as being 100% disabled, he was talking about his total medical picture and that the same injury would not have been as disabling to a 21 year old man; that he would be hard pressed to have an opinion about the degree of disability simply from the burns.

Plaintiff testified that prior to the accident which caused the injury to his legs he had worked every day for the last seven years of his employment with Bahnson Service Company. Because of the burns to his legs, he cannot stand or move around for more than an hour at a time.

We hold that this evidence is sufficient to support the Commission's award declaring that, by reason of the accident giving rise to the claim, plaintiff is totally and permanently disabled within the meaning of the Workmen's Compensation Act. See *Schrum v. Upholstering Co.*, 214 N.C. 353, 199 S.E. 385; *Mabe v. Granite Corp.*, 15 N.C. App. 253, 189 S.E. 2d 804.

Affirmed.

Judges BRITT and PARKER concur.

STATE OF NORTH CAROLINA v. JOHN McRAE SYKES

No. 7319SC171

(Filed 14 February 1973)

Automobiles §§ 3, 127— driving while license was revoked — drunken driving — sufficiency of evidence

The evidence was sufficient to support jury verdicts finding defendant guilty of driving while his license was permanently revoked and driving under the influence of intoxicants after he had been twice previously convicted of the same offense.

APPEAL by defendant from *McConnell, Judge*, 23 October 1972 Session of Superior Court held in MONTGOMERY County.

Defendant was charged with (1) driving a motor vehicle upon the highways of the State while his operator's license was permanently revoked and (2) driving a vehicle on the highways of the State while under the influence of intoxicating liquor after he had been twice previously convicted of the same offense. In each case the jury found him guilty as charged. From judgments imposing sentences, defendant appealed.

Attorney General Robert Morgan by Associate Attorney Howard A. Kramer for the State.

Bell, Ogburn & Redding by Deane F. Bell for defendant appellant.

PARKER, Judge.

The only exceptions and assignments of error are directed to denial of defendant's motions for dismissal and for judgment as of nonsuit made at the close of the State's evidence and renewed at the close of all of the evidence. There was substantial evidence to support the jury's findings that defendant was guilty of all essential elements of the offenses charged. After careful review of the entire record we find

No error.

Judges BRITT and VAUGHN concur.

BOYD S. DICKENS, ADMINISTRATOR OF THE ESTATE OF SHIRLEY MARIE DICKENS v. DR. C. D. EVERHART

No. 7317SC10

(Filed 14 February 1973)

1. **Evidence § 48— failure to find witness an expert — exclusion of testimony proper**

Where defendant in a malpractice case did not admit that plaintiff's witness was an expert and plaintiff did not request a finding of his witness's qualification, the trial court did not err in failing to declare the witness an expert, and the exclusion of his testimony as an expert is not presented for review on appeal.

2. **Trial § 36— statement of contentions of parties — claim of unequal stress**

Though the trial court's statement of defendant's contentions may have required more lines than the statement of plaintiff's contentions, the court's instructions as a whole did not give unequal stress to the contentions of either party in violation of Rule 51(a).

APPEAL by plaintiff from *Crissman, Judge*, 5 June 1972 Session of SURRY Superior Court.

This is a malpractice action brought by plaintiff administrator to recover for injuries to and death of his intestate, a 17 year old girl, defendant being a medical doctor practicing his profession in Mt. Airy and Surry County. A jury answered the issues of negligence in favor of defendant and from judgment allowing plaintiff no recovery, plaintiff appealed.

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

Folger & Folger by Fred Folger, Jr., for defendant appellee.

BRITT, Judge.

[1] By the first assignment of error argued in his brief, plaintiff contends that the trial court erred in failing to find that plaintiff's witness, Dr. Toyama, was an expert witness familiar with accepted medical procedures and failing to allow this witness to express his opinion "as to accepted medical practice in this case."

The alleged malpractice of defendant occurred in October 1964. Dr. Toyama testified: He completed medical school at Howard University, Washington, D. C., in 1963. He interned in Youngstown, Ohio, from 1963 to 1964 after which he moved to California where he received training in pathology from 1964 to 1968. He practiced pathology in California for one year then moved to Winston-Salem where he practiced that specialty from 1969 to April of 1972. At the time of trial he was practicing pathology in Galax, Virginia. He is licensed to practice medicine in North Carolina, California and Virginia. In an attempt to show what was accepted medical practice in many communities "including the community of Mt. Airy" on 3 October 1964, plaintiff posed a hypothetical question to Dr. Toyama. The trial court sustained defendant's objection to the question, stating (for the record): "My chief reason for sustaining the objection is that this man was either a medical student or an intern in Ohio or somewhere else in 1964. In my view it is impossible for him to know what is the customary practice in this case at that time."

We find it unnecessary to pass upon the reasons given by the trial court in sustaining the objection as we think the court's action should be upheld on at least one other well established ground. The record discloses that while plaintiff questioned Dr. Toyama at length about his medical training and experience, there was no admission by defendant that Dr. Toyama was a medical expert and plaintiff at no time asked the court to find that he was a medical expert. In Stansbury N. C. Evidence, 2d ed., § 133, p. 318, we find: " * * * On objection being made, the party offering a witness as an expert should request a finding of his qualification; if there is no such

request, and no finding or admission that the witness is qualified, the exclusion of his testimony will not be reviewed on appeal." The quoted statement is amply supported by authorities from this jurisdiction. We hold that in the absence of a request to do so, the court did not err in failing to declare Dr. Toyama an expert witness and the exclusion of his testimony as an expert is not presented for review.

[2] Plaintiff contends next that the trial court erred in its jury instructions in that it overemphasized the contentions of defendant, plaintiff arguing that the court "devoted more than twice as many lines" to its statement of defendant's contentions as it did in stating plaintiff's contentions. It is not required that the statement of contentions be of equal length. *Durham v. Realty Company,* 270 N.C. 631, 155 S.E. 2d 231 (1967) ; *Wheeler v. Denton,* 9 N.C. App. 167, 175 S.E. 2d 769 (1970). After a careful review of the challenged instructions, we conclude that the court did not give unequal stress to the contentions of either party in violation of G.S. 1A-1, Rule 51(a). We further note that near the end of the charge, the court inquired if there is "anything else" and counsel for both parties answered in the negative.

Plaintiff assigns as error other portions of, and alleged deficiencies in, the jury charge. Suffice to say, a careful review of the charge, with particular reference to the questions raised by plaintiff, impels us to conclude that the charge is free from prejudicial error.

We have considered the other assignments of error argued in plaintiff's brief but finding them without merit, they too are overruled.

No error.

Judges PARKER and VAUGHN concur.

IN THE MATTER OF THE ESTATE OF ALVIN J. GODWIN, JR., (DECEASED)

No. 7319SC174

(Filed 14 February 1973)

Executors and Administrators § 23— denial of widow's year's allowance — absence of notice of appeal to superior court — purported appeal to district court — dismissal in superior court

The superior court properly dismissed an appeal from a magistrate's denial of a widow's application for a year's allowance on the ground that there had been no notice of appeal to the superior court, a purported appeal to the district court having previously been dismissed on the ground that the district court had no jurisdiction in the matter.

Judges CAMPBELL and MORRIS concur in the result.

APPEAL by petitioner, Mildred B. Godwin, from *McConnell, Judge,* 20 November 1972 Session of Superior Court held in ROWAN County.

The record before us consists of the following:

(1) An application for the assignment of a widow's year's allowance signed by Mildred B. Godwin, allegedly the widow of Alvin J. Godwin, Jr.;

(2) A judgment of a magistrate in Rowan County dated 12 April 1972 as follows:

"JUDGMENT IN ACTION TO RECOVER MONEY OR PERSONAL PROPERTY

This small claim action was tried this date before the undersigned upon the cause stated in the complaint. Due and timely notice of the nature of the action and the time and place of trial were given the defendant, as is shown in the record. THE COURT FINDS:

That the plaintiff has failed to prove his case by the greater weight of the evidence.

IT IS, THEREFORE, ADJUDGED That the plaintiff recover nothing of the defendant and that this action be and is hereby DISMISSED.

This 12 day of April, 1972.

s/ MARVIN V. (illegible)
Magistrate"

(3) An appeal entry signed by the magistrate as follows:

"Upon rendition of the judgment on the reverse side hereof, the Plaintiff gave oral notice in open court of appeal for trial de novo before a district judge."

(4) An order signed by District Judge Walker on 6 June 1972 in pertinent part as follows:

"[I]t appearing to the Court that this is an application for widow's year's allowance * * *

And, it further appearing to the Court that the District Courts do not have jurisdiction to hear and determine this type of action.

It is, therefore, ORDERED, ADJUDGED and DECREED that the appeal entered in this cause be and the same is hereby dismissed."

(5) An order of Superior Court Judge McConnell, dated 20 November 1972, dismissing the appeal because "there has been no notice of appeal . . . to the Superior Court. . . ."

From Judge McConnell's order of dismissal, petitioner appealed to this Court.

Carlton & Rhodes by Graham M. Carlton and Gary C. Rhodes for petitioner appellant.

No counsel contra.

HEDRICK, Judge.

G.S. 1-282 in pertinent part provides:

"The appellant shall cause to be prepared a concise statement of the case. . . . A copy of this statement shall be served on the respondent *within fifteen days from the entry of the appeal taken.* . . . [T]he trial judge may . . . enter an order or successive orders extending the time for service of the case on appeal. . . . *The initial order of extension must be entered prior to expiration of the statutory time for service of the case on appeal.* . . ." (Emphasis added.)

In *Roberts v. Stewart* and *Newton v. Stewart,* 3 N.C. App. 120, 164 S.E. 2d 58 (1968), cert. denied, 275 N.C. 137, this Court said: "In the absence of a case on appeal served within the time

fixed by the statute, or by valid enlargement, the appellate court will review only the record proper and determine whether errors of law are disclosed on the face thereof." There is nothing in the record to indicate that "the case on appeal" has been served as provided by G.S. 1-282. Therefore, our review is limited to determining whether error appears on the face of the record proper.

From the record before us we are unable to determine when or where the application for the widow's year's allowance was filed. The judgment of the magistrate and the appeal to the district court noted thereon bear no relation to the application. Assuming, however, that the judgment was a denial of the widow's application for the allotment of a year's allowance, her appeal therefrom would have been to the superior court as provided in G.S. 30-23.

No such appeal is shown in the record and the order dismissing the appeal is

Affirmed.

Judges CAMPBELL and MORRIS concur in the result.

STATE OF NORTH CAROLINA v. JOSEPH A. FERGUSON

No. 7323SC89

(Filed 14 February 1973)

1. **Homicide § 21— first degree murder — death by shooting — sufficiency of evidence**

There was sufficient evidence to withstand nonsuit in a first degree murder case where the evidence tended to show that defendant and others approached a service station to inquire about an earlier shooting, that an argument ensued whereupon deceased left the station to go to his car, that the area outside the station was well-lighted, that one witness saw defendant point his shotgun at deceased when it was heard to fire, that another witness saw the flash of the shotgun and saw deceased fall, and that defendant stated that one shot had been fired and that he, defendant, fired it.

2. **Criminal Law § 42— identification of shotgun in possession of defendant — admissibility of shotgun at trial**

The trial court properly allowed a shotgun into evidence where there was evidence tending to show that the shotgun seen in defend-

ant's possession at the scene of the shooting was discarded at a particular location after the shooting and that a shotgun was found in that location by police officers acting on information supplied to them and where a witness to the shooting identified the shotgun at the trial as having been the gun in defendant's possession at the shooting.

APPEAL by defendant from *Lupton, Judge,* 26 June 1972 Session of Superior Court held in WILKES County.

Defendant was indicted for the first degree murder of Tony Curry. The State announced in open court that a verdict of murder in the first degree would not be sought. Defendant entered a plea of not guilty and the jury returned a verdict of guilty of voluntary manslaughter. He was sentenced to serve not less than ten nor more than fifteen years imprisonment, with credit given for time served awaiting trial.

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

Chambers, Stein, Ferguson & Lanning by Charles L. Becton; Porter, Conner & Winslow by Kurt B. Conner, attorneys for defendant appellant.

VAUGHN, Judge.

Defendant assigns as error the denial of his motions for judgment of nonsuit made at the close of the State's evidence and at the close of all the evidence. Because defendant offered evidence, the motion for nonsuit at the close of the State's evidence is waived, and the only question raised by this assignment of error concerns the denial of the motion made at the close of all the evidence and requires that we act in light of all of the evidence presented. All the evidence will be taken in the light most favorable to the State. G.S. 15-173; *State v. Robbins,* 275 N.C. 537, 169 S.E. 2d 858.

[1] We hold that there was sufficient evidence to warrant submitting this case to the jury. There was evidence indicating that on 3 July 1971 a car containing several people had been shot at by a person or persons unknown near North Wilkesboro. A group of people, including the defendant, drove to the Service Distributors Service Station, located on Route 421 near North Wilkesboro, in order to learn more about the shooting incident, and they arrived at the service station early in the morning of 4 July 1971. A shotgun was seen in the possession of defendant while he was at the service station. A shotgun shell box had

earlier been seen in the vehicle in which defendant arrived at the station. Several of defendant's companions entered the service station and Tony Curry and two others were questioned about the earlier shooting incident. An argument ensued and Curry left the station to go to his car. The area outside the station was well-lighted. One witness observed defendant pointing the shotgun in the direction of Curry when it was heard to fire. Another witness saw the flash of the shotgun and saw Curry fall. A doctor testified that Curry died of injuries inflicted by shotgun wounds. Curry was not armed. Defendant later said that one shot had been fired and that he, defendant, fired it. Any contradictions and discrepancies in the evidence are matters for the jury and do not warrant nonsuit. *State v. Bolin,* 281 N.C. 415, 189 S.E. 2d 235; 2 Strong, N. C. Index 2d, Criminal Law, § 104.

[2] Defendant's only other assignment of error is that the trial court erred in admitting a shotgun into evidence over defendant's objection. Defendant argues that this exhibit was not properly identified. It is proper to introduce weapons as evidence where there is evidence tending to show that they were used in the commission of a crime. Stansbury, N. C. Evidence 2d, § 118. In the present case, there was evidence tending to show that the shotgun seen in defendant's possession at the scene of the shooting was discarded at a particular location after the shooting and that a shotgun was found in that location by police officers acting on information supplied to them. A witness to the shooting stated at the trial, without objection, that, "[t]he gun that I have just examined here, and been marked as State's Exhibit No. 1, is the gun that [defendant] had." We hold that it was not error to admit the shotgun into evidence.

No error.

Judges MORRIS and HEDRICK concur.

IN THE MATTER OF: RICHARD STANLEY, AGE 15

No. 7319DC118

(Filed 14 February 1973)

Infants § 10; Constitutional Law § 32— juvenile delinquency hearing — parents' right to assigned counsel

Adjudication of delinquency must be set aside where the record shows only that "the parties know of their right to counsel and of the child's right, if indigent, to assigned counsel," but the record fails to show that the juvenile's parents were advised of their right, if indigent, to appointment of counsel or that they waived that right. G.S. 7A-285.

APPEAL by respondent from *Sapp, Judge,* 13 November 1972 Session of District Court held in RANDOLPH County.

In a petition filed in district court, respondent, Richard Stanley, a juvenile, was alleged to be:

> ". . . a delinquent child as defined by G.S. 7A-278(2) in that at and in the county named above and on or about the 15th day of October, 1972, the child did unlawfully and wilfully assault Somya D. Williams, Age, 10, with a pellet gun, a deadly weapon by shooting her in the foot."

In a hearing on the petition conducted by Judge Sapp, the juvenile and his parents were in attendance. Thereafter, Judge Sapp made the following pertinent findings:

> "That Richard Stanley did unlawfully and wilfully assault Somya D. Williams, with a pellet gun by shooting her in the foot."
>
> "The court finds said child or children to be delinquent within the juvenile jurisdiction of the court as defined by G.S. 7A-278(2)."

From a judgment placing respondent on probation for a period of 12 months "under the usual terms of probation and the following specific terms. . . .", respondent appealed.

Attorney General Robert Morgan and Associate Attorney John M. Silverstein for the State.

Ottway Burton for respondent appellant.

HEDRICK, Judge.

Respondent's first assignment of error presents the question of whether the trial judge properly apprised the juvenile and his parents of their right to counsel.

Apparently, no record of the proceedings before Judge Sapp was made, nor did the judge summarize the evidence as provided by Rule 19(g) of the Rules of Practice in the Court of Appeals. The record before us contains only the summons, juvenile petition, juvenile adjudication order and a narrative statement of the proceedings apparently prepared by respondent's attorney from the recollections of one of the witnesses at the hearing.

In juvenile hearings, "the judge shall . . . protect the rights of the child *and his parents* in order to assure due process of law, including . . . *the right to counsel.* . . ." (Emphasis added.) G.S. 7A-285. While the "juvenile adjudication order" entered in this cause recites "that the parties know of their right to counsel and of the child's right, if indigent, to assigned counsel in cases where the child may be committed to a State institution. . . .", nothing in the record shows that respondent's parents were advised by the judge of their right, if indigent, to appointment of counsel or that they waived that right. In *In re Garcia,* 9 N.C. App. 691, 693-94, 177 S.E. 2d 461, 463 (1970), Judge Campbell, speaking to the identical point here raised, said:

> "In the present situation, there is a finding in the summary filed by the trial judge to the effect that the juvenile's mother knew or had been informed that she could have an attorney represent her son if she so desired. But there is nothing to show that she was advised of her rights to have an attorney appointed for her if she was unable to afford one herself or that she knowingly waived such right. She was not 'confronted with the need for specific consideration of whether they did or did not choose to waive the right' to counsel. This is required by *Gault,* [*In re Gault,* 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed. 2d 527 (1967)] and the language of the General Statutes of North Carolina demands no less."

Because the record fails to disclose that respondent's parents were apprised of their right, if indigent, to appointment of

counsel, or that they waived that right, the order appealed from is

Reversed.

Judges CAMPBELL and MORRIS concur.

STATE OF NORTH CAROLINA v. WILLARD BUCK MITCHUM

No. 7320SC85

(Filed 14 February 1973)

Homicide § 26— second degree murder — instructions

The trial judge's charge to the jury in a second degree murder case contained no improper expression of opinion and fully and correctly defined second degree murder and all of its constituent elements.

APPEAL by defendant from *Webb, Judge,* 4 September 1972 Session of Superior Court held in RICHMOND County.

Defendant, Willard Buck Mitchum, was charged in an indictment, proper in form, with the murder of Betty Thomas Shaw. Upon defendant's plea of not guilty, the State offered evidence tending to show that on 24 May 1972, James Martin Hough and the deceased Betty Thomas Shaw, returned from a date to the home of deceased at about 11:30 p.m. Upon entering the home, "Mr. Mitchum, the defendant, came from the living room area and started cutting the deceased. He slit the left side of her neck and she fell to the floor and he started stabbing her." An autopsy disclosed 21 stab wounds in deceased's body and indicated that death resulted from massive internal hemorrhage caused by penetration of the heart and lungs. Defendant stated to Hough, "You son of a bitch, she's my woman." Then he cut Hough with a knife.

Defendant testified that he loved the deceased and had been dating her for between one and two years. On 24 May 1972, he received a telephone call from the deceased breaking their date for that night because "[s]he said she was not feeling well." Defendant telephoned the home of deceased at 10:00 p.m. When she did not answer, he became concerned for her welfare and asked a friend to drive him to her home. Defendant testified:

"I was sitting on the porch when Mrs. Shaw and Mr. Hough drove up. I told Mrs. Shaw that I wanted to talk

with her and that after I talked with her I would get a cab and leave. She invited me in. Mr. Hough went in also. We went into the kitchen area. I was going to get a beer and the next thing I knew Mr. Hough and I were fighting and tussling. Mrs. Shaw tried to interfere and she got cut in the neck. I ran to her and grabbed her and tried to see if she would talk to me. Mr. Hough was right in the middle of the kitchen."

Defendant stated:

"I can't explain how Betty Thomas Shaw got stabbed 21 times. When I left her and Mr. Hough she was still on the floor. The only thing I noticed is that she was cut in the neck."

From a judgment imposing a prison sentence of thirty years entered on a verdict of second degree murder, defendant appealed.

Attorney General Robert Morgan and Associate Attorney C. Diederich Heidgerd for the State.

Benny S. Sharpe for defendant appellant.

HEDRICK, Judge.

Defendant's three assignments of error relate to the court's instructions to the jury.

First, based on two specific exceptions to the instructions to the jury, defendant contends "the Judge made statements that might have been construed by a jury as the trial Judge's opinion on the matter."

While the instructions complained of might have been better stated, no prejudicial error is made to appear.

By his second assignment of error, defendant contends the court failed to instruct the jury that malice is a constituent element of second degree murder.

When the charge is considered contextually, it is clear that the judge correctly defined second degree murder and all of its constituent elements.

The errors assigned are not sustained. Defendant's trial in Superior Court was free from prejudicial error.

No error.

Judges MORRIS and VAUGHN concur.

STATE OF NORTH CAROLINA v. NATHANIEL GOVEN GRISSOM

No. 7319SC178

(Filed 14 February 1973)

Automobiles § 113— striking child in yard — involuntary manslaughter

The State's evidence was sufficient for the jury in a prosecution for involuntary manslaughter where it tended to show that defendant's automobile went into a spin as it turned onto a dirt road, that it zigzagged down the road over 340 feet at 50 mph, that it left the road, knocked down a wooden fence and struck and killed a child playing on a swing set in a yard beside the road, and that defendant's vehicle traveled a total of 32 feet from the road until it struck a house with enough force to move the house over an inch on its foundation.

APPEAL by defendant from *Armstrong, Judge,* 2 October 1972 Session of Superior Court held in CABARRUS County.

Defendant was convicted of involuntary manslaughter. He was sentenced to serve not less than seven nor more than ten years imprisonment.

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

Davis, Koontz & Horton by Clarence E. Horton, Jr., for defendant appellant.

VAUGHN, Judge.

Defendant's only contention on appeal is that the trial court erred in denying his motions for nonsuit made at the close of the State's evidence and renewed at the close of all the evidence. Defendant offered no evidence.

Taken in the light most favorable to the State, the evidence tended to show that on 4 June 1972 at about 3:50 p.m., a five-year-old girl, Tonda Renae Blake, was playing on a swing set

in the yard at 23 Flowe Street, located just outside the city limits of Concord. Flowe Street was a straight, sixteen feet wide, unpaved, dirt road in a residential area. The weather was clear and the road was dry. At this hour, at the intersection of Scotia Avenue and Flowe Street, defendant, driving a 1966 green Pontiac automobile, turned south from Scotia Avenue onto Flowe Street, went into a complete spin, then continued south on Flowe Street at a speed of approximately 50 miles per hour. Defendant's vehicle zigzagged down Flowe Street over 340 feet, at the same rate of speed, until it left the roadway, knocked down a wooden fence, damaged the swing set and struck and killed Tonda Renae Blake. Defendant's vehicle traveled a total of 32 feet from the roadway until it struck the house at number 23 Flowe Street with enough force to move the house one to one-and-one-half inches on its foundation.

Culpable negligence from which death proximately ensues, makes the actor guilty of manslaughter, and under some circumstances, guilty of murder. *State v. Colson,* 262 N.C. 506, 138 S.E. 2d 121. It is such recklessness or carelessness, proximately resulting in injury or death, as imports a thoughtless disregard of consequences or a heedless indifference to the safety and rights of others. *State v. Weston,* 273 N.C. 275, 159 S.E. 2d 883; *State v. Rountree,* 181 N.C. 535, 106 S.E. 669. Speed in excess of that which is reasonable and prudent under the existing conditions is unlawful notwithstanding that the speed may be less than the limits proscribed by statute. G.S. 20-141.

There was ample evidence to permit the jury to find that defendant operated his vehicle at an excessive rate of speed. The evidence would also have permitted the jury to find that defendant violated the reckless driving statute, G.S. 20-140. Defendant's conduct constituted a manifest display of heedless indifference to the safety of others.

No error.

Judges BRITT and PARKER concur.

STATE OF NORTH CAROLINA v. JOHNNY MARSH

No. 739SC75

(Filed 14 February 1973)

ON *writ of certiorari* to review trial before *Godwin, Judge,* 7 February 1972 Session of Superior Court held in GRANVILLE County.

Defendant was tried upon two bills of indictment: (1) assault with a deadly weapon with intent to kill and inflicting serious injury, and (2) larceny of property of a value of more than two hundred dollars.

The State's evidence tended to show the following: At about 11:30 p.m. on 3 February 1970 Inspectors Love and Holt of the License and Theft Bureau of the North Carolina Department of Motor Vehicles were in Creedmoor. Inspector Love had two or more photographs of defendant in his pocket. The two inspectors were parked in the lot of a business establishment in Creedmoor. At about 11:30 p.m., they observed a Mustang automobile backing away from the street that runs in front of Edwards Brothers Chevrolet. They observed a 1970 model Chevrolet automobile which was also backing away from the vicinity of Edwards Brothers Chevrolet. Both vehicles backed onto Railroad Street and then proceeded down Railroad Street and made left turns onto Fleming Street. The Mustang was in the lead. The inspectors observed the dealer invoice still in the left window of the Chevrolet.

The inspectors followed the Mustang and Chevrolet for several blocks. Both the Mustang and Chevrolet stopped before entering Highway 15 and the occupants of both cars went to the rear of the Chevrolet. As the inspectors approached they recognized defendant Johnny Marsh as one of the two subjects at the rear of the Chevrolet. Defendant and the other subject were crouched or kneeling at the rear of the 1970 Chevrolet attempting to put a license plate on the vehicle. The inspectors advised defendant and the other subject that they were under arrest. The other subject fled on foot and has not been apprehended or identified, although Inspector Holt gave chase.

As Inspector Love undertook to place handcuffs on defendant, defendant pulled a revolver and fired. The shot missed but the impact of the explosion knocked Inspector Love into the

roadside ditch and burned his eyes to the extent that he sought emergency treatment at Duke Hospital and further treatment the next day at Watts Hospital and McPherson Hospital.

After defendant fired the shot at Inspector Love, defendant fled in the Mustang automobile and was not apprehended for more than a year under the warrants issued in these cases.

The 1970 Chevrolet was the property of Edwards Brothers Chevrolet and it was removed from their premises without their permission or knowledge. The 1970 Chevrolet was valued at about $4,200.00.

Defendant offered no evidence.

The jury found defendant guilty as charged in each indictment. Defendant was sentenced to a term of ten years on the felonious assault charge, and to a term of not less than six nor more than eight years on the felonious larceny charge. These two sentences will run concurrently.

Attorney General Morgan, by Deputy Attorney General Vanore, for the State.

Pearson, Malone, Johnson & DeJarmon, by C. C. Malone, Jr., for defendant.

BROCK, Judge.

We have carefully considered each of defendant's assignments of error and feel that no useful purpose can be served by a seriatim discussion. In our opinion defendant had a fair trial, free from prejudicial error.

No error.

Judges CAMPBELL and GRAHAM concur.

JAMES MOORE, d/b/a SUMMIT REALTY COMPANY v. CLYDE EATON, d/b/a EATON CONSTRUCTION COMPANY

No. 7321DC3

(Filed 14 February 1973)

APPEAL by defendant from *Billings, District Judge,* 5 June 1972 Session of District Court held in FORSYTH County.

Action for commissions and expenses alleged to be due plaintiff by defendant in connection with an oral agreement relating to real estate sales. Defendant counterclaimed for a sum alleged to be due him. The jury answered the issues in favor of plaintiff and defendant appealed.

White and Crumpler by Carl D. Downing, Michael J. Lewis and G. Edgar Parker for plaintiff appellee.

Drum, Liner & Redden by David V. Liner for defendant appellant.

VAUGHN, Judge.

Only one exception appears in the record of the trial. Approximately 23 pages of the printed record are taken up by the court's charge. On about the 16th page of the charge there appears "EXCEPTION NO. 1" without further indication as to what portion of the charge appellant deems objectionable. The portion of the charge objected to is not quoted in an assignment of error. In our discretion, however, we have considered appellant's objections to the charge as they are set out in his brief and hold that no prejudicial error has been shown.

No error.

Judges BRITT and PARKER concur.

IN THE MATTER OF: DR. REGINALD A. HAWKINS
IN THE MATTER OF: DR. JOHN P. STINSON
IN THE MATTER OF: DR. GEORGE T. NASH

No. 7226SC348

(Filed 21 February 1973)

1. Physicians, Surgeons and Allied Professions § 6— hearing before Dental Examiners — absence of bias

In this proceeding before the State Board of Dental Examiners to determine whether the licenses of three dentists should be revoked or suspended because of alleged substandard dental work and discrepancies between charges for work and work actually performed under a federally financed program that furnished dental treatment to medically indigent school children, the record fails to show any prejudice or bias on the part of any member of the Board toward any respondent by reason of a suit brought by one respondent to integrate racially the North Carolina Dental Society or for any other reason.

2. Physicians, Surgeons and Allied Professions § 6— suspension of dentists' licenses upon conditions — remand for proper judgment — suspension for definite terms — no unconstitutional increased penalty

Where the State Board of Dental Examiners originally suspended each respondent's license to practice dentistry in North Carolina subject to the condition imposed of pursuing specified courses of dental study, and the superior court set aside the suspensions on the ground that the Board had no authority to impose such a condition and remanded the proceeding for entry of a proper judgment, the Board's subsequent order suspending respondents' licenses for periods of 60 days, 12 months and 18 months, respectively, did not constitute an unconstitutional imposition of a more severe penalty than that originally imposed since (1) there was no appeal resulting in a new trial as in *North Carolina v. Pearce,* 395 U.S. 711, and (2) the order upon remand did not actually impose a more severe penalty as the original suspensions could have become permanent had respondents not complied with the condition imposed.

3. Physicians, Surgeons and Allied Professions § 6— suspension of dentist's license — constitutionality of statute

The statute providing for the revocation or suspension of a dentist's license whenever it shall appear to the State Board of Dental Examiners that such dentist "has been guilty of malpractice . . . or has been guilty of willful neglect in the practice of dentistry . . . or has been guilty of any other unprofessional conduct in the practice of dentistry" is not unconstitutionally vague and indefinite. Former G.S. 90-41.

4. Physicians, Surgeons and Allied Professions § 5— federally financed dental program — participating dentists not exempt from dental statutes

Dentists in general practice who performed dental services under a federally financed program of the local school board that furnished dental treatment to medically indigent school children were not employees of a federal agency "in the discharge of their official duties" within the meaning of the statute exempting such employees from statutory provisions regulating the practice of dentistry. G.S. 90-29.

5. Physicians, Surgeons and Allied Professions § 6— suspension of dentists' licenses — sufficiency of evidence

The evidence was sufficient to support findings of fact by the Board of Dental Examiners which, in turn, support the Board's judgment suspending the licenses of three dentists for malpractice, willful neglect and unprofessional conduct because of substandard work and discrepancies between charges for dental work and work actually performed under a federally financed program that furnished dental treatment to medically indigent school children.

APPEAL by respondents from *Friday, Judge,* 18 October 1971 Session, Superior Court, MECKLENBURG County.

This appeal results from the following proceedings:

On 29 June 1966, a letter from the Charlotte-Mecklenburg Board of Education was sent to all dentists practicing in the Charlotte-Mecklenburg area advising that funds had been made available to the Board of Education under the Elementary and Secondary Education Act (Federal) for the purpose of furnishing dental treatment to children from low income families or who were medically indigent. The addressees were requested to advise whether they desired to participate, and a return card was enclosed for that purpose. The letter advised that the parents of the children would be given a choice as to where and by whom their children would be treated. The addressees were further advised that they would be allowed to charge their customary and usual fees and payment would be made promptly upon receipt of their statement for services. Appellants were among the 36 dentists who responded affirmatively. When the screening of the children had been completed, parental consent and choice of location and person to perform the services obtained from the parents, the dentist was sent an authorization letter authorizing him to treat a named child and advising that routine prophylaxis, topical fluoride, X rays, and extractions could be performed without further authorization but that any unusual treatment or procedure "may be approved by the Dental Director." The letter further advised that the work must be completed and statement mailed prior to 25 August 1966, but that no bill should be submitted for work to be done in the future, only completed work. The dentist was asked to indicate on his statement whether the child needed more care at that time.

Following receipt of all the bills, it was suggested to Mr. James T. Burch, employee of the Board of Education and Director of ESEA Activities that the charges of some of the dentists appeared to be excessive. This suggestion came from a member of the staff of the Health Department, an agency working closely with the Board of Education in this program. Subsequently, this information was passed on to Dr. Craig Phillips, Superintendent of Charlotte-Mecklenburg Schools. Dr. Phillips; Dr. Sherrill, Dental Director; and Dr. Camp, Medical Director of the Health Department, conferred after some preliminary evaluation of the work done had been made. It was decided that the dental services performed on other children in the program should be evaluated. This evaluation was done. The four dentists identified as the result of the preliminary evaluations were called

to Dr. Phillips' office for conference. The regional office and Washington office of the Office of Education, upon being informed of the problem, advised Mr. Burch that the problem was "a local responsibility in terms of the administration of the program and in terms of the evaluation of the program." Dr. Phillips then turned to the North Carolina Dental Society. As a result of his discussion with the President of the Dental Society, the request was made that a qualified review committee of dentists be organized to investigate the matter further. This was done and this committee will hereafter be referred to as the "six-man committee." The six-man committee asked that arrangements be made for them to re-examine the children. This was done and in October 1966, 488 children were re-examined at the Dental Clinic at the Central Piedmont Community College. Discrepancies found were reported to the Board of Education.

Subsequently, and on 21 December 1966, the North Carolina State Board of Dental Examiners subpoenaed all of the investigative records and materials then held by the Charlotte-Mecklenburg Board of Education. This action was taken pursuant to the provisions of G.S. 90-27. The Board of Dental Examiners secured the services of Dr. Clifford M. Sturdevant, Professor of Operative Dentistry, School of Dentistry, University of North Carolina at Chapel Hill; Dr. Fred Charles Fielder, Professor of Operative Dentistry, Meharry Medical College, Nashville, Tennessee; and Dr. Herman Gaskins, Professor of Operative Dentistry, School of Dentistry, Howard University, Washington, D. C. These gentlemen are hereafter referred to as the "reviewing committee" when referred to collectively. The reviewing committee was requested to review the records of the appellants and other dentists participating in the program in conjunction with a review of the report previously filed by the six-man committee. In the process of evaluation by the reviewing committee a system was devised using numbers rather than names of dentists in order that identity of the dentist involved would not be known to the reviewing committee. Following their examination of records and the clinical review of some of the patients, the reviewing committee submitted their report to the Board of Examiners. Their report verified a number of discrepancies attributed to appellants by the six-man committee and exonerated one dentist, Dr. John Reynolds, against whom the six-man committee had listed two discrepancies.

After considering the report filed, the Board of Examiners, acting under the provisions of G.S. 90-41, caused to be served

on each of the appellants by the Sheriff of Mecklenburg County notice advising each that "[t]he North Carolina State Board of Dental Examiners has sufficient evidence which, if not rebutted or explained, will justify the said Board in permanently or temporarily revoking or suspending your license to practice dentistry in North Carolina." The notice set out seriatim the general nature of the evidence referred to; advised that unless hearing was requested within 20 days of service of the notice, action would be taken by the Board which would be final and not subject to judicial review; that if requested, hearing would be held not less than 10 nor more than 30 days from the date of notification; that all proceedings would be in accordance with the provisions of Chapter 150, General Statutes of North Carolina and "under the authority of Chapters 451 and 452 as enacted by the 1967 North Carolina General Assembly," and that the notice was given pursuant to resolution duly considered and adopted by the Board.

Each appellant filed a "request for hearing and response to notice." They were identical in form and content. Each contained the following motions: (1) that "the hearing be held before an impartial board, tribunal or committee, selected pursuant to the laws of the State of North Carolina and without regard to race, color or national origin"; (2) for a bill of particulars as to the charges against the movant; (3) that the Board furnish the movant with the "names and addresses of all persons, institutions or agencies participating in the bringing and investigation of the charges contained in the Notices (sic) and of the names and addresses of all persons and of exhibits or documents upon whose testimony the Board intends or expects to rely in support of the charges contained in the Notice"; and (4) "for an order allowing the pretrial adverse examination of all persons participating in the bringing or investigation of the charges contained in the Notice or who are expected by the Board to testify in support of the charges and allowing the Respondent to examine all exhibits or documents upon which the Board expects or intends to rely in support of the charges."

The Board then filed a "notice of hearing" in answer to each appellant's "response to notice and request for hearing." The notice set the hearing for 20 September 1967 at 9:30 a.m. in the United States District Courtroom in Charlotte. The Board in the notice denied the first motion; allowed the motion for a bill of particulars and set out seriatim and with particularity the

charges against the particular dentist on whom the notice was served; denied the motion for adverse examination but, on its own motion, allowed each respondent the right to take the depositions of all witnesses pertaining to any matters relevant to the proceeding upon terms and conditions set out therein; granted the motion for examination of documents and exhibits; allowed the third motion set out above; and set out in the notice the information requested.

Upon request of respondents, the hearing was continued from 20 September to 29 November 1967.

Each respondent filed a response to the notice of hearing in which each requested additional particularized information with respect to the charges and objected and excepted to the ruling of the Board denying his original motion that the hearing be held before an impartial board, tribunal or committee.

The matters were consolidated for hearing, and hearing before the Board was begun on 29 January 1968 and concluded on 5 March 1968.

Pleadings were read into the record. Respondents renewed their request for more definite statements of the charges and for hearing before an impartial board or committee. Prior to the taking of evidence the parties entered into certain stipulations as follows: (1) that the transcripts of depositions previously taken on motion of respondents could be received in evidence as the sworn testimony of the deponents, those depositions being the testimony of Dr. Luby T. Sherrill, Dr. A. Craig Phillips, Mr. James Burch, Dr. J. H. Guion, Dr. Paul Stroup, Jr., Dr. J. H. Rehm, Dr. C. E. Sturdevant, Dr. Fleming Stone, Dr. Worth Williams, Dr. Barry Miller, and Dr. Herman E. Gaskins; (2) that the X rays to be used in the hearing, previously used in the deposition hearing, might be received and introduced into evidence without the necessity of technical authentication; that the X rays were authentic, depicted the mouth and teeth of the person whose name appeared on the X-ray mounting and were in fact, made of the mouth and teeth of the person whose name appeared on the mounting; that the name of the person on the X-ray mounting was the same person named on the bill and statement as having been treated by respondents with the exception of Mary Sanders and Lara Ann Huston as to whom respondents did not make the above stipulation; (3) that certain duplicate original bills might be introduced into evidence in lieu

of the originals; (4) that the initial investigation of alleged discrepancies was done by a six-man review committee, composed of Dr. Paul Stroup, Dr. J. H. Rehm, Dr. Fleming Stone, Dr. Worth Williams, Dr. Barry Miller, and Dr. J. D. Martin, all dentists practicing in Mecklenburg County; that of that group Dr. Worth Williams and Dr. J. D. Martin are Negroes; that their report was submitted 27 October 1966 and was marked as Exhibit No. 5; (5) that Board's Exhibit No. 6, "Identification of Dentists by Number" shows an identifying list by number of the dentists participating in the ESEA program and that the numbers thereon are the same identification numbers appearing in the report of the six-man review committee; (6) that the report dated 21 February 1967 and supplemented by report and attachments dated 6 March 1967 is the further written report made and submitted by Dr. Fred C. Fielder, Dr. Herman E. Gaskins, and Dr. C. E. Sturdevant, marked as Board's Exhibit No. 7; (7) that the testimony of Dr. Lindahl, Dr. Sturdevant, Dr. Fielder, and Dr. Gaskins might be taken with their sitting in a panel rather than individually; (8) that the numbers assigned to respondents and to their case records for the six-man investigation purpose was: Dr. Reginald A. Hawkins, 13; Dr. George T. Nash, 22; Dr. John P. Stinson, 29.

Upon the conclusion of the hearing the requirement of G.S. 150-20 was waived, and it was agreed that the Board's decision should be rendered within 60 days after the Board received the written transcript of the proceedings. On 30 July 1968, the decision of the Board relative to each respondent was rendered. As to each respondent, the Board entered findings of fact and conclusions of law and, subject to conditions imposed of pursuing courses of study, ordered the suspension of each respondent's license to practice dentistry in the State of North Carolina. From the orders entered, each respondent filed written exceptions and appealed to the Superior Court, Mecklenburg County, and filed an application for stay. Stay order as to each respondent was entered by Judge Fred Hasty on 15 August 1968.

On 1 February 1971, hearing was had before Judge A. Pilston Godwin at the conclusion of which it was stipulated that order could be entered out of term. On 20 March 1971, Judge Godwin entered an order as to each respondent. The order in each instance affirmed the Board's findings of fact relative to patients treated with the exception of the findings relative to one Treva Watts, a patient of respondent Dr. Nash. It set aside the portion

of the order suspending license to practice dentistry upon failure to comply with certain conditions therein imposed upon the basis that, in the opinion of the court, the Board lacked authority to suspend, upon conditions imposed, the penal provisions of its orders entered pursuant to G.S. 90-41. It remanded the cause to the Board "for reconsideration and for the entry of an appropriate lawful order." It provided that upon service of the order entered upon respondents, each should have the right to appeal to the Superior Court "to the end that a judicial hearing may be conducted and a determination made regarding the legal efficacy of the hearing conducted by the Board as the same relates to the prior motion of the Respondent for a hearing before 'an impartial Board, tribunal or committee.' " The order stayed the effectiveness of any punitive order entered pending determination to be made upon any appeal therefrom. Except as set forth therein, each respondent's exceptions were overruled and the decision of the Board affirmed. The record contains no objection to the entry of any of the orders or any part of any. At the end of each order reproduced in the record a numbered exception appears.

On 20 May 1971, the Board entered an order as to each respondent. The order as to Dr. Hawkins suspended his license for a period of 12 months, and was served on respondent Dr. Hawkins on 26 May 1971. The order as to Dr. Stinson suspended his license for a period of 60 days and was served on him 26 May 1971. The order as to Dr. Nash suspended his license for a period of 18 months and was served on him on 28 May 1971.

On 9 June 1971 each respondent filed notice of appeal and exceptions to the order entered. Respondents contended that the orders entered unconstitutionally imposed increased punishment, that they had been deprived of their right to appear before the Board for further hearing relative to punishment to be imposed, and that no further and additional findings were made by the Board to support the punishment imposed.

On 30 August 1971 a hearing was had before Judge John R. Friday. Respondents presented evidence which they contended indicated bias, prejudice, or lack of impartiality on the part of the North Carolina State Board of Dental Examiners. This evidence consumes 142 pages of the record. At the conclusion of the hearing, counsel for respondents was asked by the court to "dictate to the Reporter the Issues that you feel arise in this case." Counsel thereupon stated the issues in the

case as (1) whether the Board of Dental Examiners which conducted the hearings, both initially and on remand, was a fair and impartial tribunal to hear the matter and whether the hearing was conducted in a fair and impartial manner; (2) whether the Board violated the constitutional rights of respondents in failing to allow them to appear and present argument on remand, prior to the imposition of its order; and (3) whether the Board violated the constitutional rights of respondents in imposing a more severe penalty on remand than the Board had previously imposed.

On 2 September 1971, Judge Friday entered an order as to each respondent retaining jurisdiction of the cause for a period of 30 days for determination of the issue raised by respondents as to the impartiality of the North Carolina State Board of Dental Examiners and the conduct of the original hearing before the Board, remanding the causes to the Board "to the sole end that the board shall give the respondent an opportunity to appear before said board, personally or by counsel, for the restricted purpose of presentation of argument upon the matter of penalty or penalties to be imposed upon respondent by said board; and that no conclusive order shall be entered by said board herein until respondent is afforded the above said opportunity"; and reserving determination of respondent's exception as to increased punishment until entry of order by the Board.

On 30 September 1971, after hearing at which respondents and counsel were present in person and presented argument, the Board entered orders and in each case imposed identical punishment as was imposed in its previous order. Each respondent filed written exceptions and notice of appeal.

The causes were again heard before Judge Friday on 18 October 1971. A transcript of the last hearing before the Board was, upon request of counsel for respondents, made a part of the record. At that hearing, counsel for respondents requested that the record reflect an exception to the ruling of the court with respect to affirming the order of the Board. Counsel for respondents stated further: "Would like for the record to further reflect our specific exceptions to the findings of the Board, Findings of Fact, that were previously set out in the matter heard by Judge Godwin. We would also like for the record to reflect our specific exceptions to the findings of Judge Godwin affirming the findings of the Board, affirming the finding of facts of the Board, and the conclusions of law."

The court entered an order as to each respondent in which he set out the order of the Board, that respondents appealed to the Superior Court; that after hearing the court entered an order affirming the Board's findings of fact and conclusions of law; determined that the conditional order of license suspension was in excess of the Board's statutory authority, remanded the proceeding to the Board for the entry of an appropriate order, and required a subsequent judicial hearing for the determination of respondent's motion for a hearing before an "impartial Board, tribunal or committee"; that on remand the Board entered an order of license suspension; that respondents again appealed noting two exceptions, both alleging violation of constitutional rights; that a hearing was had in Superior Court upon this appeal and evidence taken with respect to the lack of impartiality of the Board; that the court again remanded the proceeding to the Board for the restricted purpose of allowing respondents to be heard with respect to the penalty or penalties to be imposed and retained jurisdiction and reserved ruling with respect to the issues raised of impartiality and violation of constitutional rights by increased severity of penalty; that the Board heard respondents and entered orders imposing the identical license suspensions previously imposed; that respondents again appealed noting as exceptions the contentions that the penalty imposed exceeded the original penalty and was not supported by any findings made by the Board. The court noted that the issues before it were (1) determination of the issue of impartiality of the Board of Dental Examiners, (2) decision as to the exception alleging that penalty in order of 20 May 1971 violated respondents' constitutional rights by exceeding in severity the penalty imposed by the Board's original order, and (3) failure of the Board to make findings of fact to support punishment imposed. The court found that respondents had failed to present any evidence that the Board of Dental Examiners had acted in any capacity other than that of an "impartial Board, tribunal, or committee" in the conduct of the hearing and of all matters relating thereto, that the penalties of the orders of 28 September 1971 did not violate rights of respondents by exceeding the severity of the penalty imposed by the original order of the Board, that the order of 28 September 1971 was based upon the original findings of fact and conclusions of law and no additional findings were necessary. The court, therefore, overruled respondents' exceptions and affirmed the order of the North Carolina State Board of Dental Examiners. Each respond-

ent appealed. During the entire pendency of this proceeding all orders affecting licensure of respondents have been judicially stayed.

Patton, Starnes and Thompson, by Thomas M. Starnes, for North Carolina State Board of Dental Examiners.

Chambers, Stein, Ferguson and Lanning, by J. LeVonne Chambers, for respondent appellants.

MORRIS, Judge.

Respondents bring forward 13 assignments of error based on 117 exceptions. All assignments of error are common to all three respondents.

[1] Assignments of error Nos. 1 and 13 are addressed to the alleged lack of impartiality of the Board of Dental Examiners. Incorporated in respondents' "request for hearing and response to notice" was a motion "that the hearing be held before an impartial board, tribunal or committee, selected pursuant to the laws of the State of North Carolina and without regard to race, color or national origin." The Board denied the motion "for the reason that the North Carolina State Board of Dental Examiners is a lawfully and constitutionally organized agency of the State of North Carolina and is the sole lawful body or agency having jurisdiction of the subject matter of this proceeding."

Although respondents contend that the statute under which this proceeding was brought and conducted is unconstitutional, they do concede the authority given by statute to the Board to conduct the hearing. They urge that they are entitled to a hearing before a fair and impartial group. We certainly are in accord, nor does the Board challenge the correctness of this position. The Board does, however, deny that this right was denied respondents. Respondents contend that the Board was biased from the very beginning to the very end of the proceeding and that prejudice resulted to respondents not only in the weighing of the evidence by the Board but in the institution of the proceeding and in the disposition made by the Board based on the findings. Respondent Hawkins had been active as a plaintiff in suits challenging the alleged discriminatory practices of the North Carolina Dental Society and Board of Dental Examiners and the Charlotte-Mecklenburg Board of Education. A white dentist was among those against whom discrepancies were listed

by the six-man committee, but the reviewing committee found that there were no discrepancies. The members of the Board were selected by vote of the members of the North Carolina Dental Society. These circumstances, say the respondents "demonstrate that the board did not act as a disinterested and impartial body in instituting these proceedings nor could it act as a fair and impartial tribunal to conduct the hearings and to render a disposition of the matter." We are not willing, as respondents apparently would have us do, to say that a mere allegation and statement that prejudice exists is sufficient proof that the proceedings were conducted with a lack of impartiality and fairness. In their brief, respondents point to no evidence in the record indicating bias or partiality, nor does our study of the record reveal any. It is true that prior to the suit of respondent Hawkins against the North Carolina Dental Society [*Hawkins v. North Carolina Dental Society*, 355 F. 2d 718 (4th Cir. 1966)], the members of the Board of Dental Examiners were elected by the members of the North Carolina Dental Society and that no black dentist was a member of that Society. However, in 1961, G.S. 90-22 was amended to provide that members of the Board of Dental Examiners shall be elected in an election conducted by the Board "in which every person licensed to practice dentistry in North Carolina and residing in North Carolina shall be entitled to vote." G.S. 90-22(b). The statute further provides that each year there shall be elected two members for three-year terms. Nominations are made by a written petition signed by not less than ten dentists licensed to practice in North Carolina and filed with the Board within the time provided by G.S. 90-22(c)(4). Dr. Hawkins testified that he became a member of the North Carolina Dental Society in May 1966, prior to the time of his participation in the ESEA program resulting in the charges against him. He further testified that he had voted for candidates for the Board of Dental Examiners, that he had never been a candidate for election to the Board, but that he had attempted to become a candidate in 1961 and in 1966 at the June meetings of the Old North State Dental Society. He testified: "I could have found a hundred who were willing to endorse me but because of the difficulty and the costs involved and looking at practical politics, I was deterred from seeking that course. Other black dentists deterred me." The members of the Board were elected by ballots cast by all licensed dentists in North Carolina who cared to vote—not by the North Carolina Dental Society. We

find no evidence in the record before us which would indicate any prejudice or bias on the part of any member of the Board toward any of the appellants by reason of the suit brought against the Dental Society or for any other reason.

The proceeding from beginning to end was conducted fairly and impartially. Mr. James T. Burch, who is black, was employed by the Charlotte-Mecklenburg Board of Education and was Director of ESEA activities in 1966. Under his supervision a letter was sent by the Board of Education to all dentists practicing in the Charlotte-Mecklenburg area asking that the addressee advise as to their desire to participate in a program of dental treatment of medically indigent children during the summer of 1966, funds for the program having been made available under the Elementary and Secondary Education Act (Federal). The respondents, with some 33 other dentists, indicated an interest. The program was fully administered by and under the control of the Charlotte-Mecklenburg Board of Education with the cooperation of the Charlotte-Mecklenburg Health Department. Upon the conclusion of the program of dental treatment, Mr. Burch was advised by an associate working with the program that some of the bills appeared to be excessive. Mr. Burch communicated this information to Dr. Craig Phillips. Dr. Phillips conferred with Dr. Luby Sherrill, Dental Director of the Health Department, and Dr. Camp, Medical Director of the Health Department. Dr. Sherrill and one or more assistants conducted a preliminary investigation and evaluation. They discovered instances of substandard dentistry and discrepancies between treatment apparently rendered and treatment reflected on some of the statements submitted. This was reported by Mr. Burch to Dr. Phillips who, in turn, transmitted the report. Both the State Department of Public Instruction and the Federal Office of Education advised that problems of administration and evaluation of the program were local problems. Dr. Phillips then requested Dr. Homer Guion, President of the North Carolina Dental Society, to appoint a qualified review committee of qualified dentists to investigate the matter further. This was done. The committee was composed of six local dentists, two of whom were black. Mr. Burch met with the committee as a representative of the Board of Education. Mr. Burch assigned numbers to the participating dentists and their statements and records. Evidence from committee members was that never at any time did any member of this committee know the name of any doctor whose work they were reviewing. The

records were kept locked up by Mr. Burch and no one saw them. They did not know any names when their report was submitted. One member of the committee testified that he did not know any names of the doctors involved until he read it in the newspaper. The committee members convened at Central Piedmont College on or about 6 October 1966 where they clinically examined all of the children who had been treated in the program whom Mr. Burch could locate in the school system and have transported to the College. On the same day X rays were made of the teeth of the children who were examined. The chart and X ray of each child was marked with his or her name and an identifying number. Mr. Burch assigned each participating dentist a number. That number was placed in one corner on the outside of the envelope which contained the chart, X ray and statement which pertained to that child. Each time the committee met for joint review, Mr. Burch was present and at the close of the meeting took possession of all the envelopes and retained them in his possession until the next meeting. The committee decided upon those items of substandard dentistry which they would label a discrepancy. There were five discrepancies listed by them. The committee examined 308 of the 601 patients who had been treated by private dentists. The committee reported to Dr. Guion who submitted their report to Dr. Phillips by letter dated 27 October 1966. Thereafter Dr. Phillips conferred several times with each of the respondents with their counsel, and agreement was reached with respect to the amount of payment to be made for the services of each respondent. This concluded the matter insofar as the Board of Education was concerned. On 21 December 1966, the Board of Dental Examiners, by subpoena duly served, obtained all of the records, X rays, reports and related documents pertaining to all the dentists who had participated in the program. Thereafter the Board requested three experts to review the report of the six-man committee, the postoperative X rays made at the College, and all other documents relating to the four dentists reported as having discrepancies. These three experts, two of whom were black, were Dr. Clifford M. Sturdevant, Dr. Herman E. Gaskins, and Dr. Fred C. Fielder. None of them was a resident of Charlotte. Each was a professor of operative dentistry at a recognized school of dentistry. This review committee reviewed the report of the six-man committee, examined all records pertaining to the four dentists charged with discrepancies, clinically examined 13 of the children in question, and checked

random samples of the records of dentists who had not been charged with discrepancies. Their initial report was submitted on 21 February 1967. They exonerated one dentist who had been charged with two discrepancies by the six-man committee. As to respondent Hawkins, they verified 25 of the 38 discrepancies reported by the six-man committee. As to respondent Stinson, they verified 10 of 19 discrepancies reported by the six-man committee. As to respondent Nash, they verified 20 of the 33 discrepancies reported by the six-man committee. The Board, after full hearing, entered its orders finding 13 discrepancies as to Dr. Hawkins, seven as to Dr. Stinson, and 18 as to Dr. Nash. Whenever there appeared any doubt as to whether any charged discrepancy was a discrepancy, the charge was dismissed by the Board. So it appears that no charge was sustained unless it received the unanimous approval of the six-man committee, the review committee, and the Board of Dental Examiners.

The two committees utilized in the procedure totaled nine dentists. Four of them were black. The Board required complete unanimity of opinion in order to include an alleged discrepancy in its findings of fact and conclusions of law. We cannot conceive of a fairer procedure than was employed here. The respondents were given the benefit of every doubt all the way through. We perceive no bias, no prejudice, and no partiality.

[2] Assignments of error Nos. 9, 12 and 13 encompass appellants' contention that the Board erred in imposing more severe sentences on remand and the court erred in affirming. Appellants urge that the alleged increased penalties violate the rights of respondents as secured to them by the Fourteenth Amendment to the Constitution of the United States and Article I, Section 19, North Carolina Constitution.

G.S. 90-41, in effect at the time of this proceeding, provided that when one is found guilty of acts violative of the statute, "the Board may revoke the license of such person, or may suspend the license of such person for such period of time as, in the judgment of the said Board, will be commensurate with the offense committed . . . "

The Board, in its orders of 30 July 1968, ordered the suspension of each respondent's license to practice dentistry in North Carolina, subject to conditions imposed of pursuing courses of study. The Superior Court entered an order on 20

March 1971 setting aside that portion of each order upon the ground that the Board, under G.S. 90-41, had the authority only to revoke or suspend a license and had no authority to impose conditions. Whether the Board had that authority is not before us. We note that the 1971 General Assembly rewrote G.S. 90-41 to give the Board authority, in addition to revocation and suspension, to "[i]nvoke such other disciplinary measures, censure, or probative terms against a licensee as it deems fit and proper."

Respondents contend that *North Carolina v. Pearce,* 395 U.S. 711, 23 L.Ed. 2d 656, 89 S.Ct. 2072 (1969), is applicable. We do not agree. In *Pearce,* the Court was concerned with the constitutional limitations upon the imposition of a more severe punishment *after conviction for the same offense upon retrial.* The Court held that neither the double jeopardy provision nor the equal protection clause imposes an absolute bar to a more severe sentence upon reconviction but that "[d]ue process of law, then, requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial." We see no factual similarity in *Pearce* and the case *sub judice.* We have no appeal resulting in a new trial. We have here only the remand for the entry of a proper judgment within the authority of the Board. As appellee points out in its brief, the court set aside that portion of the judgment as void not because it was tainted by some error prejudicial to respondents but because the court determined that the Board did not have the legal authority to enter an order of that type. Nor can we say that the order upon remand imposed a more severe penalty. In the case of Dr. Hawkins the suspension was for 12 months; as to Dr. Nash, 18 months; and as to Dr. Stinson, 60 days. However, in the original order of the Board, the suspension in each case could have resulted in permanent suspension or revocation had respondents not complied with the conditions imposed. We hold that the orders entered upon remand do not constitute a deprivation of rights under the Constitution of the United States or the North Carolina Constitution.

[3] By assignment of error No. 6 the respondents contend that the court erred in failing to dismiss this proceeding because of the alleged vagueness and indefiniteness of the statute. Respondents apparently complain of the language "has been guilty of malpractice . . . or has been guilty of willful neglect in the practice of dentistry . . . or has been guilty of any other unprofes-

sional conduct in the practice of dentistry . . . " We agree with respondents that they are entitled to notice of the conduct which might warrant suspension or revocation. We do not agree that this language is too vague and indefinite to give notice. It is certainly not such that "men of common intelligence must guess at its meaning." *Coates v. Cincinnati,* 402 U.S. 611, 614, 29 L.Ed. 2d 214, 217, 91 S.Ct. 1686, 1688 (1971); *Connally v. General Construction Co.,* 269 U.S. 385, 391, 70 L.Ed. 322, 328, 46 S.Ct. 126, 127 (1926).

The whole purpose and tenor of Article 2, Chapter 90, of the General Statutes is to protect the public against unprofessional, improper, unauthorized, and unqualified practice of dentistry. The goal is to secure to the people the services of competent, trustworthy practitioners. The licensing by the State, granted only after certain standards of proficiency are met, amounts to the recognition by the State of the licensee as a qualified dentist. The continued holding of the license is taken by the public as indication that those standards are being maintained. The object of both granting and revoking a license is the same—to exclude the incompetent or unscrupulous from the practice of dentistry.

Webster's Third New International Dictionary (1968) defines "malpractice" as, "a dereliction from professional duty whether intentional, criminal, or merely negligent by one rendering professional services that results in injury, loss, or damage to the recipient of those services or to those entitled to rely upon them or that affects the public interest adversely."

In *Hazelwood v. Adams,* 245 N.C. 398, 95 S.E. 2d 917 (1957), Justice Higgins said:

> "One who holds himself out to practice dentistry, by implication agrees to bring to his patient's case a fair, reasonable and competent degree of skill and to apply that skill with ordinary care and diligence in the exercise of his best judgment." (p. 401.)

The phrase "willful neglect" is certainly a well-known phrase and we cannot perceive that any uncertainty as to its meaning could exist among the members of the dental profession, those to whom the statute applies. The clear meaning of the phrase as applied to the practice of dentistry is a deliberate

purpose not to discharge some duty necessary to the proper treatment of the patient.

It is true that the statute does not set out seriatim incidences of unprofessional conduct for which license revocation would lie. In *Reyburn v. Minnesota State Board of Optometry,* 247 Minn. 520, 78 N.W. 2d 351 (1956), the Court defined "unprofessional conduct" as "conduct which violates those standards of professional behavior which through professional experience have become established, by the consensus of the expert opinion of the members, as reasonably necessary for the protection of the public interest." (pp. 523-524.)

In *Kansas State Board of Healing Arts v. Foote,* 200 Kan. 447, 436 P. 2d 828 (1968), the Court had before it a statute authorizing the revocation of license to practice medicine for "immoral, unprofessional or dishonorable conduct." There the Court said:

> "It would indeed be difficult, not to say impractical, in carrying out the purpose of the act, for the legislature to list each and every specific act or course of conduct which might constitute such unprofessional conduct of a disqualifying nature. Nor does any such failure leave the statute subject to attack on grounds of vagueness or indefiniteness. Our statute makes no attempt to delineate what acts are included in the terms immoral or dishonorable conduct, which are also made grounds for revocation. The determination whether by common judgment certain conduct is disqualifying is left to the sound discretion of the board." (pp. 453-454.)

Statutes which authorize revocation for unprofessional conduct, grossly immoral conduct, incompetency, and other general terms have been held valid in the majority of jurisdictions notwithstanding their generality. For discussion and authorities see *Brinkley v. Hassig,* 83 F. 2d 351, 355 (10th Cir. 1936); annot., 79 A.L.R. 323, et seq. (1932); 61 Am. Jur., Physicians, Surgeons, § 46, pp. 169-170.

The terms used in our statutes have a well-defined meaning both in the law and the dental profession and are entirely sufficient to give respondents notice of the conduct which would warrant suspension or revocation of their licenses. We hold that the applicable phraseology of G.S. 90-41 is not unconstitutionally vague and indefinite.

[4] Respondents next contend that the proceedings should have been dismissed because the Board lacked jurisdiction over the respondents and the work they performed in the federally financed 1966 summer program out of which the charges arose. This contention is untenable. Respondents rely on the following provision of G.S. 90-29:

> "The following practices, acts, and operations, however, shall be exempt from the provisions of this article:
>
> . . .
>
> (3) The practice of dentistry in the discharge of their official duties by dentists in the United States army, the United States navy, the United States public health service, the United States veterans bureau, or other federal agency."

To say the respondents were "in the discharge of their official duties" as employees of a federal agency is simply belying the plain and uncontradicted facts in the record. The record reveals that the respondents were all private practitioners, that they indicated their desire to participate in a program to treat indigent children for their dental needs during the summer of 1966, that the children to be treated had already been screened through the cooperation of the Health Department and dentists employed to do the screening, that the funds for the work were furnished by the Federal Government but the program was administered totally by the Charlotte-Mecklenburg Board of Education through its Director of ESEA activities, that each participating dentist submitted a bill to the Charlotte-Mecklenburg Board of Education for each patient treated, that the services performed were performed by appointment in each dentist's office, where he customarily practiced his profession as a private practitioner. Mr. Burch, the Director of the ESEA program for the Board of Education, testified that after the evaluation of the work had been done, the Board sought advice from the Office of Education in Washington and "[t]hey in turn turned it back to us and said it was a local responsibility in terms of the administration of the program and in terms of the evaluation of the program . . . " At no time were the participating dentists discharging any official duties as dentists for any federal agency. This assignment of error is overruled.

By assignments of error Nos. 3, 4, 10 and 11, respondents bring forward 70 exceptions to the admission or exclusion of evidence. We do not deem it necessary to set out and discuss

these exceptions seriatim, nor do we discuss the question of whether each of these assignments of error presents but a single question for review. *Nye v. Development Co.*, 10 N.C. App. 676, 179 S.E. 2d 795 (1971), cert. denied 278 N.C. 702, 181 S.E. 2d 603 (1971). Suffice it to say that we have examined each of these exceptions and we find no error sufficiently prejudicial to warrant a new trial.

By assignment of error No. 2 respondents contend that error was committed in admitting evidence and making findings with respect to charges brought to the attention of the respondents for the first time. The assignment embraces 15 exceptions. Eight of the exceptions relate to one patient of Dr. Nash. Close examination of the record reveals that the discrepancies included in finding of the Board are substantially the same as the discrepancies listed in the notice to Dr. Nash. This patient was one of 18 patients treated by Dr. Nash with respect to whom both committees and the Board found discrepancies. We have carefully examined all these 15 exceptions, and we find that the findings and the notice are substantially the same, or that the charges with respect to that exception were eliminated from consideration, or that the charges to which the exceptions related were not included in the findings of the Board. This assignment is overruled.

[5] By respondents' remaining assignments of error (Nos. 5, 8 and 13), they contend that the Board and the court erred in failing to dismiss the charges because of the insufficiency of the evidence. Respondents do not contend that the findings of the Board are not supported by competent evidence. This candor is commendable. They do seem to take the position that the Superior Court is to weigh the evidence and make its own independent determination of the matters in dispute as in the case of consent reference. *Board of Dental Examiners v. Grady*, 268 N.C. 541, 151 S.E. 2d 25 (1966). It is true that at the time of the appeal in *Grady*, G.S. 90-41 required the matter on appeal from the Board of Dental Examiners to be heard in the superior court as in the case of consent references. However the 1967 General Assembly amended G.S. 90-41 and that proviso was deleted. The General Assembly of 1967 included the North Carolina State Board of Dental Examiners in G.S. 150-9, and the scope of review of the Board's decisions is covered by G.S. 150-27. This scope of review was discussed by Justice Parker

(later C.J.) in *In re Berman,* 245 N.C. 612, 97 S.E. 2d 232 (1957), where he wrote:

> "G.S. 150-27 sets forth the scope of review by the Superior Court of the Board's decision, and states that the Judge shall sit without a jury and may affirm the decision of the agency, or remand the case for further proceedings, or may reverse or modify the decision if substantial rights of a person may 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.
>
> The administrative findings of fact made by the State Board of Opticians, if supported by competent, material and substantial evidence in view of the entire record, are conclusive upon a reviewing court, and not within the scope of its reviewing powers. *Baker v. Varser,* 240 N.C. 260, 82 S.E. 2d 90; 42 Am. Jur., Public Administrative Law, Sec. 211, where great numbers of cases from State and Federal Courts are cited." (pp. 616-617.)

In view of respondents' position, we deem it unnecessary to set out the evidence. Suffice it to say that from our study of this voluminous record we are convinced that every finding of fact entered by the Board was supported by competent, material, and substantial evidence (not disputed by respondents) and that the findings of fact are more than sufficient to support the conclusions of law and judgments thereon.

Both respondents and the Board have been most capably represented at all levels of this proceeding.

Affirmed.

Judges PARKER and VAUGHN concur.

JANINE M. JOHNSON v. DAVID A. JOHNSON

No. 7210DC516

(Filed 21 February 1973)

1. Divorce and Alimony § 23— absolute divorce decree — effect on child support order

An order finding the amount of and adjudging defendant liable

for arrearage in payments for child support is afffirmed on appeal since no error is made to appear in the order and since defendant's obligation to support his minor child is unaffected by a decree of absolute divorce entered prior to the child support order.

2. Divorce and Alimony § 20— award of alimony pendente lite — effect of subsequent decree of absolute divorce

Where a judgment awarding the wife alimony *pendente lite* to be continued until the award of permanent alimony was rendered before rendering of judgment for absolute divorce, the rights provided for the wife by the prior judgment could not be impaired or destroyed by the subsequently rendered decree of absolute divorce, and defendant remained liable to continue to make the payments under the alimony *pendente lite* order. Former G.S. 50-11.

3. Divorce and Alimony § 20— continuance of alimony pendente lite after hearing on merits

Even if the trial court erred in continuing an alimony *pendente lite* order after a hearing on the merits was completed, defendant could not complain since he took no appeal from the judgment continuing the order and since defendant himself continued to recognize as binding the *pendente lite* order.

4. Divorce and Alimony § 20— award of permanent alimony — effect of subsequent decree of absolute divorce

Where the right of the wife to be awarded permanent alimony and her right to have the amount thereof determined by the court were expressly adjudicated by a 4 December 1970 judgment, a subsequent decree of absolute divorce rendered on 13 April 1971, by express mandate of G.S. 50-11, could not impair or destroy those rights and an order of 21 February 1972 fixing the amount of permanent alimony was within the power of the court to make.

5. Appeal and Error § 28— general exception to findings of fact — ineffectiveness

Defendant's general exception that the order fixing the amount of permanent alimony and awarding attorney fees was based upon findings not supported by the evidence was broadside and ineffectual.

6. Divorce and Alimony § 21— deed of trust to secure alimony payments — construction

Where a deed of trust executed by defendant provided for its foreclosure should defendant fail to abide by orders of the court entered either before or after its execution, defendant could not complain of partial foreclosure directed upon his failure to comply with an order entered after execution of the instrument.

APPEAL by defendant from *Winborne, District Judge,* 21 December 1971 and 10 February 1972 Civil Sessions of District Court held in WAKE County.

Plaintiff-wife commenced this action against defendant-husband on 19 March 1964 in Superior Court in Wake County under former G.S. 50-16. She alleged abandonment and other grounds and asked for alimony, *pendente lite* and permanent, and for child custody and support. On 27 March 1964 Judge Edward B. Clark signed an order directing defendant to pay plaintiff $450.00 a month as alimony *pendente lite*, $150.00 a month for support of the infant child of the parties, and granted plaintiff exclusive use, for herself and the child, of the residence of the parties at 2325 Byrd Street in the City of Raleigh pending determination of the issues. Thereafter, by orders entered in this action and dated 22 March 1967 and 25 January 1968, Judge J. William Copeland modified the alimony *pendente lite* and child support provisions in certain respects, and in the second of these orders directed defendant to execute and deliver a deed of trust conveying certain of his real estate "for the purpose of securing to the plaintiff compliance with this Court's orders with respect to alimony pendente lite; maintenance and repair, costs on the house and lot at 2325 Byrd Street; medical and drug expenses; all of which the defendant is obligated to pay to or on behalf of the plaintiff under previous orders of this Court." This order further provided that "said deed of trust shall provide for foreclosure in accordance with North Carolina law if the defendant fails to comply with this or any previous order of this Court in respect to such payments."

Defendant failed to execute the deed of trust as directed in Judge Copeland's order of 25 January 1968, and a show cause order was issued on 25 April 1969 pursuant to which the matter came on for hearing before District Judge N. F. Ransdell. After this hearing, Judge Ransdell entered an order dated 2 March 1970 finding defendant in willful contempt from which he might purge himself by executing the deed of trust and otherwise complying with the orders of the court in certain specified respects. The defendant, as Grantor did sign and acknowledge a deed of trust, dated 26 February 1970 and recorded 2 March 1970, conveying the lands he had been ordered to convey to a trustee for the benefit of plaintiff and the minor child of the parties. This deed of trust referred to plaintiff's action instituted in March 1964, recited that it was executed pursuant to Judge Copeland's order entered in said action dated 25 January 1968, "which said order directed Grantor to execute this deed of trust, to secure Grantor's compliance with the orders of the Courts in said action." This deed

of trust provided that "[i]f the Grantor shall fail or neglect to abide by the orders of the Courts heretofore entered, or that are hereafter entered, in aforesaid action, or the covenants and conditions of this deed of trust," then, upon a judicial finding to such effect by a court having jurisdiction of said action, after a hearing held on notice to the Grantor, the trustee was authorized to foreclose.

On 5 January 1970 the husband brought a separate action seeking an absolute divorce on the grounds of separation of the parties, and this divorce action was consolidated for trial with the wife's action for alimony brought under G.S. 50-16. The consolidated cases were tried before District Judge Winborne and a jury at the 30 November 1970 Civil Jury Session of District Court held in Wake County. The jury answered all issues in favor of the wife, finding that the husband had abandoned her, had offered such indignities to her person as to render her condition burdensome and intolerable as alleged in her complaint, and that by cruel and barbarous treatment he had endangered her life. On this verdict Judge Winborne signed a judgment, dated 4 December 1970 but filed 26 February 1971, adjudging as follows:

> "that plaintiff be awarded permanent alimony, said amount of permanent alimony to be determined by this Court out of session; that the alimony pendente lite order in this cause be continued until permanent alimony is determined by the Court. . . ."

No appeal was taken from this judgment.

By motion dated 28 December 1970, verified by defendant-husband on 4 January 1971 and filed on 6 January 1971, defendant moved, upon the grounds of a change in his circumstances, that the court "consider and order a reduction in the granting of child support and alimony pendente lite previously granted herein."

On 4 January 1971 defendant-husband filed a second action for an absolute divorce, basing this action upon the grounds that the parties had lived separate and apart since 27 March 1964, the date of Judge Clark's order entered in the wife's G.S. 50-16 action. On 13 April 1971 judgment was entered in this divorce action granting the husband an absolute divorce. The wife appealed, and by opinion filed 20 October 1971 this

Court affirmed. *Johnson v. Johnson,* 12 N.C. App. 505, 183 S.E. 2d 805.

(On 13 April 1971, on the same day but approximately two and one-half hours after the decree for absolute divorce was entered in the district court in the husband's second action for divorce, plaintiff filed a motion for hearing on the matter of alleged arrearage in alimony and support payments for the period up to 13 April 1971. The "Statement of Case" in the record on the present appeal indicates that this motion was heard and disposed of and that "the matters at issue therein were settled and are not pertinent to this appeal.")

On 8 October 1971 plaintiff filed a motion for an order requiring defendant to show cause why he should not be held in contempt for willful failure to pay support for the minor child and alimony for the period following 13 April 1971. A hearing was held before District Judge Winborne on 21 December 1971. By order dated 25 January 1972 and filed on 1 February 1972, the court found that defendant was in arrears in the sum of $1,785.00 in making payments for child support accruing for the period since 13 April 1971 through 31 December 1971, adjudged defendant indebted to his minor child in that amount, and reserved the issue of willfulness of defendant's failure to make such payments for ruling at a future session of the court. By separate order, also dated 25 January 1972 and filed on 1 February 1972, the court found that defendant was in arrears in the sum of $1,785.00 in making payments of alimony for plaintiff accruing for the period since 13 April 1971 through 31 December 1971, adjudged defendant indebted to plaintiff in that amount, and reserved the issue of willfulness of defendant's failure to make such payments for ruling at a future session of the court.

On 3 February 1972 plaintiff filed a motion reciting the findings made by the court in its orders dated 25 January 1972 as to the amounts of defendant's indebtedness for arrearages in payments of child support and alimony through 31 December 1971, and praying for an order directing the trustee in the deed of trust to sell a portion of the real property described therein and to apply the net proceeds of such sale to pay all amounts due under the orders of the court. On 9 February 1972 defendant filed an exception, dated 4 February 1972, to the order dated 25 January 1972 which had adjudged him indebted to plaintiff in the sum of $1,785.00 for arrearage in payments of alimony. On the same date, 9 February 1972, defendant filed answer op-

posing plaintiff's motion for an order directing foreclosure of the deed of trust on the grounds that "the alleged indebtedness for support and alimony are not based on a lawful judgment or order of the Court."

By order dated 21 February 1972 and filed on 22 February 1972 the court fixed the amount of permanent alimony to be paid monthly by defendant to the clerk of court for the benefit of plaintiff at the sum of $300.00 per month beginning with March 1972, ordered defendant to pay taxes and insurance on the residence in which plaintiff and the child resided, and directed that if defendant should sell said residence, of which he was the sole owner, the amount of permanent alimony to be paid by defendant should be $500.00 per month, instead of $300.00 per month. In this order the court also directed defendant to pay $1,700.00 counsel fees to plaintiff's attorney for services rendered to the plaintiff.

By order dated and filed on 22 February 1972 the court ordered the trustee in the deed of trust to proceed to foreclose on one of the parcels of land described therein and from the net proceeds to pay to the clerk of court the amounts by which defendant had been adjudged indebted by the orders dated 25 January 1972 for arrearages of alimony and child support for the period from 13 April 1971 through 31 December 1971, and to retain any balance of such proceeds pending further orders of the court.

Defendant appealed, assigning errors (1) the signing and entry of the orders dated 25 January 1972 adjudging him indebted for arrearages in payment of alimony and child support; (2) the signing and entry of the order dated 21 February 1972 fixing the amount of permanent alimony to be paid by defendant to plaintiff; and (3) the signing and entry of the order dated 22 February 1972 directing partial foreclosure of the deed of trust.

Smith, Patterson, Follin & Curtis by Michael K. Curtis for plaintiff appellee.

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

PARKER, Judge.

[1] By this appeal appellant seeks review of a series of orders entered by the trial judge on various dates following a single

hearing held on 21 December 1971. The first assignment of error is directed to two of those orders, both dated 25 January 1972. As to these, the record on appeal shows no appeal entries as required by G.S. 1-280 and the record was not docketed within ninety days after their date as required by Rule 5 of the Rules of Practice of this Court. Nevertheless, in order to pass upon the entire case, we elect to consider this appeal, insofar as review of the orders dated 25 January 1972 is concerned, as a petition for certiorari, allow the petition, and consider the merits of the questions raised by the first assignment of error. In this assignment appellant appears to be seeking review of both of the orders dated 25 January 1972, one of which related to arrearage in payments for child support and the other of which related to arrearage in payments of alimony. However, the arguments and authorities cited in appellant's brief are directed primarily to the legal effect of the decree for absolute divorce upon defendant's obligation to continue to pay alimony to his former wife. Since in this case the divorce decree had no effect whatever upon defendant's continuing obligation to support his minor child, and since no substantial argument has been advanced or authority cited to show error committed in the order of 25 January 1972 finding the amount of and adjudging defendant liable for arrearage in payments for child support, we affirm that order and limit our further consideration of the questions presented under the first assignment as they relate to the order adjudging defendant liable for arrearage in payments of alimony.

At the outset we note that the amendments made to Chapter 50 of the General Statutes by Chapter 1152 of the 1967 Session Laws are not applicable in this case, which was pending when the 1967 Act became effective. Section 9, Chapter 1152, 1967 Session Laws. Therefore, the further references herein to sections of G.S. Chapter 50 will be to those statutes as they existed prior to the 1967 Act. Prior to the 1967 Act G.S. 50-11 read, in pertinent part, as follows:

> "§ 50-11. *Effects of absolute divorce.*—After a judgment of divorce from the bonds of matrimony, all rights arising out of the marriage shall cease and determine, and either party may marry again unless otherwise provided by law: Provided, that no judgment of divorce shall render illegitimate any children in esse, or begotten of the body of the wife during coverture; and, provided further, that [except in cases not here pertinent] a decree of absolute

divorce shall not impair or destroy the right of the wife to receive alimony and other rights provided for her under any judgment or decree of a court rendered before the rendering of the judgment for absolute divorce."

[2] In the present case, before the rendering of the judgment for absolute divorce on 13 April 1971, the court rendered the judgment, dated 4 December 1970. This judgment, which was based upon the jury's verdict answering issues in favor of the plaintiff, was not appealed. This judgment awarded the plaintiff-wife two rights as follows: first, "that the plaintiff be awarded permanent alimony, said amount of permanent alimony to be determined by this Court out of session"; and second "that the alimony pendente lite order in this cause be continued until permanent alimony is awarded by this Court." The order of 25 January 1972 adjudicating the amount by which defendant was in arrears in payments of alimony *pendente lite,* and which is the subject of his first assignment of error, is clearly based upon the alimony *pendente lite* award as continued in effect by the second of the rights provided for his wife in the judgment dated 4 December 1970. Since this judgment was rendered before the rendering of the judgment for absolute divorce, the rights thereby provided for the wife could not be impaired or destroyed by the subsequently rendered decree of absolute divorce, G.S. 50-11, and, defendant remained liable to continue to make the payments under the alimony *pendente lite* order. *Yow v. Yow,* 243 N.C. 79, 89 S.E. 2d 867.

[3] Appellant contends that the court erred in providing in its 4 December 1970 order that the alimony *pendente lite* order continue in effect, pointing out that the purpose of such *pendente lite* orders is to provide support for the wife pending a hearing on the merits, and from this arguing that once such a hearing is held and issues are answered by the jury, the rights of the wife to *pendente lite* relief should terminate and she should thereafter be entitled only to such permanent relief as the jury's verdict might justify. We find it unnecessary to pass on this contention. If it was error for the court to continue the *pendente lite* order in effect after the hearing on the merits was completed, defendant may not now avail of such error. No appeal was noted to the judgment of 4 December 1970, and even if erroneous, it became binding on the parties. Moreover, apparently defendant himself continued to recognize as binding the *pendente lite* order which was continued in effect by the 4 December 1970 judgment, for on 28 December 1970 he moved for

a reduction in the amount of alimony *pendente lite* on the grounds of a change in his circumstances, and it appears he thereafter actually paid all amounts ordered to be paid by the *pendente lite* order accruing after the 4 December 1970 judgment and up until 13 April 1971, when the divorce decree was rendered. Appellant's first assignment of error is overruled, and both of the orders dated 25 January 1972 are affirmed.

[4] Appellant's second assignment of error is directed to the order dated 21 February 1972 fixing the amount of permanent alimony and directing defendant to pay counsel fees to his former wife's attorney. Appellant contends that the court lacked power to award permanent alimony after the decree for absolute divorce was rendered, citing *Yow v. Yow, supra,* and contends that this is what the court erroneously attempted to do by its order of 21 February 1972. In the present case, however, unlike the situation in *Yow v. Yow,* the right of the wife to receive permanent alimony was adjudicated in the judgment dated 4 December 1970, which was rendered before the decree for absolute divorce. The only matter left unresolved as far as the wife's right to receive permanent alimony was concerned, was the fixing of the amount of the monthly payments to be made from time to time by the husband. This question of the amount to be paid from time to time on account of permanent alimony, as distinguished from the question of the wife's underlying *right to be awarded permanent alimony,* never becomes finally settled in any event so long as both parties live, since the court may always reconsider the question of the amount of such payments in the light of changed circumstances. The right of the wife to be awarded permanent alimony and her right to have the amount thereof determined by the court were rights expressly adjudicated by the 4 December 1970 judgment. These rights, by express mandate of G.S. 50-11, could not be impaired or destroyed by the subsequently rendered absolute divorce decree.

[5] Appellant's second assignment of error further challenges the order of 21 February 1972 fixing the amount of permanent alimony and awarding attorney fees "for that said Order is based upon findings of fact not supported by the evidence and supported by no evidence." In the order in question the court made a number of detailed findings of fact as to defendant's age, income, properties, and physical and financial ability to pay permanent alimony, as well as making findings as to plaintiff's needs and funds. No exception appears as to any particular find-

ing of fact, the only exception being the one general exception appearing at the end of the order. An exception that the evidence is insufficient to support the findings of the trial court, without exception to a particular finding, is broadside and ineffectual. *MacKay v. McIntosh,* 270 N.C. 69, 153 S.E. 2d 800; *King v. Snyder,* 269 N.C. 148, 152 S.E. 2d 92.

The portion of appellant's second assignment of error challenging the court's power to award counsel fees is also without merit. *Shore v. Shore,* 15 N.C. App. 629, 190 S.E. 2d 666. Appellant's second assignment of error is overruled.

[6] By his third assignment of error appellant attacks the order of 22 February 1972 which directed a partial foreclosure of his deed of trust. He contends that the deed of trust was executed by him pursuant to Judge Copeland's order, which stated that it was for the purpose of securing his compliance with previous orders of the court, and that it was therefore invalid to secure his compliance with any subsequent orders of the court. We do not agree. The express language of the deed of trust which defendant signed and delivered (albeit only after being found guilty of willful contempt of court for refusing to do so for more than two years) provided for its foreclosure if the defendant "shall fail or neglect to abide by the orders of the Courts heretofore entered, *or that are hereafter entered.*" (Emphasis added.) We see no valid reason why defendant should not be bound by the language of the instrument which he signed. Defendant's third assignment of error is overruled.

The orders and judgments appealed from are

Affirmed.

Judges VAUGHN and GRAHAM concur.

STATE OF NORTH CAROLINA v. SHERRILL ALLEN COATS

No. 7211SC807

(Filed 21 February 1973)

1. **Criminal Law § 149— final judgment allowing former jeopardy plea — declaration of unconstitutionality of statute — right of State to appeal**

Though the State may not appeal from a final judgment allowing a plea of former jeopardy or acquittal, it may appeal when judgment

has been given for a defendant upon declaring a statute unconstitutional; therefore, the State's appeal was proper where judgment was given for defendant in this case only after declaration of the unconstitutionality of G.S. 15-177.1 providing for trial *de novo* in superior court without prejudice from former proceedings of the court below. G.S. 15-179(6).

2. **Criminal Law § 18— appeal to superior court — consideration of matters in trial appealed from and in prior trial**

The primary purpose of G.S. 15-177.1 is to allow a completely new trial in superior court without the burden of the plea, judgment, or proceedings in the inferior court in the trial from which defendant appealed, but the statute does not remove from consideration in the trial *de novo* the plea, judgment, and proceedings of a trial in district court which occurred prior to the trial appealed from.

3. **Criminal Law § 26— trial in district court — attachment of double jeopardy**

It is possible for a person to be twice placed in jeopardy within the district court system and, if he is, his constitutional right against such action by the State may properly be asserted by a plea of former jeopardy in bar of a second trial in district court for the same offense.

4. **Criminal Law §§ 18, 26— attachment of double jeopardy in district court — plea upon appeal to superior court**

Where defendant who was charged with drunken driving was brought to trial in district court but, upon motion of the State in mid-trial, the case was continued until two weeks later to give the State time to subpoena the breathalyzer operator who had administered the test to defendant, the second trial in district court placed defendant in jeopardy for the second time for the same offense, and defendant could assert his plea of former jeopardy upon his trial *de novo* in superior court.

5. **Criminal Law §§ 18, 26— trial de novo in superior court — plea of former jeopardy in district court**

G.S. 15-177.1 constituted no impediment upon defendant's right to assert his plea of former jeopardy upon his trial *de novo* in superior court, and the superior court judge erred in declaring the statute unconstitutional upon an erroneous determination that the statute did bar such plea.

APPEAL by State from *Braswell, Judge,* 21 August 1972 Criminal Session of Superior Court held in HARNETT County.

On 16 November 1971, defendant was brought to trial in the District Court of Harnett County on a charge of operating a motor vehicle upon the public highways while under the influence of intoxicating liquor. He entered a plea of not guilty. The State called the arresting officer as a witness and while examining this witness, the solicitor asked if he knew the result

of a breathalyzer test administered to defendant. Defendant's objection to the question was sustained. The solicitor then moved that the case be continued in order to subpoena the breathalyzer operator. Over defendant's objection, the case was continued until 30 November 1971. On that date the case was again called for trial. Before pleading to the charge, defendant entered a plea of former jeopardy on the grounds that he had been placed in jeopardy on the same charge at the trial on 16 November 1971. The plea was denied and defendant then entered a plea of not guilty to the charge. He was convicted and appealed to the Superior Court.

On 10 January 1972, defendant filed a written plea of former jeopardy in Superior Court, setting forth the facts outlined above. On 22 August 1972, the written plea was amended to allege the unconstitutionality of G.S. 15-177.1 on grounds that it "deprives this defendant of his constitutional rights not to be twice put in jeopardy . . . and does effectively deny this defendant of a right to avail himself of a plea of Former Jeopardy in any Court inferior to the Superior Court. . . ."

On 25 August 1972, an order was entered by Judge Braswell in which he found facts and concluded that when defendant was placed on trial a second time on 30 November 1971, he was placed in jeopardy a second time for the same offense; that this was a violation of his constitutional rights, and that defendant is entitled to his discharge. The order also held that G.S. 15-177.1, which provides for a trial *de novo* in the Superior Court on an appeal from a conviction in District Court, is "unconstitutional under the facts of this case in that said statute deprives the defendant of the defense of former jeopardy by trying to provide a trial *de novo;* that a statute cannot take away a constitutional right. . . ." The State appealed to this court.

Attorney General Morgan, by Associate Attorney Kramer, for the State.

Stewart and Hayes, by D. K. Stewart, for defendant appellee.

BROCK, Judge.

[1] The State may not appeal from a final judgment allowing a plea of former jeopardy or acquittal. *State v. Reid,* 263 N.C. 825, 140 S.E. 2d 547. However, because of the apparent intre-

pidity with which the assistant solicitor sought, and the District Court judge allowed, the complete termination of defendant's trial on 16 November 1972 and the retrail of defendant on 30 November 1972, we feel that it should be stated that we agree with Judge Braswell's conclusion that jeopardy attached on 16 November 1972, and that under the facts of this case defendant was twice put in jeopardy for the same offense when he was again called to answer to the same charge on 30 November 1972. This complete termination of the trial and retrial over defendant's objection is a far cry from a brief recess in the trial, or from a mistrial ordered upon appropriate grounds.

The State does have a right to appeal when judgment has been given for a defendant upon declaring a statute unconstitutional. G.S. 15-179(6). Under the procedure and theory followed in the Superior Court, the judgment was given for defendant only after G.S. 15-177.1 was declared "unconstitutional as it relates to the facts of this particular case." It is upon this right that the State bases its appeal.

Defense counsel, the State, and the Superior Court judge all seem to have agreed that G.S. 15-177.1 prevented defendant from asserting in Superior Court, on appeal, a plea of former jeopardy for having been twice put in jeopardy in District Court. For the reasons hereinafter stated, we are of the opinion that G.S. 15-177.1 presents no impediment to the consideration by the Superior Court upon appeal for a trial *de novo* of defendant's plea in bar for having been twice put in jeopardy in the District Court.

As we understand the theory which prevailed in the Superior Court in this case, the following could occur:

> A defendant could be tried, convicted and sentenced in District Court. Over his plea of former jeopardy, he again could be tried, convicted and sentenced in District Court upon the same charge. If he then appealed to the Superior Court from this second conviction, the trial *de novo* provision of the statute (G.S. 15-177.1) would prevent the Superior Court from considering his plea of former jeopardy.

This, of course, the statute does not do. It provides as follows:

> "In all cases of appeal to the superior court in a criminal action from a justice of the peace or other inferior

court, the defendant shall be entitled to a trial anew and de novo by a jury, without prejudice from the former proceedings of the court below, irrespective of the plea entered or the judgment pronounced thereon."

[2] The primary purpose of the quoted statute is to allow a completely new trial in Superior Court without the burden of the plea, judgment, or proceedings in the inferior court *in the trial from which defendant appealed.* It does not remove from consideration in the trial *de novo* the plea, judgment, and proceedings of a trial in District Court which occurred *prior to* the trial appealed from. Where a defendant conceives that he has once been placed in jeopardy and is brought to trial in District Court again upon the same charge, his plea of former jeopardy is cognizable in the District Court. If defendant's plea is overruled and he is convicted in the District Court in what he conceives to be a trial for an offense for which he has formerly been placed in jeopardy, upon appeal to the Superior Court for a trial *de novo,* he may properly reassert his plea of former jeopardy. We are not dealing with a situation in which a defendant is pleading former jeopardy for having been placed in jeopardy in District Court for the first time *in the trial from which he has appealed.* The inquiry is whether he has been placed in jeopardy for the same offense *prior to the time of the trial* from which he has appealed. It is clear that the trial *de novo* in Superior Court does not itself constitute double jeopardy. This is not the question raised by the defendant's plea in this case.

From the recitations in the judgment of the Superior Court, it seems clear that the trial judge relied upon the principles enunciated in *State v. Spencer,* 276 N.C. 535, 173 S.E. 2d 765, and in *State v. Sparrow,* 276 N.C. 499, 173 S.E. 2d 897. The principles stated therein are clearly the law in this state; however, they have no application to the factual situation presented by the present appeal. We are advertent to the implications of *State v. Stilley,* 4 N.C. App. 638, 167 S.E. 2d 529, and we disagree with its reasoning.

In *Spencer* the defendants were convicted in District Court and were sentenced to sixty days in jail. These sentences were suspended and defendants were placed on probation on certain conditions. Each defendant appealed to the Superior Court where, upon trial *de novo* by jury, they were again convicted. In Superior Court one defendant was given an active sentence of nine months and the other five were given active sentences of

six months. On appeal defendants argued that these greater sentences in Superior Court deprived them of their constitutional right to trial by jury because the exercise of their right to appeal from District Court to Superior Court for trial *de novo* by jury was unduly restricted by the threat of a greater sentence upon conviction in Superior Court.

In laying this argument to rest the Supreme Court in *Spencer* stated:

> "It is established law in North Carolina that trial *de novo* in the superior court is a new trial from beginning to end, on both law and facts disregarding completely the plea, trial, verdict and judgment below; and the superior court judgment entered upon conviction there is wholly independent of any judgment which was entered in the inferior court. 'The fact that a right of appeal was given where the defendant was convicted in the lower court without the intervention of a jury has generally been regarded as a sufficient reason, in support of the validity of such trials without a jury in the inferior tribunal, as by appealing the defendant secures his right to a jury trial, in the Superior Court, and therefore cannot justly complain that he has been deprived of his constitutional right.' *State v. Pulliam,* 184 N.C. 681, 114 S.E. 394. Accord: *State v. Norman,* 237 N.C. 205, 74 S.E. 2d 602."
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> "Here, defendants were entitled to a trial *de novo* in the superior court even though their trials in the inferior court were free from error. G.S. 7A-288 (now G.S. 7A-290) and G.S. 15-177.1. This is an unfettered statutory right. It therefore appears that when these defendants appealed to the superior court the slate was wiped clean and the cases stood for trial in the superior court as if there had been no previous trial in the district court. Hence, in the sound discretion of the superior court judge, his sentence may be lighter or heavier than that imposed in the district court. *State v. Morris,* 275 N.C. 50, 61, 165 S.E. 2d 245, 252."

In *Sparrow* the defendants were convicted and sentenced in the District Court. They appealed to Superior Court where they were tried *de novo* by a jury and again convicted. The sentences imposed in Superior Court were greater than those imposed in District Court. Defendants argued that the greater sentences in

Superior Court deprived them of the Sixth Amendment right to trial by jury because the exercise of their right of appeal to the Superior Court, where they could be tried by jury, was unduly restricted because of the risk of a greater sentence upon conviction in the Superior Court.

In laying this argument to rest the Supreme Court in *Sparrow* stated:

> "Here, an appeal entitled these defendants to a trial *de novo* in the Superior Court as a matter of right. This is true even when an accused pleads guilty in the inferior court. *State v. Broome,* 269 N.C. 661, 153 S.E. 2d 384; *State v. Meadows,* 234 N.C. 657, 68 S.E. 2d 406. When an appeal of right is taken to the Superior Court, in contemplation of law it is as if the case had been brought there originally and there had been no previous trial. The judgment appealed from is completely annulled and is not thereafter available for any purpose."

In *Sparrow* the court also quoted with approval from *State v. Morris,* 275 N.C. 50, 61, 165 S.E. 2d 245, 252 as follows:

> "The fact that defendant received a greater sentence in the superior court than he received in the Recorder's Court of Thomasville is no violation of his constitutional or statutory rights. Upon appeal from an inferior court for a trial *de novo* in the superior court, the superior court may impose punishment in excess of that imposed in the inferior court provided the punishment imposed does not exceed the statutory maximum."

The opinions in *Spencer* and *Sparrow* hold that when a defendant appeals from District Court, where he is not entitled to a trial by jury, to the Superior Court, where he is entitled to a trial *de novo* by a jury, the judgment and the proceedings in the trial from which he appealed are overruled as if the trial had never taken place. These opinions are clearly referring to the judgment and proceedings in the District Court *in the trial from which defendants appealed.* These opinions clearly do not hold that the judgment and proceedings in District Court in trials *taking place prior to* the one appealed from are annulled.

In a like manner the opinions in *Colten v. Kentucky,* 407 U.S. 104, 32 L.Ed. 2d 584, 92 S.Ct. 1953; *State v. Broome,* 269 N.C. 661, 153 S.E. 2d 384; and *State v. Meadows,* 234 N.C. 657,

68 S.E. 2d 406; *State v. Overby,* 4 N.C. App. 280, 166 S.E. 2d 461; and *Doss v. North Carolina,* 252 F. Supp. 298 (M.D. N.C. 1966) refer to the annulment of the judgment and proceedings *in the trial from which defendant appealed* to the Superior Court. Nothing in these opinions relates to annulment of proceedings in a trial in the District Court *which took place prior to* the trial appealed from. Insofar as *Colten, Spencer, Sparrow, Broome, Meadows, Overby,* or *Doss* might support a general statement that a defendant may not ordinarily complain on appeal in Superior Court of constitutional deprivations suffered in the District Court, such a general statement does not conflict with our holding in this case. Such a general statement refers to the *de novo* nature of the trial in Superior Court where, if the constitutional guarantees are observed, a constitutional defect in the District Court trial is cured; e.g., where counsel is not appointed for an indigent in District Court, but, upon appeal for trial *de novo,* counsel is provided in the Superior Court (as was the situation in *Doss).*

A plea of former jeopardy is a plea in bar to the prosecution. It poses an inquiry as to what action the court has taken on a former occasion. This inquiry is determined by the trier of facts unless it can be determined as a matter of law on the record. *State v. Davis,* 223 N.C. 54, 25 S.E. 2d 164. The plea of former jeopardy is not an automatic bar to further prosecution. The burden is on defendant to plead and to offer evidence to sustain his plea of former jeopardy. If he fails to plead this defense it is waived. *State v. Cutshall,* 278 N.C. 334, 180 S.E. 2d 745. "The constitutional right not to be placed in jeopardy twice for the same offense, like other constitutional rights, may be waived by the defendant and such waiver is usually implied from his action or inaction when brought to trial at the subsequent proceeding. (citations omitted)." *State v. Hopkins,* 279 N.C. 473, 183 S.E. 2d 657. When double jeopardy is raised as a defense, it is abandoned if defendant pleads guilty after an adverse ruling on his plea of double jeopardy. *State v. Hopkins, supra.*

[3, 4] The general rule is that jeopardy attaches when a defendant in a criminal prosecution is placed on trial (1) on a valid indictment or information, (2) before a court of competent jurisdiction, (3) after arraignment, (4) after plea, and (5) when a competent jury has been impaneled and sworn to make true deliverance in the case. 2 Strong, N. C. Index 2d, Criminal

Law, § 26, p. 516. In our view, a valid warrant charging an offense within the jurisdiction of the District Court is sufficient to satisfy requirement (1) when the trial is in District Court. In our view, when the State calls upon a defendant to plead to a charge in District Court, requirement (3) is satisfied. And, in our view, when a duly elected, qualified, and assigned District Court judge is present to sit as the trier of the facts, requirement (5) is satisfied. Requirements (2) and (4) are by their terms applicable to either the Superior Court or the District Court. Therefore, in our view, it is possible for a person to be twice placed in jeopardy within the District Court system and, if he is, his constitutional right against such action by the State may properly be asserted by a plea of former jeopardy in bar of a second trial in District Court for the same offense. If his plea of former jeopardy is overruled in District Court, and he is placed on trial there and convicted, he may appeal to the Superior Court from this second trial unburdened by the District Court ruling on his plea in bar or any of the other proceedings in the trial appealed from (the second trial). The defendant will then be tried *de novo* and he may assert his plea in bar *de novo* in the Superior Court. If it is determined in Superior Court that defendant has been twice placed in jeopardy in the District Court, the plea in bar should be sustained. This procedure is consistent with the provisions of G.S. 15-177.1.

[5] As stated above, in our opinion, the Superior Court judge was correct in sustaining defendant's plea of former jeopardy. However, he fell into error in considering that G.S. 15-177.1 constituted an impediment to defendant's right to assert his plea of former jeopardy upon the trial *de novo* in the Superior Court; and, consequently, was in error in declaring the statute unconstitutional in this respect.

In our opinion that portion of the judgment appealed from which sustains defendant's plea of former jeopardy is correct and is affirmed. That portion of the judgment appealed from which holds G.S. 15-177.1 "unconstitutional under the facts of this case" is reversed.

Affirmed in part

Reversed in part.

Judges CAMPBELL and GRAHAM concur.

PRISCILLA SMITH v. ALBERT N. SMITH, JR.

No. 7319DC72

(Filed 21 February 1973)

1. **Rules of Civil Procedure §§ 41, 60— motion for involuntary dismissal prior to trial**

A motion for involuntary dismissal pursuant to Rule 41 and Rule 60 is improperly entertained prior to a trial of the cause unless made on the specific grounds that the plaintiff has failed to prosecute or comply with the Rules of Civil Procedure or any order of the court.

2. **Rules of Civil Procedure § 7— motion for involuntary dismissal — purpose of Rule 7**

A motion for involuntary dismissal may not be properly made pursuant to Rule 7 because that Rule merely defines the form of motions made to the court.

3. **Judgments § 45; Rules of Civil Procedure § 12— prior judgment as bar to action — motion to dismiss for failure to state claim for relief — treatment as motion for summary judgment**

The affirmative defense of a prior judgment as a bar to the present action was properly raised by a Rule 12(b)(6) motion to dismiss the complaint for failure to state a claim for relief, and in passing upon such motion, the trial court properly considered matters off the face of the record, gave the parties reasonable opportunity to present all materials pertinent to a disposition of the case by summary judgment under Rule 56, treated the motion as one for summary judgment and disposed of the case on its merits.

4. **Divorce and Alimony § 20— action for alimony without divorce — absolute divorce as bar**

The trial court properly dismissed the wife's action for alimony without divorce and terminated an award of alimony *pendente lite* to the wife on the ground of an absolute divorce obtained by the husband while the wife's action was awaiting a new trial as ordered by the Court of Appeals, since the judgment of absolute divorce terminated the wife's right to sue for alimony.

APPEAL by plaintiff from *Warren, Judge,* 24 July 1972 Session of District Court held in RANDOLPH County for the trial of civil actions.

The original record on appeal filed with this Court is captioned *"Priscilla Smith v. Alfred N. Smith, Jr."* All references to defendant elsewhere in the record are to Albert N. Smith, Jr. On our own motion, we had sent up by the Clerk of the Superior Court of Randolph County copies of the complaint and answer filed. The caption on the record on appeal

appears to be the only instance where defendant is referred to as "Alfred." We, therefore, correct the caption to conform to the pleadings, summons, motions and orders entered in this cause.

This appeal arises from the dismissal of the plaintiff's action for alimony without divorce commenced on 4 December 1970. On 14 December 1970, an order was entered in the cause allowing the plaintiff alimony pendente lite and awarding her custody of and support for the minor children of the marriage. The cause came on for trial on 14 October 1971 and judgment was entered therein awarding the plaintiff permanent alimony. The defendant appealed to the Court of Appeals.

Thereafter on 15 December 1971, the defendant commenced a separate action for absolute divorce in Wake County on the ground of one year's separation, and personal service was had on the plaintiff, Priscilla Smith, defendant in that action. Judgment was entered in that action on 21 January 1972 granting an absolute divorce to the parties, plaintiff and defendant herein.

On 28 June 1972, subsequent to the judgment of divorce, the Court of Appeals filed its decision in the appeal of the alimony without divorce cause, ordering that "[f]or the reasons stated the judgment appealed from is vacated and this cause is remanded for a new trial." [See *Smith v. Smith,* 15 N.C. App. 180, 189 S.E. 2d 525 (1972).]

After the Court of Appeals had filed its opinion granting a new trial, the defendant moved in the Randolph County action "pursuant to G.S. 50-16.9 and Rules 7, 41 and 60 of the Rules of Civil Procedure . . . to terminate the order heretofore entered . . . whereby alimony pendente lite is awarded to plaintiff and to dismiss and bring to a final determination the above entitled action as to alimony. . . . " In support of his motion, defendant attached as exhibits a certified copy of the judgment entered by Judge Winborne in the Wake County divorce action, and a copy of the opinion of the Court of Appeals written and filed by Judge Britt. The defendant also prayed in his motion "[t]hat this verified motion be taken as an affidavit in support of the relief herein sought."

Upon detailed findings of fact and conclusions of law based thereon, Judge Warren in Randolph County entered a judgment

terminating the previous order allowing alimony pendente lite and dismissing the action for alimony without divorce. Plaintiff appealed to the Court of Appeals, assigning error.

Bell, Ogburn and Redding, by Deane F. Bell, for plaintiff appellant.

Emanuel and Thompson, by W. Hugh Thompson, for defendant appellee.

MORRIS, Judge.

Plaintiff assigns as error the trial court's dismissal of her action for alimony without divorce and the termination of the order entered in that action for alimony pendente lite. At the time of the entry of Judge Warren's order dismissing the permanent alimony action, the case stood at the pleading stage, awaiting a new trial as ordered by the Court of Appeals [*Smith v. Smith,* 15 N.C. App. 180, 189 S.E. 2d 525 (1972)], which had vacated the judgment for alimony without divorce previously entered in the Randolph County action.

[1] Initially, we are confronted with the problem of whether it was procedurally permissible for Judge Warren to have entertained and allowed a motion to dismiss the cause pursuant to G.S. 1A-1, Rules 41 and 60, prior to the new trial of the cause and in the absence of any judgment of the court. Rule 6 of the General Rules of Practice for the Superior and District Courts, Supplemental to the Rules of Civil Procedure, provides in part that "[a]ll motions, written or oral, shall state the rule number or numbers under which the movant is proceeding." It is apparent from a perusal of Rule 41 and Rule 60 that a motion for involuntary dismissal pursuant to those rules, *prior to a trial of the cause,* is improperly entertained, unless made on the specific grounds that the plaintiff has failed to prosecute or comply with the rules of civil procedure or any order of the court. See G.S. 1A-1, Rule 41(b).

[2] In like fashion, a motion made pursuant to Rule 7 is improperly entertained by the court for the reason that Rule 7 merely defines the form of motions made to the court. Nonetheless, the plaintiff herein has raised no objections to the method of procedure utilized by the defendant, and we have elected to treat the motion as one made pursuant to G.S. 1A-1, Rule 12(b)(6).

G.S. 1A-1, Rule 12(b) reads as follows:

"*How presented.*—Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, 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:

(1) Lack of jurisdiction over the subject matter,

(2) Lack of jurisdiction over the person,

(3) Improper venue or division,

(4) Insufficiency of process,

(5) Insufficiency of service of process,

(6) Failure to state a claim upon which relief can be granted,

(7) Failure to join a necessary party.

A motion making any of these defenses shall be made before pleading if a further pleading is permitted. The consequences of failure to make such a motion shall be as provided in sections (g) and (h). No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense, numbered (6), to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."

[3] From the rule itself, it may be seen that unless the defendant was entitled to raise the affirmative defense of a prior judgment as a bar to the present action by a motion made pursuant to Rule 12(b) (1) through 12(b) (7), the defense must "be asserted in the responsive pleading thereto if one is required." The issue before us is whether the affirmative defense

of a prior judgment as a bar to the present action may be raised by a Rule 12(b) (6) motion to dismiss the complaint for failure to state a claim upon which relief may be granted.

In *Florasynth Laboratories v. Goldberg,* 191 F. 2d 877 (7th Cir. 1951), we find the following statement:

> "The plaintiff also objects to the fact that the Court below dismissed the complaint on a motion to dismiss the complaint as not stating a cause of action as provided for by Rule 12(b)(6), Federal Rules of Civil Procedure, 28 U.S.C.A., instead of requiring an answer alleging the affirmative defense of *res adjudicata* as provided for by Rule 8(c) F.R.C.P.
>
> . . .
>
> The plaintiff admits 'that certain exceptions have been made to the general rule (requiring an affirmative answer pleading *res adjudicata)* and that in certain instances a motion to dismiss on the ground of *res adjudicata* may be appropriate,' but says that 'controlling factual identities for the purpose of *res adjudicata* must be clearly shown and cannot rest on mere assertion and speculation.' Here, however, we have much more than assertion and speculation. Here the defendants' motion to dismiss alleged facts, shown to be true by the Court's own records, which constituted a complete defense to the action alleged in the complaint. In *W. E. Hedger Transportation Corporation v. Ira S. Bushey & Sons,* 2 Cir., 186 F. 2d 235, 237, the court stated that in such a case, ' * * * there appears no good reason why an answer should be first required.' "

Moreover, by the provisions of Rule 12(b) itself, matters outside the pleading may be presented to the court and considered by it on a Rule 12(b) (6) motion to dismiss in which case the motion will be treated as one for summary judgment under Rule 56. At the common law, such a "speaking motion" was improper, but pursuant to Rule 12(b)(6), "speaking motions" have become permissible by statute. See 2A Moore's Federal Practice, ¶ 12.09 [2], p. 2287. Logically, no distinction should be made "between a speaking motion tending to negative plaintiff's case, and a motion raising affirmative defenses: since the motion is to be treated as one for summary judgment, there is no reason why the existence of affirmative defenses may not be shown even though not appearing on the face of

the complaint." 2A Moore's Federal Practice, ¶ 12.09[3](4), p. 2307. See also *Larter & Sons v. Dinkler Hotels Co.*, 199 F. 2d 854 (5th Cir. 1952).

Judge Warren's order, dismissing the cause in the case at bar, recites the following findings of fact:

> "3) By action numbered 71 CvD 8752, commenced in the Wake County District Court on December 15, 1971, the aforesaid Albert N. Smith, Jr. (defendant in the above entitled action), as plaintiff, filed an action for absolute divorce from the aforesaid Priscilla Smith (plaintiff in the above entitled action); that summons and complaint in said Wake County action were personally served on the defendant therein, said Priscilla Smith, by the Chatham County Sheriff Department on December 20, 1971; that said Wake County action came on for trial and was tried before the Honorable Samuel Pretlow Winborne, Judge Presiding, on January 21, 1972; that judgment was entered by the court on January 21, 1972, absolutely divorcing the aforesaid Albert N. Smith, Jr. and Priscilla Smith, who are the defendant and plaintiff respectively in the above entitled action; and that no appeal was or has been taken from said judgment of Judge Winborne.
>
> . . .
>
> 5) Defendant's aforesaid verified Motion To Dismiss and attached exhibits, upon which this hearing was held and notice of said hearing at 9:30 a.m. on July 27, 1972, were served on plaintiff by mailing of the same to her attorney of record, Deane F. Bell, on July 11, 1972; and said motion, notice of hearing, and certificate of said service were filed with the Randolph County Clerk of Superior Court on July 12, 1972."

Plaintiff did not except to the aforesaid findings of fact, nor has she attempted to dispute the truthfulness of their recitals on appeal before this Court. We hold that, treating the defendant's motion to dismiss as having been made pursuant to Rule 12(b)(6), the trial court properly considered matters off the face of the record, gave the parties reasonable opportunity to present all material pertinent to a disposition of the case by summary judgment, Rule 56, and properly treated the motion as one for summary judgment, disposing of the case on its merits.

[4] We are further of the opinon that the trial judge was correct in terminating the husband's obligation for payment of subsistence pendente lite and dismissing the action for alimony without divorce, as a matter of law, since no issue of fact was raised as to the validity of the judgment of absolute divorce granted in Wake County, which had the effect of ending the plaintiff's right to sue for alimony. *Fullwood v. Fullwood,* 270 N.C. 421, 154 S.E. 2d 473 (1967); *Smith v. Smith,* 12 N.C. App. 378, 183 S.E. 2d 283 (1971); *McLeod v. McLeod,* 1 N.C. App. 396, 161 S.E. 2d 635 (1968).

The judgment appealed from is

Affirmed.

Judges CAMPBELL and HEDRICK concur.

H. BRUCE ROUSE v. JOHNNY F. WHEELER

No. 735SC77

(Filed 21 February 1973)

1. **Reference § 8; Trial § 12— referee's report — alleged misconduct of witness — failure to object — harmless misconduct**

A referee's report will not be set aside on the ground that plaintiff's testimony before the referee was improperly influenced by motions made to him by his wife where no timely objection to the alleged misconduct was made at the hearing before the referee and the misconduct, if any, was harmless.

2. **Reference § 8; Rules of Civil Procedure § 53— authority to enter judgment upon reference**

Where the referee made findings of fact and conclusions of law and purported to enter a judgment against defendant, and the superior court judge confirmed the referee's report but did not enter a judgment on the approved findings and conclusions, the cause must be remanded to the superior court for entry of a proper judgment since only the judge, and not the referee, has authority to enter judgment upon a reference. G.S. 1A-1, Rule 53(e).

ON *certiorari* as substitute for an appeal by defendant from *James, Judge,* 26 June 1972 Session of Superior Court held in NEW HANOVER County.

Narron, Holdford & Babb by William H. Holdford and Henry C. Babb, Jr. for plaintiff appellee.

O. K. Pridgen II for defendant appellant.

MALLARD, Chief Judge.

Plaintiff and defendant had been partners. Plaintiff alleged that the defendant was indebted to him and brought this action against defendant for an accounting of the partnership affairs.

By consent, all issues in the case were referred for determination pursuant to the provisions of G.S. 1A-1, Rule 53. After a hearing at which both parties participated, the referee made findings of fact and conclusions of law and undertook to enter a judgment in favor of plaintiff. There is no contention by appellant that the referee failed to comply with the provisions of G.S. 1A-1, Rule 53(f)(3) requiring the testimony at the hearing before the referee to be reduced to writing.

The referee's report was dated 5 June 1972 and was filed 9 June 1972. On 9 June 1972 appellant excepted to the findings of fact and conclusions of law, excepted to the signing and entry of the referee's report, and "hereby gives notice of appeal to Superior Court." In addition, the appellant made the following motion:

> "Defendant moves to set aside said findings of facts & conclusions of law and defendant respectfully requests that the Referee, or Judge of Superior Court set a time and place for the defendant to argue this motion and allow defendant to present evidence in support of this motion."

The above motion does not appear to have been ruled on by the referee, and no specific request appears on this record for the *referee* to hold such a hearing. On 21 June 1972, more than ten days after the referee's report was filed, the appellant made a motion in the superior court that the referee's report be set aside on the grounds that the plaintiff, at the hearing before the referee, did not testify freely from his own knowledge of the facts because he was frequently prompted by his wife while testifying and that this deceived the referee and constituted a fraud upon the court. On 30 June 1972 after hearing the evidence on the motion, Judge James entered an order denying it after stating in the order that it appeared "to the Court that the Referee in this cause ably and properly

conducted the reference proceedings and was neither deceived nor defrauded by the Plaintiff or any of his witnesses." Defendant objected and excepted to the entry of this order.

Judge James then proceeded to enter what was denominated a judgment, dated 30 June 1972 and filed 5 July 1972, as follows:

> "This cause coming on to be heard and being heard before His Honor, Joshua S. James, Resident Judge of the Fifth Judicial District, at Burgaw, in Pender County, in said District, on the 30th day of June, 1972, upon the Referee's Report duly filed, and the Defendant's exceptions thereto, the Plaintiff and Defendant both being represented by their respective attorneys of record;
>
> And it appearing to the Court, after having considered various and several exceptions of the Defendant to the findings of fact and conclusions of law contained in the Report of the Referee, and the exception of the Defendant to the signing and entry of the Referee's Report, and after having heard Counsel representing Plaintiff and Defendant, that the findings of fact and conclusions of law found by the Referee are correct and based upon competent evidence and the law applicable thereto;
>
> IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the Report of the Referee be, and the same is hereby in all respects approved and confirmed.
>
> IT IS FURTHER ORDERED that $815.10 be allowed as a fee to Richard Von Biberstein, Jr., Referee, for his services rendered herein and that such amount be taxed as a part of the costs to be paid by the Defendant."

Defendant objected and excepted and gave notice of appeal.

[1] Appellant's first assignment of error is that the trial court erred in denying his motion to set aside the referee's report on the grounds that the plaintiff, while testifying as a witness before the referee, was improperly influenced by his wife's making motions to him.

The rule with respect to the granting of a *new trial* on the grounds of misconduct of a witness is stated in 66 C.J.S., New Trial, § 26: "Irregularity in the conduct of a witness is not ground for a new trial if it was harmless, or *if proper objection*

was not taken." (Emphasis added.) We hold that the above-quoted rule relating to misconduct of a witness on a motion for a new trial is applicable in this case where the motion was to set aside the referee's report on the grounds of alleged misconduct of a witness.

It appears from the referee's report that a verbatim record of the proceedings before the referee was made, transcribed and filed with the report. The appellant did not cause this transcript to be made a part of the record on appeal. The referee testified at the hearing before the judge on the defendant's motion that "as to any prompting, if it occurred, I was not aware of it. *It was not brought to my attention.*" (Emphasis added.) There is no evidence that appellant was unaware of the conduct of the witness. On the record before us, timely and proper objection does not appear to have been taken to the alleged misconduct of the witness. We hold that inasmuch as the alleged misconduct of the witness was not brought to the attention of the referee during the course of the hearing, the motion by the appellant to set aside the report of the referee on the grounds of misconduct of the witness before the referee came too late when first made in the superior court. See 66 C.J.S., New Trial, § 37. Moreover, even if we consider that the motion was timely made in superior court (which we do not), it was addressed to the discretion of the judge who heard the motion, and no abuse of discretion is shown. See 7 Strong, N.C. Index 2d, Trial, § 50. In addition, the judge who heard and denied the motion stated that he could not find any basis for the appellant's contention that a fraud was perpetrated on the referee. This was, in effect, a finding that the misconduct, if any, of the witness was harmless.

Appellant states in the record that his second and only other assignment of error, which is to the entry of the judgment approving the referee's report, "is in effect the same as" his first assignment of error. This second assignment of error reads as follows:

> "The Court erred in entering final judgment approving the referee's report in all respects when defendant's evidence clearly showed that plaintiff had been coached by his wife and that the referee was unaware of this coaching, and had relied upon the plaintiff's testimony in preparing his report."

We hold that the defendant's second assignment of error is without merit.

The parties have assumed on this appeal that the foregoing "Judgment" of Judge James was a final judgment. No question as to its validity as a final judgment has been raised by exception duly entered or assignment of error properly presented. However, when the face of the record is considered, the question of the validity of the judgment appealed from is presented. We hold that the above-quoted "Judgment" is not an adjudication of the rights of the parties.

The provisions of G.S. 1A-1, Rule 53(g)(1) and (2) read as follows:

> "(1) Contents and Filing.—The referee shall prepare a report upon the matters submitted to him by the order of reference and shall include therein his decision on all matters so submitted. If required to make findings of fact and conclusions of law, he shall set them forth separately in the report. He shall file the report with the clerk of the court in which the action is pending and unless otherwise directed by the order of reference, shall file with it a transcript of the proceedings and of the evidence and the original exhibits. Before filing his report a referee may submit a draft thereof to counsel for all parties for the purpose of receiving their suggestions. The clerk shall forthwith mail to all parties notice of the filing.
>
> (2) Exceptions and Review.—All or any part of the report may be excepted to by any party within 30 days from the filing of the report. Thereafter, and upon 10 days' notice to the other parties, any party may apply to the judge for action on the report. The judge after hearing may adopt, modify or reject the report in whole or in part, render judgment, or may remand the proceedings to the referee with instructions. No judgment may be rendered on any reference except by the judge."

[2] The last sentence in the above-quoted section of Rule 53 specifically prohibits a referee from entering a judgment in a matter presented to him. His powers are set out in G.S. 1A-1, Rule 53(e) [see also McIntosh, N. C. Practice 2d, § 1399], and the power to enter a judgment is not conferred upon a referee but is specifically limited to the judge. See *Thompson v. Smith,*

156 N.C. 345, 72 S.E. 379 (1911) and *Jones v. Beaman*, 117 N.C. 259, 23 S.E. 248 (1895).

In this case, after making findings of fact and stating conclusions of law separately, the referee attempted to enter a judgment against the defendant in the following language:

> "IT IS, NOW, THEREFORE, ORDERED, ADJUDGED AND DECREED:
>
> 1. That the Plaintiff, on behalf of Excel Tire Company, a partnership, have and recover of the Defendant the sum of $28,302.79.
>
> 2. That the remedy of civil arrest as set forth in G.S. 1-311 and G.S. 1-410(1) and (4) is available to the Plaintiff in the event the Defendant fails to satisfy the judgment herein rendered after execution against the property of the Defendant.
>
> 3. That the costs of this action be taxed against the Defendant."

The referee was without authority to enter such a "Judgment," and the superior court judge should have disregarded that portion of the report of the referee. When that unauthorized portion of the report of the referee is disregarded, there is left only the findings of fact and conclusions of law. These findings of fact and conclusions of law have been in all respects approved and confirmed in the above-quoted "Judgment" of Judge James. We find no error in the order of approval and confirmation by Judge James. However, in view of the fact that Judge James did not enter a *judgment* based on the approved findings of fact and conclusions of law other than to make an allowance for the referee's fee, this cause is remanded to the superior court with directions that a proper judgment be entered herein.

Remanded for judgment.

Judges MORRIS and HEDRICK concur.

IREDELL KNITTING MILLS v. PRINCETON REALTY CORPORATION

No. 7322SC96

(Filed 21 February 1973)

Evidence § 29— accounts payable ledger — lack of authentication — admission as reversible error

The trial court committed error requiring a new trial in this action to cancel a bond and deed of trust executed by plaintiff in favor of defendant when it allowed into evidence a ledger purporting to be plaintiff's accounts payable ledger where the evidence tended to show that the ledger was discovered by plaintiff's president in a store building which had formerly been an outlet of plaintiff mill, that the president could offer no testimony as to who had kept the books of the corporation during the time the ledger was allegedly kept, that the president himself did not know whether entries in the ledger were correct and that no testimony was offered, by identification of handwriting or otherwise, to show who made the entries in the ledger.

APPEAL by defendant from *Kivett, Judge,* at the 26 June 1972 Session of IREDELL Superior Court.

This action was instituted on 4 March 1971 and seeks cancellation of a bond and deed of trust executed by plaintiff in favor of defendant. The complaint alleges:

Plaintiff is a North Carolina corporation and on or about 6 April 1966 executed and delivered to defendant a bond in the amount of $45,000. The bond recites that plaintiff had sold defendant certain machinery and other personal property; that plaintiff had certain common creditors to whom it owed an aggregate amount exceeding $45,000; that although plaintiff was solvent it did not have on that date sufficient cash or current assets with which fully to pay its creditors; that when plaintiff had paid its said creditors an aggregate of $45,000, the bond would be void. The bond is secured by a deed of trust to A. B. Raynor, trustee, conveying certain real estate and improvements thereon. Plaintiff has discharged all of its obligations imposed by the bond and is entitled to have the bond and deed of trust cancelled.

Defendant filed answer denying material allegations of the complaint. Jury trial was waived. Following a trial, the court entered judgment finding facts and adopting conclusions of law as contended by plaintiff, and adjudging that the bond be discharged and the deed of trust cancelled of record. Defendant appealed.

Raymer, Lewis & Eisele by Douglas G. Eisele for plaintiff appellee.

Collier, Harris & Homesley by Edmund L. Gaines for defendant appellant.

BRITT, Judge.

Defendant assigns as error the admission into evidence of plaintiff's exhibit 8 identified as plaintiff's accounts payable ledger. This ledger is approximately 9 inches by 12 inches, loose-leaf, contains some 250-300 pages, entries are in handwriting, and has a label "IREDELL KNITTING MILLS, INC. ACCOUNTS PAYABLE LEDGER" affixed on the front cover with Scotch tape. Plaintiff's purpose in offering the ledger was to show plaintiff's accounts payable as of 6 April 1966 and payments on said accounts.

Plaintiff's president testified in pertinent part as follows: A resident of New York, he became plaintiff's president a few months after the death of his father, plaintiff's former president and general manager, on 13 October 1971. He located said ledger in a store building at 117 North Center Street, Statesville, N. C.; his father formerly operated an outlet store at said location. From 1966 until about 1970, one Nell Winecoff worked for his father as bookkeeper; she died in April of 1971. On cross-examination he testified that prior to his father's death he had no active role in plaintiff's operation, did not know who kept said ledger prior to April 1966 and did not know who kept it from that date until his father's death; " . . . all I know is where I found it, and I don't know if the various entries are correct as to the creditors' names and amounts owed or paid."

No testimony was offered, by identification of handwriting or otherwise, to show who made the entries in the ledger.

The assignment of error must be sustained.

In Stansbury N. C. Evidence, 2d Ed., § 155, after reviewing the business entries rule in this State and its liberalization due to changing business conditions, the author on page 390 says: " * * * If the entries were made in the regular course of business, at or near the time of the transaction involved, and are authenticated by a witness who is familiar with them and the system under which they were made, they are admissible. * * * "

In *Supply Co. v. Ice Cream Co.*, 232 N.C. 684, 685-686, 61 S.E. 2d 895, 896-897 (1950), the court said:

> "The rule of evidence formerly observed by the courts limiting proof of items of business transactions to matters within the personal knowledge of a witness, has undergone revision in the light of modern business conditions and methods. (Citations.) The impossibility of producing in court all the persons who observed, reported and recorded each individual transaction gave rise to the modification which permits the introduction of recorded entries, made in the regular course of business, at or near the time of the transaction involved, and authenticated by a witness who is familiar with them and the method under which they are made. This rule applies to original entries made in books of account in regular course by those engaged in business, when properly identified, though the witness may not have made the entries and may have had no personal knowledge of the transactions. (Citations.)"

In *Sims v. Insurance Co.*, 257 N.C. 32, 35, 125 S.E. 2d 326, 329 (1962), the court in passing upon the admissibility of hospital records said: " * * * Ordinarily, therefore, records made in the usual course of business, made contemporaneously with the occurrences, acts, and events recorded by one authorized to make them and before litigation has arisen, are admitted upon proper identification and authentication. (Citations.)"

In *City of Randleman v. Hinshaw*, 2 N.C. App. 381, 383, 163 S.E. 2d 95, 97 (1968), we said: "Before any writing will be admitted in evidence, it must be *authenticated* in some manner—i.e., its genuineness or execution must be proved. (Citations.) * * * "

In 30 Am. Jur. 2d, Evidence, § 927, pp. 46-47, we find:

> "Under the common law, entries in books of accounts made in the regular course of business by a person other than the party who offers them in evidence are admissible provided they are proved by the person who made them. If the entries are not verified by the person who made them, and it is not shown that such person is unavailable as a witness, the books are not admissible. However, where such third person is dead at the time of the trial or otherwise unavailable as a witness, entries or memoranda made by him in the regular course of business,

and under circumstances calculated to insure accuracy and precluding any motive of misrepresentation, are admissible as prima facie evidence of the facts stated, *upon proof of his handwriting.* * * * " (Emphasis ours.)

We hold that the court erred in admitting plaintiff's exhibit 8 into evidence. Proper foundation for its admission was not laid.

We are of the opinion that the ends of justice require that the judgment appealed from be vacated and a new trial be had. *Watkins v. Grier,* 224 N.C. 334, 30 S.E. 2d 219 (1944). It is so ordered. We deem it unnecessary to discuss the other assignments of error argued in the briefs. We also deem it unnecessary to decide *ex mero motu* if the trustee in the deed of trust is a necessary party to this action.

New trial.

Judges MORRIS and HEDRICK concur.

HOUSING AUTHORITY OF THE CITY OF GREENSBORO, NORTH CAROLINA v. MABEL L. FARABEE AND SPOUSE, IF ANY, R. D. DOUGLAS, JR., TRUSTEE, HOME FEDERAL SAVINGS AND LOAN ASSOCIATION, INC., CITY OF GREENSBORO, COUNTY OF GUILFORD AND ALL OTHER PERSONS, IF ANY, WHO MAY HAVE OR CLAIM AN INTEREST IN THE SUBJECT MATTER OF THIS PROCEEDING

No. 7318SC56

(Filed 21 February 1973)

Costs § 1— condemnation proceeding — taxing of attorney fees

G.S. 160A-243.1 does not authorize an award of attorney fees to the landowner when judgment is entered awarding title to the condemnor and compensation to the landower for the taking in a proceeding instituted by the condemnor, but the statute does authorize an award of attorney fees to the landowner when the condemnor abandons a condemnation proceeding, or when it is adjudicated that the condemnor cannot acquire the property by condemnation, or when the condemnor takes possession of the landowner's property without first instituting a condemnation proceeding and the landowner institutes an action against the condemnor and recovers damages for the taking; therefore, the trial court erred in awarding attorney fees to the landowner for costs incurred in an action instituted by condemnor adjudicating condemnor's right to condemn landowner's property and the amount to be paid as just compensation.

APPEAL by petitioner from *Webb, Judge,* 10 July 1972 Session of Superior Court held in GUILFORD County.

The petitioner, the Housing Authority of the City of Greensboro, instituted this special proceeding under the provisions of Chapter 157 and Chapter 40 of the General Statutes of North Carolina.

The questions of the right of the Housing Authority to condemn respondents' property, and the amount to be paid as just compensation for the taking of respondents' property are no longer in controversy.

Respondents filed a motion before the Clerk of Superior Court of Guilford County requesting that counsel fees and appraiser's fees for respondents' attorneys and appraisers be taxed as a part of the court costs to be paid by petitioner. The Clerk denied the motion and respondents appealed. The matter was heard by Judge Webb and he signed judgment directing that a fee of $3,967.00 be paid to respondents' counsel and that it be taxed in the court costs against petitioner.

Petitioner appealed from that portion of the judgment awarding counsel fees.

Frye, Johnson & Barbee, by Ronald Barbee, for petitioner-appellant.

Smith, Patterson, Follin & Curtis, by Marion G. Follin, III, for respondents-appellees.

BROCK, Judge.

The sole question presented by this appeal is the authority of the court under G.S. 160A-243.1 to order attorney fees for the landowners taxed in court costs to be paid by the Housing Authority. The pertinent portions of G.S. 160A-243.1 read as follows:

> "The court having jurisdiction of an action instituted by a city or an agency, board or commission of a city to acquire any interest in real property by condemnation shall award the owner of any right, or title to, or interest in, such real property such sum as will in the opinion of the court reimburse such owner for his reasonable cost, disbursements, and expenses, including reasonable attorney fees, appraisal, and engineering fees, actually incurred

because of the condemnation proceedings, if the final judgment in the action is that the city or agency, board or commission of a city cannot acquire such real property or interest therein by condemnation, or if the proceeding is abandoned by the city, agency, board or commission of a city.

"The judge rendering a judgment for the plaintiff in a proceeding brought under Chapter 40 of the General Statutes awarding compensation for the taking of property by a city or an agency, board or commission of a city shall determine and award or allow to such plaintiff, as a part of such judgment, such sum as will in the opinion of the court reimburse such plaintiff for his reasonable cost, disbursements and expenses, including reasonable attorney, appraisal, and engineering fees, actually incurred because of such proceeding."

In our opinion the first paragraph quoted above directs the court to award attorney fees to the landowner when the city, agency, board or commission abandons a condemnation proceeding; or when it is adjudicated that the city, agency, board, or commission cannot acquire the property, or interest, by condemnation. This paragraph clearly does not authorize an award of attorney fees to the landowner when judgment is entered awarding title to the condemnor and compensation to the landowner for the taking in a proceeding instituted by the condemnor.

In our opinion the second paragraph quoted above directs the court to award attorney fees to the landowner when the city, agency, board, or commission takes possession of the landowner's property, or interest therein, without first instituting a condemnation proceeding, and the landowner institutes an action against the city, agency, board, or commission and recovers damages for the taking. It does not authorize an award of attorney fees to the landowner when judgment is entered awarding title to the condemnor and compensation to the landowner for the taking in a proceeding instituted by the condemnor.

We are advertent to the provisions for the award of attorney fees contained in the Urban Redevelopment Law, particularly G.S. 160-456(2), but in our opinion it expresses a legislative intent different from that expressed in G.S. 160A-

243.1. It appears to us that G.S. 160A-243.1 is intended to accomplish the same purpose as that expressed in G.S. 136-119. The wording of these last two mentioned statutes is very similar.

The portion of the judgment of the trial tribunal which awards an attorney fee to respondent as a part of the court costs taxed against petitioner is

Reversed.

Judges CAMPBELL and GRAHAM concur.

IVEY S. BODENHEIMER v. WALTER STANTON BODENHEIMER

No. 7322SC7

(Filed 21 February 1973)

1. **Rules of Civil Procedure § 51— no failure to review any of the evidence**

The trial court did not fail to review any of the evidence in violation of G.S. 1A-1, Rule 51, where the court stated to the jury what the parties contended the evidence tended to show.

2. **Deeds § 4— instructions on mental capacity**

Trial court's instruction that a grantor had sufficient mental capacity to execute a deed "if he understood the act in which he was engaged and its scope and effect" was sufficient without the addition of the phrase "and whether he knew what land he was disposing of, to whom and how."

Judge BROCK concurring in the result.

APPEAL by defendant from *Chess, Special Judge,* 22 May 1972 Civil Session of DAVIDSON County Superior Court.

Plaintiff instituted this civil action to set aside a deed conveying real property from W. A. Bodenheimer (deceased) to Walter Stanton Bodenheimer, dated 16 August 1971, on the grounds of insufficient mental capacity of the grantor and undue influence on the part of the grantee. W. A. Bodenheimer died on 26 August 1971 leaving a will which devised the real property in question to the plaintiff.

The jury found that there was insufficient mental capacity to execute the deed in question.

Walser, Brinkley, Walser & McGirt by Walter F. Brinkley and Charles H. McGirt for plaintiff appellee.

Powe, Porter and Alphin, P.A. by James G. Billings for defendant appellant.

CAMPBELL, Judge.

The case on appeal certified to this Court contains none of the evidence presented at the trial; it does contain the record proper and the trial court's charge to the jury.

In this appeal the defendant has asserted two assignments of error: (1) that the trial court erred in failing to review *any* of the evidence presented in the trial, as required by Rule 51 of the rules of procedure; and (2) that the court erroneously instructed the jury as to the law regarding the requisite mental capacity to execute a deed.

Rule 51 requires the trial judge to perform two positive acts: (1) to declare and explain the law arising on the evidence presented in the case; and (2) to review such evidence to the extent necessary to explain the application of that law to the particular facts and circumstances of the case.

If the evidence presented in the case at trial is not preserved in the record on appeal, the appellate court is unable to determine if the court instructed on all the law which is raised by that evidence and cannot determine if enough of the evidence was summarized to explain the applicable law to the particular facts and circumstances. Absent a clear showing that the trial judge committed error, it is presumed that the trial judge charged the jury correctly upon the evidence adduced at the trial. *James v. R. R.*, 121 N.C. 530, 28 S.E. 537 (1897).

Although it is a correct rule that where there is no evidence in the record on appeal the trial court's charge will be sustained, it is also true that where an instruction is patently or inherently erroneous to the prejudice of the appellant, the judgment will be reversed for new trial. *State v. Todd*, 252 N.C. 784, 114 S.E. 2d 581 (1960); *State v. Ray*, 232 N.C. 496, 61 S.E. 2d 254 (1950).

This latter principle would be applicable, for example, where the trial court's instruction did not contain any evidence whatsoever, or where the trial court's statement of the law was obviously wrong.

[1] Defendant in the instant case asserts that the trial court committed both these errors; that is, that it did not review *any* evidence, and that its statement of the law was incorrect.

The trial court prefaced its remarks concerning the evidence of each party with a statement that, " . . . the plaintiff [defendant] has offered evidence which he contends tends to show . . . " , followed by a general summary of the testimony. Defendant argues that the court did not review any evidence, but merely stated *contentions* of the parties. A contention, however, is a point advanced or maintained in a debate or argument; it is a statement of ultimate fact or conclusion which must be supported by evidence. As a contention is not evidence, so evidence is not a contention. Thus, where the trial judge began a portion of his charge by saying, "The State contends and offers evidence tending to show," followed by a summary of the evidence of the witnesses, the court did not undertake to give any of the *contentions* of the parties. *State v. Colson,* 222 N.C. 28, 21 S.E. 2d 808 (1942).

The charge in the instant case was quite scant on the evidence adduced; but it cannot be said that the trial court failed to review *any* of the evidence, and in the absence of any evidence in the record, we will not say it was error.

[2] Defendant's second assignment of error alleges that the trial court stated the law concerning mental capacity to execute a deed incorrectly. On this issue the court charged:

> "[I]f the grantor had mental capacity to know at the time, the nature of the act in which he was engaged and its scope and effect, then he had mental capacity to execute it.
>
> It is not necessary that the grantor be able to dispose of his property with the judgment and discretion, wisely or unwisely, for he had a right to do with his own what he pleased, but it is enough if he understood the act in which he was engaged and its scope and effect."

Defendant argues that the instruction was incomplete, in that the trial court should have added the phrase, *"and whether he knew what land he was disposing of, to whom and how."* For authority, defendant relies upon *Hendricks v. Hendricks,* 272 N.C. 340, 158 S.E. 2d 496, reversed on rehearing in 273 N.C. 733, 161 S.E. 2d 97 (1968).

Hendricks does not support defendant's contention for several reasons: (1) the appeal dealt with the propriety of a question asked witnesses concerning their opinion of the grantor's mental capacity, not the court's charge to the jury; (2) the *Hendricks* opinion quoted with approval a statement of the law from *Goins v. McLoud,* 231 N.C. 655, 58 S.E. 2d 634 (1950), which statement is substantially in the same words as the instruction in the instant case; (3) the words "and whether he knew what land he was disposing of, to whom and how," were quoted from *McDevitt v. Chandler,* 241 N.C. 677, 86 S.E. 2d 438 (1955), which used the phrase only to explain the meaning of the phrase, "understood . . . the nature and consequences of his act in making the deed." (4) There is nothing in either of these two cases which requires the trial judge to say the same thing in two or more different ways.

Accordingly, we find no error.

No error.

Judge GRAHAM concurs.

Judge BROCK concurs in the result.

Judge BROCK concurring in the result.

I would overrule the assignment of error which charges that the trial judge failed to review *any* of the evidence presented in the trial. I would do this upon the basis that the trial judge quite clearly instructed the jury upon *some* of the evidence when he read to the jury the stipulations which the parties had entered into. However, I cannot agree that the trial judge properly summarized the testimony as the majority opinion apparently holds. In my opinion a statement by the trial judge of what the parties contend the evidence shows does not satisfy the requirements of G.S. 1A-1, Rule 51(a). This rule requires the judge to state the evidence to the extent necessary to explain the application of the law thereto. In the case presently before us, the trial judge only told the jury what the *parties contended* that the evidence tended to show. In my opinion this type of instruction is inadequate.

For the reasons stated, I concur only in the result reached by the majority.

THOMAS SMITH AND JEANNIE RUTH HEGGINS v. GORDON T. VONCANNON AND KIRK'S TAXI SERVICE, INC.

No. 7319DC45

(Filed 21 February 1973)

1. **Principal and Agent § 4— absence of proof of agency— directed verdict for principal**

Where there is no evidence presented tending to establish an agency relationship, the alleged principal is entitled to a directed verdict.

2. **Negligence §§ 52, 59; Trespass §§ 1, 7— taxi driver entering driveway — licensee — taxi striking house during assault by passenger — absence of negligence by driver**

Defendant taxi driver entered plaintiffs' land as a licensee, not a trespasser, when he drove upon their driveway at the end of a road in a remote area and is not strictly liable for all harm caused but is liable only for injury proximately caused by his negligence or intentionally inflicted by him; consequently, defendant driver is not liable to plaintiffs for damages caused when the taxi rolled down a hill and struck their house while the driver was attempting to defend himself from an assault by the passenger.

Judge BROCK dissenting.

APPEAL by plaintiffs from *Warren, Judge,* 17 July 1972 Session of ROWAN County District Court.

This is a civil action instituted by plaintiffs to recover for damage to their home located on York Road in Salisbury, North Carolina, which allegedly occurred as a result of a trespass on their land committed by VonCannon as the agent of the corporate defendant, Kirk's Taxi Service, Inc.

Plaintiffs' evidence tended to show the following facts: On 27 April 1971, at about 9:30 p.m., plaintiff Heggins, who lived in the home with her six children, returned to the home and discovered that one end of the house had been crushed inward. The interior of the house was severely damaged, and a hole through the wall allowed the winter weather and deleterious objects to enter the house.

Sometime before 9:00 that evening, defendant VonCannon was sitting in his cab outside the cabstand when a colored man came across the street and got into the back and said he wanted to go out on Bringle Ferry Road. VonCannon drove him out there and was then told to go down York Road and on reaching the end VonCannon pulled into the right and stopped. At this time VonCannon was four to six feet from a house which was

lower than the York Road. The driveway went downhill to the house. At this time the man in the back hit VonCannon several times on the head. VonCannon turned to defend himself and the assailant jumped out and ran and has not been arrested. During this time the automobile rolled down the hill and damaged the house. VonCannon did not lose consciousness but was bleeding about the head and went to the hospital.

At the close of plaintiffs' evidence a defense motion for directed verdict was granted on the grounds that plaintiffs' evidence did not show an "unlawful" trespass, and that there was no evidence of an agency relationship between VonCannon and Kirk's Taxi Service, Inc.

Burke & Donaldson by Arthur J. Donaldson for plaintiff appellants.

Kluttz and Hamlin by Lewis P. Hamlin, Jr. and Richard R. Reamer for defendant appellees.

CAMPBELL, Judge.

[1] Agency is a fact to be proved as any other, and where there is no evidence presented tending to establish an agency relationship the alleged principal is entitled to a directed verdict. *Lindsey v. Leonard,* 235 N.C. 100, 68 S.E. 2d 852 (1952). The directed verdict in favor of defendant Kirk's Taxi Service, Inc., was therefore proper.

[2] The plaintiffs contend that defendant VonCannon entered their land without permission or consent, that VonCannon is therefore a trespasser, and that he is, as a result of the trespass, strictly liable for all harm caused. Plaintiffs rely on *Dougherty v. Stepp,* 18 N.C. 371 (1835). We do not concur in the plaintiffs' theory of this case. On the contrary, it is the opinion of this Court that the defendant VonCannon entered the driveway on plaintiffs' property as a licensee.

> "A licensee is a person who is neither a customer nor a servant nor a trespasser and does not stand in any contractual relation with the owner . . . and who is permitted, expressly or impliedly, to go thereon merely for his own interest, convenience or gratification. . . . " *Pafford v. Construction Co.,* 217 N.C. 730, 9 S.E. 2d 408 (1940).

We are of the opinion that the defendant in the instant case was entitled to assume, when he entered plaintiffs' drive-

way, that he had the landowner's consent to do so. In the words of the plaintiff, "My home is out in a remote area at the end of a road and the driveway turns off there at the end of that road into my house." The license, or consent to enter, may, of course, be denied by the landowner with some expression of intent to that effect, or may terminate where the extent of the privilege is abused by some conduct on the part of the licensee, in which case his continued presence would constitute a trespass.

In the instant case there is neither evidence that VonCannon knew beforehand that he did not have permission to enter, nor that VonCannon committed any act in abuse of the privilege. Since he is not a trespasser, it is clear that his liability for harm is determined by ordinary principles of tort law; he is liable for injury which is a proximate result of his negligence, or which is intentionally inflicted by him. Compare *Smith v. Pate,* 246 N.C. 63, 97 S.E. 2d 457 (1957) and *Schloss v. Hallman,* 255 N.C. 686, 122 S.E. 2d 513 (1961).

Since the plaintiffs' property damage is not the *proximate* result of any wrongful conduct on the part of the defendant VonCannon, he is not liable to them for their unfortunate damages.

No error.

Judge GRAHAM concurs.

Judge BROCK dissents.

Judge BROCK dissenting.

In my opinion the opening of a private driveway from the street to a residence does not constitute an invitation to the general public to use it for the purpose of turning around.

PAUL VUNCANNON v. JOE W. GARRETT, COMMISSIONER, NORTH CAROLINA DEPARTMENT OF MOTOR VEHICLES

No. 7319SC69

(Filed 21 February 1973)

Automobiles § 1— drunken driving — limited driving privilege — suspension for refusal to take breathalyer test

The Department of Motor Vehicles had authority to suspend for 60 days the limited driving privilege granted a defendant convicted of drunken driving for defendant's willful refusal to take a breathalyzer test at the time of his arrest for drunken driving. G.S. 20-16.2

Vuncannon v. Garrett, Comr. of Motor Vehicles

APPEAL by plaintiff from *Armstrong, Judge,* 25 September 1972 Session of RANDOLPH Superior Court.

The parties stipulated to the following:

"1. That all parties are properly before the Court and the Court has jurisdiction of the parties and the subject matter.

2. That all parties have been correctly designated and there is no question as to misjoinder or nonjoinder of parties.

3. That there are no pending motions and neither party desires further amendments to the pleadings.

4. That on 22 February 1972, the petitioner was arrested upon reasonable grounds and charged with operating a motor vehicle upon the public highways of the State while under the influence of intoxicating liquor in violation of G.S. 20-138.

5. That after the petitioner was placed under arrest and advised of his constitutional rights, the petitioner was requested to submit to a chemical test of his breath for the purpose of determining the alcoholic content of the petitioner's blood; that petitioner without just cause or legal excuse willfully refused to submit to said test after being informed of his right to counsel and to have a witness observe the test, and that such refusal would result in a revocation of his driving privilege for a period of 60 days.

6. That the petitioner has exhausted his administrative remedies.

7. That on 11 April 1972, the petitioner was convicted of driving under the influence in the Randolph County District Court and was granted a limited driving privilege pursuant to the provisions of G.S. 20-179; that on said date, the petitioner surrendered his driver's license to the Court and the same was forwarded to the Department of Motor Vehicles.

8. That at the time the limited privilege was granted to the petitioner by the Court on 11 April 1972, the respondent had issued its official notice of revocation of driving privilege dated 31 March 1972, but such order did not become effective until 12:01 a.m., 15 April 1972, revoking the petitioner's driving privilege for 60 days, as shown by Exhibit "A."

9. That respondent on 2 May 1972 mailed its official notice and record of revocation of driving privilege to the petitioner, effective 12:01 a.m., 11 April 1972, requesting the petitioner to surrender his limited driving privilege granted by the Court, but the petitioner refused to surrender his limited driving privilege, as shown by Exhibit "B."

10. That the only issue for determination by the Court is an issue of law as follows:

> Does the Department of Motor Vehicles have the authority to require the petitioner to surrender his limited driving privilege granted by the Court for a willful refusal to take the breathalyzer test in violation of G.S. 20-16.2?"

The trial court entered a judgment to the effect that Vuncannon must surrender his limited driving privilege granted by the court to the Department of Motor Vehicles for a period of 60 days for a wilful refusal to take a chemical test of breath but that the limited driving privilege granted by the court could not be retained beyond 60 days. From this judgment Vuncannon appealed.

Attorney General Robert Morgan by Assistant Attorneys General William W. Melvin and William B. Ray for the defendant appellee.

Bell, Ogburn and Redding by J. Howard Redding for the plaintiff appellant.

CAMPBELL, Judge.

The judgment of the trial court is in accordance with the law set forth in *Joyner v. Garrett, Comr. of Motor Vehicles,* 279 N.C. 226, 182 S.E. 2d 553 (1971). In the *Joyner* case, instead of having been convicted for operating a motor vehicle on a public highway while under the influence of an intoxicant in violation of G.S. 20-138, the driver pled guilty to the charge, and his driver's license was revoked for one year with "limited driving privileges in accordance with G.S. 20-179." The North Carolina Supreme Court went on to point out, however, speaking through Sharp, J. as follows:

> "The suspension of a license for refusal to submit to a chemical test at the time of an arrest for drunken

driving and a suspension which results from a plea of guilty or a conviction of that charge are separate and distinct revocations. The interpretation which petitioner seeks would render G.S. 20-16.2 superfluous and meaningless. Petitioner's guilty plea [in this case a conviction] in no way exempted him from the mandatory effects of the sixty-day suspension of his license if he had wilfully refused to take a chemical test. . . . "

In the *Joyner* case the proceeding was sent back for a determination as to whether or not the driver willfully refused to take the test. "If the Superior Court finds that he did, his license must be revoked for an additional sixty days." In the instant case it was stipulated "that petitioner without just cause or legal excuse willfully refused to submit to said test." Thus, in the instant case the undetermined question in the *Joyner* case had been determined.

Affirmed.

Judges BROCK and GRAHAM concur.

STATE OF NORTH CAROLINA v. JOHNNY C. COLEY

No. 7320SC167

(Filed 21 February 1973)

1. **Automobiles § 126— breathalyzer test — statements by administering officer — admissibility of results**

Statements by the officer administering a breathalyzer test to defendant in a drunk driving case as to the effect of defendant's refusal to take the test were accurate and did not coerce defendant into submitting to the test.

2. **Automobiles § 126— breathalyzer test — qualifications of administering officer — manner of administering**

Where qualifications of the officer administering a breathalyzer test and the manner of conducting it met the requirements of G.S. 20-139.1, results of the test were competent evidence in a prosecution under G.S. 20-138.

APPEAL by defendant from *Lupton, Judge,* 24 July 1972 Session of STANLY County Superior Court.

Defendant was tried and convicted of the offense of driving a motor vehicle while under the influence of intoxicating liquor, in violation of G.S. 20-138. The State offered the testimony of three police officers, two of whom were present at defendant's arrest, the other being the officer who administered a breathalyzer test.

The arresting officers testified that they observed a truck traveling erratically along Highway 52 at about 1:00 a.m. on 27 May 1972; that they stopped the truck and found defendant to be the driver; and that defendant's face was red, his breath smelled of alcohol, his speech was slurred, and his walk slightly unsteady.

Officer J. M. Leopard testified that he gave defendant a breathalyzer test on 27 May 1972 at 1:35 a.m. after informing defendant that he did not have to take the test, but that if he refused, such refusal could be used as evidence in court against him and that he had thirty minutes to secure the presence of his attorney or other witness if he desired.

Defendant took the breathalyzer test, the result of which indicated his blood-alcohol content to have been 0.17 per cent by weight.

Attorney General Robert Morgan by Assistant Attorneys General William W. Melvin and William B. Ray for the State.

Gerald R. Chandler for defendant appellant.

CAMPBELL, Judge.

[1] Defendant contends that he was coerced into submitting to a breathalyzer test because of incorrect statements made to him by Officer Leopard as to the effect of his refusal. We have reviewed the testimony of Officer Leopard, and it was factually accurate and distinguishable from *State v. Mobley,* 273 N.C. 471, 160 S.E. 2d 334 (1968), upon which defendant relies.

Defendant has challenged the admissibility of the breathalyzer test result on other grounds. He argues that there was no competent evidence in the trial that the particular breathalyzer used was working properly; that the operator, Officer Leopard, was competent to testify; that the chemicals used were pure and mixed correctly and that the mechanical parts of the device were in perfect working condition.

[2] "The result of a Breathalyzer test, when the qualifications of the person making the test and the manner of making it meet the requirements of G.S. 20-139.1, is competent evidence in a criminal prosecution under G.S. 20-138." *State v. Cooke,* 270 N.C. 644, 155 S.E. 2d 165 (1967). These requirements were all met in the instant case.

We have reviewed all of the 28 assignments of error and do not think a seriatim discussion is necessary as we find no prejudicial error and the defendant was afforded a fair trial.

No error.

Judges BROCK and GRAHAM concur.

STEVE W. KISER v. H. F. SNYDER, C. EDWIN ALLMAN, W. O. BARRETT, R. DOUGLAS BOYER, DALLAS CHAPPELL, VANN H. JOHNSON, MRS. H. C. LAUERMAN, CLYDE F. McSWAIN, GRADY SWISHER, MARVIN MULHERN, DR. DONALD M. HAYES AND THOMAS D. ROBINSON, TRUSTEES OF FORSYTH TECHNICAL INSTITUTE

No. 7321SC162

(Filed 28 February 1973)

Negligence § 5; Rules of Civil Procedure § 56— summary judgment — negligence case — material issue of fact

When all the evidence is considered in the light most favorable to plaintiff, material issues of fact were raised as to whether plaintiff was properly instructed as to the use of a metal shearing machine before being directed to use it; therefore, summary judgment was improperly entered for defendant in plaintiff's action for personal injury sustained when his fingers were caught in the machine while he operated it.

APPEAL by plaintiff from *Gambill, Judge,* 18 September 1972 Session of Superior Court held in FORSYTH County.

Plaintiff instituted this action against the trustees of Forsyth Technical Institute, a community college organized under Chapter 115A of the General Statutes of North Carolina and maintaining liability insurance pursuant to the provisions of G.S. 115A-35. Plaintiff sought to recover damages for personal injuries received on 27 January 1972 while plaintiff was operating a metal shearing machine maintained and supplied

by Forsyth Technical Institute and under the supervision of one of the Institute's classroom instructors.

After the complaint, answer and amended answer were duly filed, defendant moved for summary judgment against the plaintiff and supported its motion by affidavits and the deposition of the plaintiff Kiser. Summarized, the evidence tended to show that on 27 January 1972 the plaintiff was 19 years of age and enrolled as a student at Forsyth Technical Institute in Winston-Salem, North Carolina. Plaintiff, at the time the accident at issue occurred, was in his second semester of a course in acetylene welding, and there were approximately eighteen to twenty-five persons in plaintiff's class. The classroom instructor for both semesters was Joseph William Key.

The deposition of the plaintiff tended to show in pertinent part that at the first class session of the first semester, Mr. Key explained and demonstrated the use of the metal shearing machine to the students in the welding class, including the plaintiff, but that no further instructions concerning the use of the machine were given the plaintiff.

In his deposition plaintiff stated that the color of the guard on the machine was changed from green to a bright orange after his accident and that his accident occurred after he had started into his second semester. However, in his affidavit in opposition to defendants' motion for summary judgment, he stated "that when he returned to class for the second semester in January, the plaintiff did notice that the guard on the machine had been painted orange."

In his deposition plaintiff stated that:

> " * * * During my first class session of the first semester, Mr. J. W. Key was my teacher.
>
> As to whether or not I remember on that first evening that Mr. Key explained the use of this particular machine to me and to all of the other students in the class—well, he explained it to us. He just got us in a group and showed us how to mash the pedal to operate it, and he didn't go into no big details about the machine. Yes, sir, he did tell us at that time that the machine could be dangerous if you didn't use it properly. Yes, sir, all of the class was around him at the time.

During the course of that first semester, no, I did not ever hear him explain any further about the machine. Yes, sir, the only time was on that first class session. * * *

* * *

On this evening, as to whether I came up to Mr. Key and told him that I needed a piece of metal cut—I come up to him and I said that we were out of metal, and he told me to go and cut some metal. * * *

* * *

* * * Yes, sir, I know what the guardrail was there for. It was supposed to be warning you, but, I mean, I don't see any purpose that the thing served at all.

* * *

* * * As to whether I knew also that there was a hold-down plunger right directly behind the guard—no, sir, I didn't know it was directly behind the guard. I knew there were a series of them behind there, but I didn't know where they were located. Say if I stuck my fingers in there, I didn't know if it was a hold-down here, or if it was here, or here (indicating).

* * *

As to whether I knew what the purpose of the hold-down plungers was—not till this accident. * * * Yes, sir, on the night of this accident, I had seen this thing operate several times before and had operated it once myself, and I knew that was the purpose of the hold-down plunger.

* * *

When I was being instructed by Mr. Key on this machine, yes, sir, I do remember him telling me and the entire class there on the first evening of that first session that 'You don't want to get your fingers beyond that guardrail.'

* * *

* * * Yes, sir, I did finish that session. Yes, sir, after my injury I went back and finished. Yes, sir, I did pass my course. * * * "

Also in his deposition plaintiff stated that his instructor never did explain anything further about the machine, either

during the first semester or the second semester, but that once or twice during the first semester he did use the machine and that one of the other students had told him on one occasion to get his fingers away from the machine. However, in his affidavit in opposition to defendants' motion for summary judgment, the plaintiff said:

> "That at the beginning of the first semester and again at the beginning of the second semester in January of 1972, the plaintiff, along with the entire class, was taken into a room where a metal shearer was located and in the presence of the class, the instructor cut some metal and stated to the class very briefly the working of the machine and stated that in using machines the students should not permit their hands to go under the guardrail; that other than these two times with the whole class, the plaintiff never received any instruction with regard to the said machine nor did he ever receive any warning in regard to the machine.
>
> * * *
>
> That the plaintiff had understood in the two short periods when he received a brief introduction to the said machine that there were holding down pieces at the ends of the machine but did not know that the machine had holding down pieces which plunged down into the center where his hand was injured; that the plaintiff has learned since the accident that the holding down pieces plunge downward onto the metal very quickly after the mechanism is triggered and that there is a series of metal plungers or holding down pieces running all the way across immediately behind the guardrail and are cylindrical with an approximately three-inch diameter."

The deposition of the plaintiff also tended to show that the metal shearing machine cuts metal with a knife that comes down and shears the metal; that the metal sheet to be cut is placed in the machine by laying it flat on a bed and sliding it underneath a guardrail; that in order to activate the machine, a foot bar is depressed, at which time plungers, located to the rear of the guardrail, slip down and clamp the metal sheet in position; that the cutting edges are located behind the plungers; that plaintiff was injured when he depressed the foot pedal, or bar, causing the plungers to come down on two of plaintiff's fingers. The plaintiff's deposition also tended to show that the

metal shearing machine was constructed so that when plaintiff looked underneath the bed of the machine in order to place his foot on the lever, he could not see the location of his hand and the metal sheet he was holding; and that "his hand accidentally slipped just under the edge of the guard without the plaintiff knowing that his hand had gone under the guard."

After a hearing, the court entered an order that "the motion of the defendants for summary judgment be and the same is hereby allowed." From this order dismissing the plaintiff's action, the plaintiff appealed to the Court of Appeals.

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

Womble, Carlyle, Sandridge & Rice by Allan R. Gitter for defendant appellee.

MALLARD, Chief Judge.

Rendition of summary judgment is, by the rule itself, conditioned upon a showing by the movant (1) that there is no genuine issue as to any material fact and (2) that the moving party is entitled to a judgment as a matter of law. *Page v. Sloan,* 281 N.C. 697, 190 S.E. 2d 189 (1972). "An issue is material if the facts alleged would constitute a legal defense, or would affect the result of the action, or if its resolution would prevent the party against whom it is resolved from prevailing in the action." *Koontz v. City of Winston-Salem,* 280 N.C. 513, 186 S.E. 2d 897 (1972). " 'The party moving for summary judgment has the burden of clearly establishing the lack of any triable issue of fact. . . . His papers are carefully scrutinized; and those of the opposing party are on the whole indulgently regarded.' " *Singleton v. Stewart,* 280 N.C. 460, 186 S.E. 2d 400 (1972).

In *Page v. Sloan, supra,* it is said:

> "While our Rule 56, like its federal counterpart, is available in all types of litigation to both plaintiff and defendant, 'we start with the general proposition that issues of negligence . . . are ordinarily not susceptible of summary adjudication either for or against the claimant, but should be resolved by trial in the ordinary manner.' 6 Moore's Federal Practice (2d ed. 1971) § 56.17[42] at 2583; 3 Barron and Holtzoff, Federal Practice and Procedure (Wright

ed. 1958) § 1232.1, at 106. It is only in exceptional negligence cases that summary judgment is appropriate. *Rogers v. Peabody Coal Co.*, 342 F. 2d 749 (C.A. 6th 1965); *Stace v. Watson*, 316 F. 2d 715 (C.A. 5th 1963). This is so because the rule of the prudent man (or other applicable standard of care) must be applied, and ordinarily the jury should apply it under appropriate instructions from the court. Gordon, The New Summary Judgment Rule in North Carolina, 5 Wake Forest Intra. L. Rev. 87 (1969).

Moreover, the movant is held by most courts to a strict standard in all cases; and 'all inferences of fact from the proofs proffered at the hearing must be drawn against the movant and in favor of the party opposing the motion.' 6 Moore's Federal Practice (2d ed. 1971) § 56.15[3], at 2337; *United States v. Diebold, Inc.*, 369 U.S. 654, 8 L.Ed. 2d 176, 82 S.Ct. 993 (1962)."

Nonetheless, summary judgment is proper in negligence actions where it appears that there can be no recovery even if the facts as claimed by plaintiff are true. *McNair v. Boyette*, 282 N.C. 230, 192 S.E. 2d 457 (1972); *Pridgen v. Hughes*, 9 N.C. App. 635, 177 S.E. 2d 425 (1970). When the facts are admitted or established, negligence is a question of law and the court must say whether it does or does not exist. *McNair v. Boyette, supra; Hudson v. Transit Co.*, 250 N.C. 435, 108 S.E. 2d 900 (1959).

The facts in this case are not admitted and neither are they agreed. Portions of the deposition of the plaintiff offered by the defendants in support of their motion are in conflict with other portions of the deposition, as well as portions of plaintiff's affidavit offered by the plaintiff in opposition to the motion. These conflicts, although they appear in plaintiff's statements, when carefully scrutinized and "indulgently regarded" in favor of the plaintiff, raise material issues of fact as to whether plaintiff was properly instructed as to the use of the metal shearing machine before being directed to use it.

Thus, when all the evidence is properly considered and all inferences of fact from the proofs proffered at the hearing are drawn against the movant (defendant) and in favor of the party opposing the motion (plaintiff), genuine issues of fact as to negligence, contributory negligence and damages were raised, and the defendants failed to carry the burden of showing that

there was a lack of any triable issue of fact and that they were therefore entitled to judgment as a matter of law.

The entry of summary judgment was error.

Reversed.

Judges MORRIS and HEDRICK concur.

RAY HAMM AND ROE CHURCH v. TEXACO INCORPORATED, ELLER & HUFFMAN, INCORPORATED, AND JOE HUFFMAN

No. 7323DC153

(Filed 28 February 1973)

1. **Contracts § 27— insufficiency of evidence to show contract**

Plaintiffs' evidence was insufficient to establish the existence of a contract between the plaintiffs and the defendants where it tended to show negotiations which were intended to culminate in a five-year written contract, but there was no evidence tending to show that the parties' minds had met upon terms sufficiently definite to be enforced.

2. **Rules of Civil Procedure §§ 41, 50— motion to dismiss — nonjury trial — motion for directed verdict — jury trial**

A motion to dismiss under G.S. 1A-1, Rule 41(b), is properly made only in cases tried by a judge without a jury, the proper motion in jury cases being for a directed verdict under G.S. 1A-1, Rule 50(a).

APPEAL by plaintiffs from *Osborne, District Judge,* 14 July 1972 Session of District Court held in ALLEGHANY County.

This is a civil action to recover damages for an alleged breach of contract by the defendants. Prior to the trial of the cause and upon motion for summary judgment and a hearing thereon, the action was dismissed on the merits as to defendant Texaco Incorporated.

The plaintiffs Church and Hamm entered into what appears to have been an informal partnership arrangement to build and operate a service station on property owned by the plaintiff Hamm and situated on N. C. Highway 18 approximately one-half mile west of the town limits of Sparta, North Carolina. The defendant Joe Huffman was the agent of the defendant Eller & Huffman, Incorporated, a corporation with its principal place

of business in North Wilkesboro, North Carolina, engaged in the business of distributing Texaco products to service stations.

The plaintiffs alleged in their complaint that in the Spring of 1970 they negotiated with the defendant Huffman "with the view toward working out an agreement whereby they [the defendants] could put in Texaco products" to supply the plaintiffs' service staton business. Plaintiffs further alleged:

> "(T)hat said negotiations led to the offer by Joe Huffman, as agent of Eller & Huffman, Inc., who were agents of Texaco Inc., upon completion of the construction of a building by the plaintiffs, to install underground storage tanks, pumps, car lift, air compressor, lighting for the outside of the service station, paint the building, and do the necessary concrete work for driveways, islands, etc., said work to be completed by November 1, 1970.
>
> *Subsequently this agreement was reduced to writing, said writing being signed by the plaintiff Ray Hamm and the defendant Joe Huffman.* All copies of this agreement were at that time kept by Joe Huffman.
>
> * * *
>
> * * * On February 3, 1971, the plaintiff received correspondence from Eller & Huffman, Inc., executed by Joe Huffman, stating that Eller & Huffman, Inc. would not proceed further with the contract. * * * " (Emphasis added.)

At the trial of the cause, the plaintiffs introduced evidence tending to show that they began negotiating with defendant Huffman in the Spring of 1970 and that at a meeting with Huffman in June of 1970 Huffman said that "he would put in tanks, pumps and lighting and pave the front on a five-year contract." Thereafter, plaintiff Hamm borrowed $12,000 and built a living area and service station building on his tract of land; an addition to the building was added pursuant to specifications provided by defendant Huffman in order to house a "car lift" at a cost of $4,000. The plaintiff Hamm testified that from his dealings with Mr. Huffman, November 1, 1970 was the date they should have commenced business; that prior to November 1, 1970, Huffman did not advise him that there had to be an approval by anyone else. About the first of the year [1971], he said a man would have to come and approve it;

and, after he came "he said they wouldn't approve it or anything and didn't give me no chance to make any alterations in order for them to approve it. They gave no reasons for disapproval."

Plaintiff Hamm also testified that during all the time he was working on the project, he dealt with Huffman without knowing his connection with a corporation. However, on 28 October 1970, Hamm signed a contract at his attorney's office, a copy of which was introduced into evidence by the plaintiffs, but which was not included in the record on appeal or filed as an exhibit in this court. Thereafter, Hamm signed a second contract in November, which apparently was intended to be a substitute for the first contract. No copy of the second contract has been filed in this court or included in the record on appeal. Hamm testified that Huffman was present at the signing but that he didn't see him sign. Hamm signed about six copies and turned them over to Huffman. Hamm understood that someone else was to sign the contract. He did not know who was to sign but he was dealing directly with Huffman.

At the completion of the plaintiffs' evidence, the defendants moved for an involuntary dismissal pursuant to G.S. 1A-1, Rule 41. The motion was allowed by the trial court, and the plaintiffs appealed, assigning error.

Arnold L. Young for plaintiff appellants.

Hayes & Hayes by Kyle Hayes and Douglas L. Winslow, for defendant appellees.

BROCK, Judge.

[1] Plaintiffs assign as error the trial judge's entry of a judgment, pursuant to G.S. 1A-1, Rule 41(b), dismissing the plaintiffs' action. This assignment of error presents the question whether there was sufficient evidence, when viewed in the light most favorable to the plaintiffs, to establish the existence of a contract between the plaintiffs and the defendants.

In *Horton v. Refining Company,* 255 N.C. 675, 122 S.E. 2d 716 (1961), a case factually similar to the one at bar, Chief Justice Winborne stated:

> "In *Williamson v. Miller,* 231 N.C. 722, 58 S.E. 2d 743, this Court said: 'To be binding, the terms of a contract must be definite and certain or capable of being made so.' (Citations omitted.)

"In *Elks v. Ins. Co., supra* [159 N.C. 619, 75 S.E. 808], this Court said: 'It is elementary that it is necessary that the minds of the parties meet upon a definite proposition. "There is no contract unless the parties thereto assent, and they must assent to the same thing, in the same sense. A contract requires the assent of the parties to an agreement, and this agreement must be obligatory, and, as we have seen, the obligation must, in general, be mutual." 1 Par. Con., 475.' "

In the case at bar, the evidence presented by the plaintiffs tends to show negotiations by the parties which were intended to culminate in a "five-year contract" in written form.

In *Elks v. Ins. Co., supra,* it is said that where the minds of the parties "meet upon a proposition which is sufficiently definite to be enforced, the contract is complete, although it is in the contemplation of the parties that it shall be reduced to writing as a memorial or evidence of the contract; but if it appears that the parties are merely negotiating to see if they can agree upon terms, and that the writing is to be the contract, then there is no contract until the writing is executed." Here, there is no evidence which would tend to show that the parties' minds met upon terms sufficiently definite to be enforced. Rather, the evidence tends to show that there was to be a written agreement executed by both parties and that there was to be no contract until the writing was executed.

[2] The judgment entered in this case recites that the cause was heard before the judge *and jury.* The judgment also recites that defendant moved for dismissal under Rule 41. G.S. 1A-1, Rule 41(b) is applicable where a cause is tried before the judge *without a jury;* a motion to dismiss under this rule is not properly available in cases being tried by jury. The proper motion would have been a motion for directed verdict under Rule 50(a). General Rules of Practice for the Superior and District Courts adopted by the Supreme Court on 14 May 1970, pursuant to G.S. 7A-34, provide in Rule 6 that "(a)ll motions . . . shall state the rule number or numbers under which the movant is proceeding." In this case movants stated that they were proceeding under Rule 41. Obviously movants were not entitled to relief under Rule 41 because the case was being tried before a jury. However, plaintiffs made no objection to the improper motion, and they may not raise the question for the first time on appeal. We, therefore, treat the judgment of

dismissal in the present case as having been entered pursuant to a motion for directed verdict under Rule 50(a). *See Pergerson v. Williams*, 9 N.C. App. 512, 176 S.E. 2d 885.

Affirmed.

Judges MORRIS and HEDRICK concur.

ROGER G. KNAPP v. PENNSYLVANIA NATIONAL MUTUAL CASUALTY INSURANCE COMPANY

No. 7318DC143

(Filed 28 February 1973)

Insurance § 131— action on homeowner's policy — dismissal because of arbitration award

Findings by the trial court were sufficient to support the court's dismissal of an action to recover "additional living expense" under a homeowner's insurance policy on the ground that arbitration to determine the amount of plaintiff's loss had been conducted pursuant to the terms of the policy and that an arbitration award had been made to plaintiff.

Judge HEDRICK dissenting.

APPEAL by plaintiff from *Kuykendall, District Judge*, 24 July 1972 Session of District Court held in GUILFORD County.

Plaintiff seeks to recover "additional living expense" under a homeowner's insurance policy issued by defendant.

There was no controversy as to the coverage, and the only question involved was the amount the plaintiff was entitled to recover. Plaintiff sought to recover the maximum limit of $2,400.00.

The loss occurred in May 1970. The complaint was filed 15 June 1971. The defendant filed an answer 30 July 1971, and among other things pleaded G.S. 58-176, together with the policy provision based thereon providing for a determination of loss by arbitration.

On 1 June 1972 the defendant filed a verified motion to dismiss the case for that while the case was pending a determination by arbitration pursuant to the provisions of the policy

and G.S. 58-176 had taken place. The defendant set forth in the motion to dismiss that the plaintiff had appointed an appraiser; the defendant likewise had appointed an appraiser. The two appraisers had appointed an umpire; and pursuant to the arbitration procedure, the loss had been determined to be $1,291.18, for which sum the defendant had sent the plaintiff a check which the plaintiff was still holding. A copy of the appraisal signed by the two appraisers and the umpire was attached to the motion.

Based upon this motion, the district court entered a judgment finding that the arbitration had been conducted and an award made; that no objections or exceptions had been made to any of the proceedings or findings of the arbitration board. The court further found that all of the allegations contained in the motion to dismiss were true based upon statements made by the plaintiff in open court. The trial judge thereupon dismissed the action as being moot.

The plaintiff appealed from this action of the trial court.

Donald K. Speckhard for plaintiff appellant.

Perry C. Henson for defendant appellee.

CAMPBELL, Judge.

The record contains three assignments of error purporting to be based upon exceptions appearing in the record. There are no exceptions in the record. The only assignment of error meriting attention is the one to the order dismissing plaintiff's case and noting an appeal. This presents the record proper for review.

The record reveals that the findings made by the trial judge were adequate. The findings support the judgment, and no prejudicial error has been made to appear on the face of the record.

Affirmed.

Judge MORRIS concurs.

Judge HEDRICK dissents.

Judge HEDRICK dissenting.

In my opinion, prejudicial error appears on the face of the record. While defendant alleges in its answer that plaintiff was not entitled to maintain this action because defendant had served upon plaintiff a written demand for appraisal pursuant to G.S. 58-176 and the provisions of the insurance policy sued upon, the defense that the appraisal barred plaintiff's claim was not asserted in the answer or an amendment thereto as required by G.S. 1A-1, Rule 12(b). Indeed, the purported appraisal was not made until approximately three months after the answer was filed.

Defendant attempted to raise the defense of the plea in bar in its motion to dismiss. The motion does not specify the number of the rule under which the movant was proceeding as required by Rule 6 of the General Rules of Practice for the Superior and District Courts, Supplemental to the Rules of Civil Procedure. My complaint, however, is not so much as to the manner in which the defense replied upon was raised or pleaded but is more to the manner of its adjudication. The trial judge made findings of fact with respect to the plea in bar just as if there had been a hearing where evidence was offered in support of the allegations in the motion, and the majority opinion affirms the judgment entered by holding that the record reveals the findings made by the trial judge were adequate and supported by the evidence and that the findings support the judgment. Yet, there is nothing in the record to indicate the court heard or considered any evidence whatsoever except the motion and the attached copy of the appraisal.

To me, the record indicates that the trial court treated the motion as one made pursuant to Rule 12(b)(6), considered matters outside the pleadings, and disposed of the motion as provided by Rule 56. If so, the order dismissing plaintiff's claim (in effect summary judgment for defendant) would not have been appropriate unless the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, disclosed that there was no genuine issue as to any material fact and that defendant was entitled to judgment as a matter of law. G.S. 1A-1, Rule 56(c). Rule 56(e) in pertinent part provides:

> "Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be

admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith."

Defendant filed nothing in support of his motion except what purports to be a copy of the "appraisal" which was attached to, and by reference made a part of, the motion. The motion purports to be verified by defendant's counsel. It is not in affidavit form and does not purport to be made on the personal knowledge of the attorney. The copy of the appraisal attached to the motion does not purport to be a sworn or certified copy.

While the judgment does contain a recital that plaintiff admitted in open court that the allegations contained in the motion were true, there is nothing in the record to support such a recital. Moreover, since the defense relied upon as being a bar to plaintiff's claim was not asserted in the answer or an amendment thereto and the motion to dismiss did not specify the rule under which the defendant was proceeding and was not supported as required by Rule 56(e), plaintiff was never confronted with the necessity of either admitting or denying the allegations in the motion. In my opinion, the judgment dismissing plaintiff's claim is not supported by the record and I vote to reverse.

TEMPIE J. CURRIE, ADMINISTRATRIX OF LOIS L. CURRIE, DECEASED v. OCCIDENTAL LIFE INSURANCE COMPANY OF NORTH CAROLINA AND GENERAL MOTORS ACCEPTANCE CORPORATION

No. 7318DC27

(Filed 28 February 1973)

Insurance § 8— age limitation in life policy — requisites for waiver by insurer

Where terms of an insurance policy expressly provided that no insurance took effect unless the named insured was less than 66 years of age on the policy's effective date, the named insured who was 67 years of age obtained no coverage under the policy in question even though defendant insurer knew plaintiff's age at the time of application and accepted the first premium from plaintiff since age limitations in life insurance policies cannot be waived by insurer without a specific agreement to that effect supported by a new consideration.

Currie v. Insurance Co.

APPEAL by defendant from *Kuykendall, District Judge,* 10 July 1972 Session of District Court held in GUILFORD County.

Action to recover on credit life insurance policy issued on the life of plaintiff's intestate as security for an installment loan with General Motors Acceptance Corporation. The policy was issued with an effective date of 7 May 1971. On that date the insured, Lois L. Currie, was 67 years of age. This fact was made known to the issuing agent and he entered "67" in a space provided for "Insured's age" on the first page of the policy. The premium was paid and received by defendant. The insured died on 15 July 1971. Defendant tendered a refund of the premium but refused to pay the proceeds of the policy, contending that no insurance became effective under the policy because of a provision therein that "NO INSURANCE SHALL TAKE EFFECT UNDER THIS POLICY UNLESS ON THE EFFECTIVE DATE . . . YOU [THE INSURED] ARE SIXTEEN, BUT LESS THAN SIXTY-SIX YEARS OF AGE."

The case was tried before the court without a jury on a statement of stipulated facts. The court entered judgment in which it found the facts to be as stipulated, reviewed various legal precedents, and concluded, among other things, that: (1) since the insured's age appears on the first page of the policy, defendant knew, or should have known, that plaintiff was making application for a void policy and defendant's agent should not have written the policy; (2) having accepted the premium, defendant cannot now be allowed to say that it did not know the facts appearing on the face of the policy or that it accepted the premium expecting that it would never have to pay the policy proceeds; (3) equities strongly indicate a judgment for plaintiff; and (4) notwithstanding previous Supreme Court conflicting opinions, plaintiff should recover the proceeds due under the policy. Based upon these conclusions, it was adjudged and decreed that plaintiff recover $2,983.68 with interest and costs.

Douglas, Ravenel, Hardy & Crihfield by John W. Hardy for plaintiff appellee.

Smith, Anderson, Blount & Mitchell by John L. Jernigan for defendant appellant.

GRAHAM, Judge.

"While waiver and estoppel have been held applicable to nearly every area in which an insurer may deny liability, the

courts of most jurisdictions agree that these concepts are not available to broaden the coverage of a policy so as to protect the insured against risks not included therein or expressly excluded therefrom." Annot., 1 A.L.R. 3rd 1139, § 2, p. 1144 (1965). Accord, *Hunter v. Insurance Co.*, 241 N.C. 593, 86 S.E. 2d 78; *McCabe v. Casualty Co.*, 209 N.C. 577, 183 S.E. 743.

The essential question presented on this appeal is whether the age limitation provided in the policy is a matter which could be waived by the defendant company without a specific agreement to that effect supported by a new consideration. The cases of *Hunter v. Insurance Co., supra,* and *McCabe v. Casualty Co., supra,* compel us to answer in the negative and reverse the judgment.

In *McCabe,* the insurance policy in question provided that the insurance "shall not cover any person under the age of 18 years nor over the age of 65 years." The named insured in the policy was over 65 years of age when the policy was issued. The jury found that the company, through its agents, knew the insured's age at the time the policy was issued and therefore waived the provision in the policy relating to age. In reversing judgment for plaintiff entered upon the jury verdict, the Supreme Court held that the provision in question was not a condition working a forfeiture, which could be waived, but was a limitation upon liability inserted in the policy to protect the insurance company "against the heedlessness of youth and the debility of age."

In *Hunter,* the company continued to receive full premiums more than four years after the insured became 55 years of age. The policy provided for disability coverage until the anniversary of the policy nearest insured's 55th birthday, with reduction of the annual premiums after the expiration of the disability coverage. The insured became disabled during the period covered by the last payment of premium. The trial court awarded disability benefits upon the jury's finding that the company waived the termination date for disability insurance by accepting premiums for more than four years after that date. The Supreme Court reversed, holding that the doctrines of waiver and estoppel are not available to bring within the coverage of a policy risks not covered by its terms, or risks expressly excluded therefrom. In the opinion by Justice Denny (later Chief Justice), it is stated:

> "While there is some conflict in the authorities on this question, the greater weight of authority supports the

view laid down in Anno.—Insurance—113 A.L.R. 857, *et seq.*, as follows: 'It is well settled that conditions going to the coverage or scope of the policy, as distinguished from those furnishing a ground for forfeiture, may not be waived by implication from conduct or action, without an express agreement to that effect supported by a new consideration. This rule may be, as it often is, otherwise stated that the doctrine of waiver may not be applied to bring within the coverage of the policy risks not covered by its terms, or risks expressly excluded therefrom.' "

The North Carolina position that age limitations in a life insurance policy are matters of coverage and are not subject to the doctrines of waiver and estoppel finds support in other jurisdictions. *Pierce v. Homesteaders Assn.*, 223 Iowa 211, 272 N.W. 543; *Prudential Ins. Co. v. Brookman,* 167 Md. 616, 175 A. 838; *Great American Reserve Insurance Co. v. Mitchell,* 335 S.W. 2d 707, (Tex. Civ. App. 1960). Contra: *Travelers Insurance Co. v. Eviston,* 110 Ind. App. 143, 37 N.E. 2d 310.

Under the express provisions of the policy here in question, no insurance took effect unless the named insured was less than 66 years of age on the policy's effective date. Since the named insured was 67 years of age, she obtained no insurance coverage under the insurance policy and her administratrix is entitled to a return of the premiums paid.

Reversed.

Judges CAMPBELL and BROCK concur.

STATE OF NORTH CAROLINA v. CARLTON H. MILLS

No. 733SC198

(Filed 28 February 1973)

1. **Criminal Law §§ 79, 89— statement signed by accomplice — admission for corroboration of accomplice**

In this prosecution for burning a tobacco barn, a typewritten statement signed by defendant's accomplice was properly admitted in evidence for the purpose of corroborating the accomplice's testimony.

2. **Criminal Law § 86— statement that prior convictions were traffic violations — continuation of questioning as to other offenses**

Where defendant stated on cross-examination that he had only been convicted of traffic violations, the trial court did not err in

allowing the solicitor to question defendant further as to whether he had been convicted of other specified offenses.

ON *certiorari* to review judgment entered by *Cohoon, Judge,* at the 31 January 1972 Session of Superior Court held in PITT County.

Defendant was charged in a bill of indictment with burning a tobacco barn.

The State's evidence included the testimony of an accomplice, Creston Mills, who testified to the following: Sometime in May, 1971 defendant loaned accomplice $200. Defendant later told accomplice he wouldn't have to pay him back if he "helped him burn the packhouse." Defendant said he wanted to burn the packhouse "so that he could get some money out of it." Accomplice agreed to help.

On 21 September 1971 at about 8:00 p.m., defendant approached accomplice at a local poolroom near Chicod Community and said "Let's go run the dogs." Defendant and accomplice left the poolroom, stopped at accomplice's house to get his shoes, and then stopped at defendant's trailer where defendant filled up a five gallon can of gas. From there the two proceeded to a tobacco packhouse barn owned by Mrs. Mattie Smith. At defendant's direction, accomplice poured gasoline from the five gallon can around the inside perimeter of the barn while defendant held a flashlight illuminating the area. Both defendant and accomplice tried, without success, to ignite the gasoline by tossing matches through the barn window. At defendant's direction, accomplice tossed a match through the barn door onto the middle of the floor. The resulting explosive combustion set accomplice's shirt on fire and severly burned his hands, back, and arms. Defendant was burned on the right arm, and the hair on his arm and head was singed. Accomplice was driven home by defendant, and then taken by his brother to Pitt Memorial Hospital, where he was hospitalized for three weeks.

In corroboration of accomplice's testimony, both the investigating officer who had interrogated accomplice at the hospital, and accomplice's mother testified. In addition to this testimony, the State introduced a typed statement signed by the accomplice at the hospital.

The State also presented evidence which tended to show the following: The tobacco barn in question belonged to Mrs. Mattie Smith, and was located on a farm near Chicod Community owned by her and rented to defendant; that at the time of the fire the tobacco barn contained between 26 and 30 thousand pounds of tobacco, two-thirds of which belonged to defendant; that defendant's interest in the tobacco was covered by insurance; that one week after the fire defendant's right arm showed signs of a recent burn and that the hair on his arms and head had been singed; that there were no burn marks under the hood of defendant's pickup truck or around the carburetor.

The defendant's evidence tended to show: That on the night of the fire he was with accomplice from 7-8:00 p.m., but that they did not go near the tobacco barn; that for part of that night he drank beer with four other men, and that the rest of the night he was at home in the presence of his wife; that he received his burns working on the carburetor of his truck several days after the fire; that he had no burns on the day after the fire.

Defendant entered a plea of not guilty. Defendant was found guilty by a jury, and from this conviction he appealed.

Attorney General Morgan, by Associate Attorney Ricks, for the State.

Willis A. Talton for defendant.

BROCK, Judge.

[1] Defendant assigns as error the admission into evidence of a typewritten statement signed by accomplice. This statement was admitted to corroborate accomplice's testimony after a proper instruction to the jury. Defendant argues that the cumulative effect of the admission of this statement, allowed in addition to the corroborating testimony of two witnesses, was prejudicial. This evidence was properly admitted for the purpose of strengthening the witness's credibility by showing prior consistent statements. Stansbury, N. C. Evidence, §§ 51, 52. This assignment of error is overruled.

[2] Defendant also assigns as error the Court's allowance, over defendant's objections, of questions concerning defendant's previous convictions of crime after defendant had testified he had only been convicted of traffic violations. The solicitor was

permitted to continue to ask about convictions; *e.g.*, " I ask you to state whether or not you have ever been convicted of carrying a concealed weapon." Defendant affirmatively answered several questions asked in this manner. Defendant's contention that the State was bound by his first statement that he had been convicted only of traffic violations is without merit. *State v. Robinson,* 272 N.C. 271, 158 S.E. 2d 23; *State v. Weaver,* 3 N.C. App. 439, 165 S.E. 2d 15. Had defendant denied these questions he could not have been contradicted by independent evidence. *State v. Redfern,* 13 N.C. App. 230, 185 S.E. 2d 6.

Defendant does not carry forward his other assignments of error in his brief, and they are deemed abandoned. Rule 28, Rules of Practice, North Carolina Court of Appeals.

No error.

Judges CAMPBELL and GRAHAM concur.

WILKES HOME IMPROVEMENT COMPANY, INC. v. COLIN RUNDLE AND WIFE, MARY ANN RUNDLE

No. 7323DC8

(Filed 28 February 1973)

APPEAL by plaintiff from *Osborne, District Judge,* May 1972 Session of District Court held in WILKES County.

This action is to recover the balance due on a contract for remodeling done to defendants' residence.

Plaintiff's evidence tended to show that plaintiff and defendants entered into an agreement for certain modifications and improvements to be made to defendants' home; that the contract price was $8,466.92; that plaintiff performed approximately seventy-five percent of the work but was prevented by defendants from completing the job; that defendants paid $4,000.00, but have refused to pay the balance of $4,466.92.

Defendants' evidence tended to show that plaintiff agreed to complete the work in six to eight weeks; that the workmen would not stay on the job; that much of the work was inferior and had to be reworked; that defendants paid plaintiff

$4,000.00, but when four months passed and the work was not completed they stopped plaintiff from performing further; that the work was about fifty percent completed when defendants stopped plaintiff; that defendants completed the work at a cost of about $3,000.00 plus defendants' labor.

One issue was submitted to and answered by the jury as follows: "What amount, if any, is the plaintiff entitled to recover of the defendants? Answer: None." Plaintiff appealed.

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

Joe O. Brewer for defendants.

BROCK, Judge.

Plaintiff has brought forward and argued four assignments of error to the trial judge's charge to the jury. While we recognize defects in the charge, plaintiff has failed to show in what way the defects were prejudicial to it. "The burden is on appellant not only to show error, but that the alleged error was prejudicial and amounted to the denial of some substantial right." 1 Strong, N. C. Index 2d, Appeal and Error, § 46, p. 190.

In our opinion the jury was given ample opportunity to consider evidence of both parties. It has weighed that evidence and rendered a verdict favorable to defendant. We perceive no miscarriage of justice. There were no complicated legal principles involved in this case, and we feel the jury clearly understood the controversy.

No error.

Judges CAMPBELL and GRAHAM concur.

STATE OF NORTH CAROLINA v. ANTHONY R. BATEMAN

No. 7312SC147

(Filed 28 February 1973)

APPEAL by defendant from *Clark, Judge,* at the 21 September 1972 Criminal Session of CUMBERLAND Superior Court.

By indictment proper in form defendant was charged with armed robbery to which charge he pleaded not guilty. A jury found him guilty as charged and from judgment imposing prison sentence of not less than 15 nor more than 25 years, to be credited with 74 days confinement pending trial, he appealed.

Attorney General Robert Morgan by Ralph Moody, Special Counsel, for the State.

Kenneth A. Glusman, Assistant Public Defender Twelfth Judicial District, for defendant appellant.

BRITT, Judge.

Defendant's counsel concedes that although he has carefully examined the record in this case he has been unable to find prejudicial error. We too have reviewed the record and conclude that defendant received a fair trial, free from prejudicial error.

No error.

Judges CAMPBELL and GRAHAM concur.

MARY BAME JONES v. CHARLES L. SEAGROVES

No. 7211SC484

(Filed 14 March 1973)

1. **Trial § 16— instruction to disregard testimony — no exclusion of competent evidence**

In an action to recover for personal injuries allegedly sustained when plaintiff was struck by an automobile driven by defendant, the trial court's instruction that the jury should disregard a witness's testimony as to what transpired "after she was placed in the ambulance," given after the witness disclosed that she had not gone in the ambulance with plaintiff, did not result in excluding competent evidence as to the condition of the plaintiff immediately following the accident and during the succeeding months, the witness thereafter having been allowed to testify in detail as to plaintiff's condition at the times the witness saw her while plaintiff was hospitalized during the months following the date she was injured.

2. **Automobiles § 45; Evidence § 33— hearsay evidence — inadmissibility to show defendant's reaction**

In an action to recover for personal injuries allegedly sustained when plaintiff was struck by an automobile driven by defendant, testimony that immediately after officers stopped an automobile driven by defendant, a passing motorist told the officers in defendant's presence that a woman was lying in the highway just up the road was hearsay and was not admissible for the purpose of showing defendant's reaction to the statement where the evidence shows that the officers left abruptly and that defendant "went on towards home."

3. **Trial § 35— instructions defining "greater weight of the evidence"**

The trial court's instructions defining the term "greater weight of the evidence" were correct when read contextually and did not constitute an expression of opinion on the evidence.

4. **Negligence § 7— willful or wanton negligence — instructions**

Failure of the court to apply the law to the evidence as to defendant's willful and wanton conduct in one portion of the charge was not error where the court instructed the jury on willful and wanton conduct in another portion of the charge.

APPEAL by plaintiff from *Brewer, Judge,* 31 January 1972 Civil Session of Superior Court held in LEE County.

This is a civil action to recover damages for personal injuries sustained by plaintiff when she was struck by an automobile at about 1:45 a.m. on 24 October 1970 as she walked along U.S. Highway No. 1 By-Pass at a point approximately two miles south of the City of Sanford, N. C. In her complaint as originally filed plaintiff alleged that defendant was the

driver of the automobile which struck her and that he was negligent in failing to keep his vehicle under proper control, in failing to keep a proper lookout, in operating at a speed greater than prudent under existing circumstances, and in other respects. Defendant denied all material allegations of the complaint and as an affirmative defense alleged that if he drove his automobile into the plaintiff, which he expressly denied, then plaintiff was contributorily negligent in walking, standing, or sitting in the northbound lane of a heavily traveled highway in the nighttime.

Plaintiff's evidence showed the following: In the area where she was struck, U. S. Highway No. 1 By-Pass runs north and south. Plaintiff lived with her mother and brother in a house located a short distance east of the highway. A dirt access road connected the house with the highway. This road ran westward from the house toward the highway for a short distance and then turned and ran southward for several hundred feet until it intersected with a crossover road. At the point where the crossover road crosses the highway, U. S. Highway No. 1 By-Pass is a four-lane highway, with two lanes for northbound and two lanes for southbound traffic separated by a median. Northward from the intersecting crossover the median gradually narrows until, at a point approximately 988 feet north of the intersection, it terminates altogether and U. S. Highway No. 1 becomes a two-lane highway, with one lane for northbound and one lane for southbound traffic. Just north of the point where the highway narrows to a two-lane road, there is a picnic area adjoining the highway on the east.

Shortly after 1:50 a.m. on 24 October 1970 two deputy sheriffs, who were alerted by a passing southbound motorist, found plaintiff lying in the northbound lane of the highway at a point approximately 103 feet north of the north end of the median and approximately 1,091 feet north of the point where the crossover road, which connects with the access road leading to plaintiff's house, crosses the highway. Her head was approximately three to four feet from the eastern edge of the paved portion of the highway. Her clothes were torn and she was severely injured.

Plaintiff testified that she had been going with defendant for approximately a year prior to October 1970. She is an alcoholic and defendant drinks. In the evening of 23 October 1970 she drove with defendant in his car to Sanford, where they

purchased whiskey and wine. They returned to her house, where they sat in the front room talking. Her mother and brother were in other portions of the house. Sometime after midnight defendant began to argue and slapped her on the face. She walked out of the house, intending to go to a telephone to call the sheriff's department. She went on the dirt access road to Highway No. 1 and started walking on the shoulder of the road northward toward Sanford. After she got on the highway she saw defendant. She testified:

> "When I first saw him again after I had left him at my home, he was driving slowly behind me. I saw the lights coming up the access road. When he got to the highway, he followed me. He turned North on the highway. I really don't know the distance that I was from that access road going North when he got behind me, but he would get close and then he would drop back. He would slow up and then he would speed up again. I don't know how far this continued, I think it was probably down close to the picnic tables somewhere where he hit me. At this point I was walking . . . on the shoulder of the road. He was driving on the highway. I believe he was in the right-hand lane for traffic going North. When I got down somewhere in the vicinity of the picnic tables, I realized that he was getting so close behind me I made a dash for it and tried to run and the next thing I knew I was hit and I didn't remember anymore.
>
> "Charles Seagroves hit me. I recognized—a red cardinal on the front end of his car. I knew that it was him by that. He spoke to me out there on the highway. I was just before crossing over to try to get to the other side of the road when he first spoke to me out there on the highway. He said, 'I've got you now, you—.' When I started to cross over the highway I ran. When that car hit me, I think I was knocked unconscious. I don't remember anything until Mr. Currin and Mr. Stone was there and my mother."

Deputy Sheriffs Currin and Stone testified that at 1:50 a.m. on 24 October 1970 they were parked in their patrol car with its lights off in the crossover on the west side of the highway, facing eastward toward the southbound traffic lanes. They observed a car, later determined to be defendant's, parked in the curve of the dirt access road leading from plaintiff's house. It was in the portion of the road which ran westward

from the house. Its headlights were shining westward toward the highway, and it was about 105 feet from the place plaintiff was later found lying in the highway. Between the car and where plaintiff was later found there was grass and a kind of low incline. Defendant's car remained parked with its lights on for approximately five minutes, during which time no other traffic passed on the highway. It then made a sharp left turn and came south on the dirt access road to the crossover, where it turned right into the crossover and came across the northbound lanes into the southbound lanes. It then turned left, passing in front of the parked patrol car in which the deputies were seated, and proceeded south on the highway. Defendant was the driver and was the only occupant of his car. The deputies followed defendant's car south on the highway, turning on their blue light and siren. About a fourth of a mile south of the crossover, defendant pulled his car to the right and stopped. The deputies stopped their patrol car just behind defendant's car, got out, and walked up to defendant's car. As they did so, defendant rolled his window down. Just then, another car, traveling south on the highway, pulled up beside the deputies and the occupants of this car reported to the deputies that they had seen a woman lying in the road. The deputies then left defendant and drove in their patrol car back north on the highway until they found plaintiff lying in the road. About the time the deputies reached her, plaintiff's mother came up. The plaintiff was conscious at that time. She told Deputy Stone that "it was Charles that did it."

Plaintiff's mother testified that plaintiff and defendant came back to her house from the liquor store about 10:00 o'clock. She heard them fussing in the front room. She heard the door open and shut and in a little while heard it open and shut again. She went out into the yard, and about that time defendant drove back to the house alone. Defendant told her he did not know where plaintiff was. She went down the dirt road to the curve, looking for her daughter, and then started back to the house to wake up her son to help her. As she did so and when she was between the curve and the house, defendant passed her. He stopped when he passed, and she again asked him where the plaintiff was. Defendant said that "Mary was lying down there at the picnic table and he was going over there . . . and kill her." She then ran to the house and woke up her son and got her coat. When she came back out of the house, she heard her daughter hollering for help. She ran and

found plaintiff "laying there in the road between the picnic table and where the road joins to go north and south." About that time the two deputy sheriffs came up.

Defendant testified in substance as follows: After he and plaintiff returned from Sanford, where they purchased whiskey and wine, they sat in the front room of plaintiff's house until about 1:00 o'clock. They then went out and sat in his car, listening to the radio and drinking. Plaintiff's mother came out to the car and wanted him to leave. Defendant wanted to go, but plaintiff wouldn't get out of his car. Plaintiff "got mad and she was pretty well drinking, throwed the door open and got out and left."

> "I remained at Mary's home about 15 minutes, 10 or 15 minutes, after she got out of the car and left. During that time I was talking to her mother. Her mother wanted me to look for her and I said I wasn't going to look for her because she had run off before that way and that I wasn't going to look for her. She had run off before lots of times when she got pretty well intoxicated."

Defendant then left the house, drove down the dirt access road to the highway, then across to the southbound lane and turned south. After he had driven south about a quarter of a mile, the deputy sheriffs stopped him. The deputies' car stopped almost at the back of his car. Another car passed, slowed down, but did not stop. Defendant did not hear anyone in that car say anything to the deputies. The deputies then left and went back north on the highway. Defendant did not know why they left. He then drove home. On the following day he first learned that plaintiff had been hit when he was given this information at the Siler City Police Station. Defendant denied he had seen plaintiff at any time on that night after she left his car, denied he had ever operated his automobile behind plaintiff on the highway, and denied he had at any time run his car against or over her.

Other evidence will be referred to in the opinion. At the conclusion of the evidence the court allowed plaintiff's motion to amend her complaint by adding an allegation that "[t]he defendant was operating his car with willful and wanton conduct, purposely and deliberately striking the plaintiff with his car."

The court submitted four issues to the jury as follows:

"1. Was the plaintiff injured and damaged by the negligence of the defendant as alleged in the Complaint?

"2. If so, did the plaintiff contribute to her own injury and damage by her own negligence as alleged in the Answer?

"3. Was the plaintiff injured and damaged by the willful and wanton conduct of the defendant as alleged in the Complaint?

"4. What amount, if any, is the plaintiff entitled to recover of the defendant for her injury and damage?"

The jury answered the first issue in the negative, and from judgment that plaintiff take nothing by this action, plaintiff appealed.

Pittman, Staton & Betts by William W. Staton for plaintiff appellant.

Hoyle & Hoyle by W. D. Sabiston, Jr. for defendant appellee.

PARKER, Judge.

[1] Plaintiff's mother testified that her daughter was conscious when she was found lying on the highway and that "she stayed conscious until they picked her up and put her in the ambulance and then she went in a coma." In answer to further questions on direct examination, to which no objections were made, this witness then testified that plaintiff was not conscious after she got in the ambulance, that she remained unconcious about two months, and that she was taken by ambulance to the Lee County Hospital. When it developed from the witness's answer to the next question that she had not gone in the ambulance with her daughter, defendant's counsel moved to strike her testimony "as to what happened in the ambulance." The court allowed the motion and instructed the jury to "disregard the testimony of this witness as it relates to what's transpired and what was said in her testimony as to her observations of the plaintiff, Mary Jones, after she was placed in the ambulance." This instruction is the subject of appellant's first assignment of error. Appellant contends that the court's ruling was so broad that it resulted in excluding "competent,

relevant and material evidence as to the condition of the plaintiff immediately following the accident and during the next two months." We do not agree that the court's ruling was either intended or that the jury could have understood it as being so broad as to have the effect of which appellant now complains. It was proper to instruct the jury to disregard the witness's testimony as to matters of which she could have had no personal knowledge. That this was the only effect of the court's ruling was made manifest by the fact that immediately following the ruling the witness was permitted to testify in detail and at length concerning her daughter's condition at the times the witness saw her in the Lee County Hospital and in the North Carolina Memorial Hospital in Chapel Hill during the weeks and months following the date she was injured. Appellant's first assignment of error is overruled.

[2] After defendant testified and rested, plaintiff called one of the deputy sheriffs in rebuttal. This witness testified: When he stopped defendant on the highway, the deputy got out of the patrol car and walked up beside defendant's car. Defendant was lowering the window. At that point another car, going south, pulled up just beyond the witness, partially in front of and partially even with defendant's car. The driver of this car, who was then approximately six to eight feet from the defendant, said something in a loud voice, which the deputy, who was two or three feet from the defendant, had no difficulty in hearing. The court sustained defendant's objection as to what the man in the car said. If permitted to answer, the witness would have testified that the man in the car said to him: "There is a woman laying in the highway just up the road," and when the witness asked him how far, the man said "about a half a mile." The exclusion of this testimony is the subject of appellant's second assignment of error.

If "the assertion of any person, other than that of the witness himself in his present testimony, is offered to prove the truth of the matter asserted, the evidence so offered is hearsay. If offered for any other purpose, it is not hearsay." Stansbury, N. C. Evidence 2d, § 138. Here, appellant contends that evidence as to the statements which the passing motorist made to the officers in defendant's presence was competent, not to show the truth of the matters asserted in the statements, but rather to show defendant's reactions to the statements. The record shows, however, that the deputy testified that "[a]s a

result of what I heard the man say, I immediately got back into my car and got into the northbound lane and went north." The only evidence in the record as to defendant's reactions to the passing motorist's statements, assuming the jury should have found that he heard them, indicates that when the officers thus abruptly left, defendant simply "went on towards home." (Efforts of plaintiff's counsel in cross-examining defendant to show that he followed an unusual route on his trip home were unavailing.) We cannot, as appellant's counsel seek to do, equate this "reaction" of defendant with the flight of a guilty person nor do we think it could have had sufficient probative force tending to discredit the truthfulness of defendant's version of what had previously occurred as to make the exclusion of evidence of the statements made by the passing motorist prejudicial error. If error at all, it was in our opinion, not so prejudicial as to require a new trial. Appellant's second assignment of error is overruled.

[3] Appellant's third assignment of error relates to a portion of the court's instructions to the jury given in defining the term "greater weight of the evidence," as it relates to the burden of proof. Appellant contends that the portion excepted to "appeared to instruct the jury to find that the plaintiff had not sufficiently met the burden of proof" and "could possibly be interpreted as an expression of opinion" in violation of G.S. 1-180. We do not agree. When read contextually, we think the charge correctly defined the term "greater weight of the evidence," and that the jury could not have been in any way confused or misled into believing that the court had expressed an opinion as to the evidence in this case. Appellant's third assignment of error is overruled.

[4] Finally, appellant excepts to the court's charge on the first issue, contending that in this portion of the charge the court failed adequately to apply the law to the evidence as to defendant's willful and wanton conduct. We note, however, that in a subsequent portion of the charge the court did correctly define willful and wanton conduct and we do not think the jury could have been misled by the charge.

The evidence in this case was in sharp conflict. While plaintiff originally brought her action on the theory that she had been injured by defendant's negligence, her evidence would show him guilty of a deliberate and criminal assault. Defend-

ant's evidence would show him guilty of nothing. No exception was taken to the issues as submitted. It would appear that the jury accepted defendant's version of what occurred. In the trial we find no prejudicial error.

No error.

Judges VAUGHN and GRAHAM concur.

RALPH E. LEE, JR. v. F. M. HENDERSON & ASSOCIATES AND IOWA MUTUAL INSURANCE COMPANY

No. 7310IC95

(Filed 14 March 1973)

1. **Master and Servant § 56— injury arising out of and in course of employment**

A claimant before the Industrial Commission must prove that the injury sustained was the result of an accident arising out of and in in the course of employment, that is, that the injury was a natural and probable consequence or incident of the employment and a natural result of one of its risks.

2. **Master and Servant § 56— hand injury — use of power saw — injury in course of employment**

Injury to plaintiff salesman's hand sustained while he was operating a power saw in defendant employer's shop arose out of and in the course of his employment where plaintiff was working in the shop at the specific instruction of his employer but without any specific assignment, plaintiff had previously obtained permission to work on a doghouse in the shop during working hours when he had nothing else to do, plaintiff was allowed to use scrap material of the employer to build the doghouse and plaintiff was operating the saw at the time of the injury to cut wood for the doghouse.

APPEAL by claimant from an opinion of the North Carolina Industrial Commission filed 11 September 1972.

The evidence before the Industrial Commission tended, in pertinent part, to show the following.

The claimant, Ralph E. Lee, Jr., was hired as a salesman by F. M. Henderson & Associates, a manufacturer and installer of cabinet units, and began work in August of 1970. As was the custom with all new salesmen, he was first assigned to work in the workshop and warehouse as part of a training program.

This experience was necessary in order to enable salesmen for the firm to design cabinet layouts for their customers. He worked full time in the shop for about two and a half weeks actually cutting lumber and building cabinets. During this time, claimant obtained permission from Carl Smith, superintendent in charge of the shop, warehouse, and Raleigh office, to design and construct a doghouse during working hours as long as he received no other specific assignment. Mr. Smith assisted in the project and the same tools, materials and techniques were employed in the execution of the doghouse project as were used in drawing and constructing cabinets. Before the doghouse was completed, claimant's schedule was altered to riding with a salesman part-time and working in the shop part-time. His duties as one of the firm's three salesmen included designing cabinet layouts, helping to deliver the product, working in the shop, unloading cabinets from time-to-time and rotating Saturday duty assignments with the other salesmen so as to work at the office and shop every third Saturday. At the request of his employer, claimant reported to work on Saturday, 26 September 1970 at about 7:45 a.m. While working in the office, he received a telephone call from F. M. Henderson (his employer) who asked claimant to "open the warehouse and put a sign on the door and do whatever [he] saw needed to be done. He did not give [Lee] any specific assignments to perform in the warehouse." Claimant opened the warehouse, used a saw to cut wood for some cabinet sink fronts and generally cleaned up the area. Mr. Norman Altman, shop foreman, arrived and he and Lee unloaded some cabinets from Altman's truck. At claimant's request, Mr. Altman adjusted the blade setting on a power table saw. Since it was his day off, Mr. Altman left the shop and had just started to drive off when he heard claimant holler in distress. He had begun cutting wood which could be used either in cabinet construction or in the doghouse and, in so doing, severed his first, or index finger, and the second finger on his left hand.

The Industrial Commission made the following pertinent findings of fact, among others.

The "plaintiff's training period [in the shop] was shorter than average [thirty days] due to the fact that he had had some experience with woodworking machinery while in the Armed Forces." . . . . "He obtained permission from Smith [manager of the Raleigh office] to work on [a] doghouse in

the employer's shop during working hours when he had nothing else to do and to use 'scrap' material to build the doghouse. In fact, Smith helped plaintiff soon after beginning this employment to design the doghouse on company time, using company materials. When plaintiff had finished his training program, the doghouse was only partially completed and was left in the shop." . . . . "One of the saws [in the employer's shop] was a table-mounted electric saw with the blades protruding from a plate in the table which could be raised or lowered to regulate the depth of the cut. The safety guard on this particular table saw was missing at the time complained of." . . . . "[At this same time] the employer's shop and warehouse was one unit and located under one roof." . . . . "On Saturday, September 26, 1970 plaintiff began work for the defendant employer in the shop and warehouse, this being his Saturday to work. For the first hour, he worked in the office and at approximately 8:45 a.m., the owner of the business, F. M. Henderson, instructed plaintiff by telephone to open the warehouse and shop and do whatever he saw needed to be done there. Plaintiff then went into the warehouse and shop, swept the floors, cut some cabinet parts, and then helped the shop foreman, Norman Altman, unload a load of cabinets. He then asked Altman to reset the saw so that it could be used to rip some three-eighths inch plywood scrap. After Altman reset the saw, he left, since he (Altman) was not required to work on this Saturday. Plaintiff then started ripping some three-eights inch plywood scrap which he was intending to use in the completion of his doghouse. While ripping the plywood with the table saw above-described, his left hand became caught in the saw, resulting in loss by amputation of the first and second fingers of the left hand." . . . . "This was the first Saturday plaintiff had worked on his rotation [with the other salesmen] since becoming a full-time salesman." . . . . "It was not unusual for plaintiff and his co-workers to use the defendant employer's equipment for personal projects when the employees were not busy with company work. a (sic) practice or custom had been established by the employer, allowing the employees to use such equipment. However, at the time complained of, plaintiff was performing an act personal to himself; constructing a doghouse for his own use, and this activity in no way enhanced the business of the defendant employer. At the time complained of, plaintiff did not sustain an injury by accident arising out of and in the course of his employment."

Under the heading "COMMENT" interposed between its findings of fact and conclusion of law, the Commission makes, among others, the following observation: "Our Supreme Court has held that where an employee at the time of his injury is performing acts for his own benefit not connected with his employment, the injury does not arise out of the employment. This is true even if the acts are performed with the consent of the employer and the employee is on the payroll at the time. BELL v. DEWEY BROTHERS, INC., 236 N.C. 280; JONES v. MYRTLE DESK CO., 264 N.C. 401."

The Commission concluded as a matter of law that plaintiff did not sustain an injury by accident arising out of and in the course of his employment on 26 September 1970. The Commission's conclusions of law also state: "2. Plaintiff's accident occurred while performing an act personal to himself which did not further the employer's business. The claim must, therefore, fail. BELL v. DEWEY BROTHERS, INC., *supra;* JONES v. MYRTLE DESK, *supra.*" An order was entered denying plaintiff's claim.

Manning, Fulton & Skinner by W. Gerald Thornton for plaintiff appellant.

Teague, Johnson, Patterson, Dilthey & Clay by C. Woodrow Teague and Robert W. Sumner for defendant appellees.

VAUGHN, Judge.

[1] A claimant before the Industrial Commission must prove that the injury sustained was the result of an accident arising out of and in the course of employment. The phrase "arising out of the employment" refers to the origin or cause of the accident and the phrase "in the course of the employment" refers to the time, place and circumstances under which the injury occurred. *Bass v. Mecklenburg County,* 258 N.C. 226, 128 S.E. 2d 570. In order for an injury to arise out of the employment, it must be a natural and probable consequence or incident of the employment and a natural result of one of its risks. *Perry v. Bakeries Co.,* 262 N.C. 272, 136 S.E. 2d 643. Whether the injury arises out of or in the course of employment is a mixed question of law and fact. *Bryan v. Church,* 267 N.C. 111, 147 S.E. 2d 633; *Enroughty v. Industries, Inc.,* 13 N.C. App. 400, 185 S.E. 2d 597. The appellate court is bound by the nonjurisdictional findings of the Industrial Commission, if there is com-

petent evidence to support such findings, but the appellate court is not bound by the conclusions of law made by the Commission. *Enroughty v. Industries, Inc., supra.*

[2] The Commission found that the three salesmen rotated their Saturday duties so that only one of them would be working in the shop on any given Saturday and each salesman worked his turn, it being plaintiff's turn on the date in question. Further, the findings show that plaintiff, at the request of the employer, went from the office to the shop and did whatever he saw that there was to be done without having been given any specific assignment. He also had previously obtained permission "to work on [the] doghouse in the employer's shop during working hours when he had nothing else to do and to use 'scrap' material to build the doghouse."

The Commission found that, at the time of the accident, claimant was a full-time salesman, that he had finished his training program and that he was performing an act personal to himself. These findings are not determinative of the issues.

Other findings of the Commission disclose that, whether called a "salesman" or trainee, at the time and place of the accident one of the duties of his employment was to operate a power saw and that he had operated the saw to cut cabinet parts on the morning of the accident. Certainly one of the risks incidental to employment as a power saw operator is that of getting cut. The finding by the Commission that the particular piece of wood being sawed was destined for a doghouse instead of a cabinet does not alter the fact that claimant was injured while exposed to a risk of his employment in the operation of a power saw. These facts distinguish the case on appeal from *Bell v. Dewey Brothers, Inc.*, 236 N.C. 280, 72 S.E. 2d 680, where a night watchman, without permission or express prohibition, was washing his private automobile on company time. The employee was standing on the rear bumper of the car; his trousers caught on a bumper guard; when he tried to step off the bumper the trousers remained caught on the bumper guard and the employee fell to the ground on his left hip. The duties of his employment were to make six regular rounds of the premises, punch six key stations in his time clock on each round, to turn off lights which might have been left burning, to inspect various electric motors which might be operating, and to maintain general surveillance of the em-

ployer's premises. The court held that falling off of an automobile bumper while washing his personal automobile (without being expressly permitted to do so) was not a risk incident to his employment as a nightwatchman and that there was no causal relationship between his employment as a watchman and the injury he sustained.

Nor do we consider as determinative the Commission finding that the use of the saw at the time of the accident to cut a board for claimant's doghouse "in no way furthered the employer's business." In *Stubblefield v. Construction Co.*, 277 N.C. 444, 177 S.E. 2d 882, an employee of an electrical contractor was standing near some conveyor belts in a brick plant. He had no duties in connection with the operation of the brick plant or the conveyor belts. While awaiting the arrival of his foreman, the employee proceeded to knock dust and pieces of brick from the rollers of a conveyor belt. As he did so, his hand became entangled, and he was pulled between the rollers and the belt and killed. Certainly the business of his employer, the electrical contractor, was not being furthered by an effort to clear a conveyor belt of the brick company. The Supreme Court held that there was a causal relationship between the accident and the employment. The employee was where he was supposed to be and was engaged in a duty required by his employment, namely, waiting for his foreman. In *Bellamy v. Manufacturing Co.*, 200 N.C. 676, 158 S.E. 246, the spinning department of a cotton mill, located on the fifth floor, stopped work at 11:00 a.m. but employees were not allowed to leave the building until 11:30 a.m. Between 11:00 and 11:30 a.m., claimant, an employee of the spinning department, left that department to go to the weaving room which was located on the first floor of the mill. Claimant's purpose in going to the weaving room was to inquire about getting a job for a friend. While returning, she was injured as she attempted to get off the elevator on the fourth floor. The accident was held to be compensable. The court held that she was "on duty" and was injured before the time expired for her to go off duty. The court held that her mission (which was obviously personal to herself) was not such a departure from the employer's business as to bar recovery.

In the present case all of the facts found by the Commission disclose that at the time of the accident the employee was where he was authorized to be at a time he was authorized to

be there and was engaged in an activity specifically authorized by his employer. It is distinguishable from *Jones v. Desk Company,* 264 N.C. 401, 141 S.E. 2d 632, which is cited by the Commission and appellee. In that case, in a per curiam opinion, the court affirmed the denial of compensation to an employee in a furniture plant who was injured while operating a shaping machine to make a picture frame for personal use. Unlike the present case, however, the employee was not engaged in an authorized activity. In *Jones,* before an employee could use cull and waste materials and do personal work on company time, the employee was required (1) to obtain permission from his foreman, (2) present the material to his supervisor for appraisal and (3) make payment for the price fixed for the material, if any. The injured employee had failed to obtain permission and had failed to have the cull material valued. The employee, therefore, had failed to obtain permission when permission was specifically required and was thus engaged in a specifically unauthorized activity. In the present case the claimant was engaged in an activity which had been specifically authorized by his employer.

Though not binding, several cases from other jurisdictions are of interest to us in our decision.

In *Maheux v. Cove-Craft, Inc.,* 103 N.H. 71, 164 A. 2d 574, an employee suffered permanent injury to his left eye while engaged in operating a table saw to manufacture a checkerboard for his own use. The accident took place during the employee's lunch hour and at his place of employment. The Commissioner of Labor denied compensation and was reversed by the Superior Court. In affirming that decision, the Supreme Court stated that the issue was determined by the question of whether the activity is reasonably expectable so as to be incident to the employment. Stress was laid upon the factors that the plaintiff was on the employer's premises, using the employer's machinery, electricity and stock in an enterprise never expressly forbidden to him and which was consistent with customary practices and impliedly sanctioned by the employee's immediate supervisor in charge.

The New Hampshire Commissioner of Labor also denied compensation to the survivors of an employee who worked as a boiler tender at a tanning plant and who was killed when he drove his automobile into his employer's carpentry shop during working hours, jacked the automobile up in order to work on a

broken torsion bar and had the auto fall on top of him. *Hanchett v. Brezner Tanning Company,* 107 N.H. 236, 221 A. 2d 246. The Superior Court reversed the Commissioner and the Supreme Court agreed and found several factors to be significant: the employer allowed employees to make such repairs; the employee had been an auto mechanic prior to his employment with the defendant company and the employer was interested in having all mechanics improve their skills as such; the work on the auto had not been forbidden; the employee was where he was supposed to be at a time when he was supposed to be there; the employee was not required to remain idle during slack periods of work; the activity engaged in was reasonably expectable so as to be an incident of the employment and thus, in essence, a part of it.

In a Georgia case, the rule has been stated that, "If an employee, while doing something in the interest of his employer, is simultaneously engaged in an act personally beneficial to himself, the service to the employer is not broken, and any injury received by him at that time as the result of the ordinary exposures of his employment, is an injury arising out of and in the course of his employment, and particularly so where the cause for the employee's engaging in such act personally beneficial to himself is the reasonable result of his employment." *Hartford Accident and Indemnity Co. v. Souther,* 110 Ga. App. 84, 137 S.E. 2d 705, 706.

In *Wamhoff v. Wagner Electric Corp.,* 354 Mo. 711, 190 S.W. 2d 915, 161 A.L.R. 1454, it was held that an injury to an employee in doing work for himself on his employer's time may entitle him to Workmen's Compensation benefits where there was substantial evidence, not only that the employer should have anticipated the activities of the employee and others doing personal work, but that the employer encouraged such activities, so long as they did not unduly encroach upon the employer's work, in order to give the employee useful experience. The employee in this case had electroplated both a work item and a toy for his child. He buffed the work item and then, while buffing the toy, the employee injured his hand in the buffing machine.

For the reasons stated we hold that the Commission's conclusion of law that claimant did not sustain an injury by accident arising out of and in the course of his employment is not supported by its findings of fact which are pertinent to this

appeal. The order from which claimant appealed is reversed and the cause is remanded for proceedings not inconsistent with this opinion.

Reversed and remanded.

Judges BROCK and GRAHAM concur.

THOMASVILLE OF NORTH CAROLINA LIMITED v. CITY OF THOMASVILLE, A MUNICIPAL CORPORATION

No. 7322SC24

(Filed 14 March 1973)

1. **Municipal Corporations § 30— obligations incurred by builder — change in zoning classification — vested right of builder to proceed**

Where plaintiff committed itself to a $60,000 earth moving contract and obligated itself by a promissory note and security agreement to the repayment of a $1,142,400 loan, such substantial contractual obligations, if incurred in good faith, vested in plaintiff the right to proceed with its apartment building project irrespective of any subsequent changes in zoning classification made by defendant city.

2. **Municipal Corporations § 30— issuance of building permit — substantial expenditure by builder — good faith of builder**

The trial court sitting as a jury did not err in holding that plaintiff's actions in reliance upon building permits issued it were taken in good faith where the evidence tended to show that plaintiff's plans to construct apartments were well known many months before any movement was made to rezone the property to a lower density classification, that plaintiff spent approximately $120,000 in preliminary plans, mortgage fees, legal fees and other expenses before the project was frustrated by defendant's actions, some of which defendant admits were illegal, that plaintiff was proceeding under permits issued pursuant to a final court judgment in a case which was not appealed and that plaintiff did not act with extraordinary haste or for the sole purpose of thwarting the effect of a zoning ordinance that would prohibit apartment construction on the property.

3. **Municipal Corporations § 30— building permit — evidence of builder's expenditures — competency on good faith issue**

In an action to enjoin defendant city from withdrawing building permits issued to plaintiff for the construction of an apartment, the trial court did not err in admitting evidence as to expenditures and commitments made by plaintiff before obtaining the permits since this evidence was competent on the question of whether plaintiff acted in good faith once the permits were obtained.

Thomasville v. City of Thomasville

APPEAL by defendant from *Chess, Special Judge,* 22 May 1972 Session of Superior Court held in DAVIDSON County.

Through a complaint and motion filed 9 May 1972, plaintiff sought to have the City of Thomasville temporarily and permanently restrained and enjoined from withdrawing building permits issued to plaintiff for the construction of a one hundred unit apartment complex on a 10.296 acre tract of land within the city, and from interfering with plaintiff's right to proceed with the project as long as the construction complied with zoning restrictions encompassed under the zoning classification of R-2. This classification permits the construction of multiple family dwellings.

The property in question, and also adjoining properties, were zoned R-2 in June of 1967. Plaintiff and his predecessor in title acquired an option to purchase the property in early 1971 and immediately began negotiating with the United States Department of Housing and Urban Development (HUD) for approval of an apartment complex under a mortgage guarantee-rental subsidy program known as the "236 Program." Through its officers and agents, the city knew throughout the negotiations about the plaintiff's plans for the project and in May of 1971 the city's director of public works wrote the director of the Federal Housing Administration and advised that the tract of land was properly zoned for the proposed housing. HUD approved the project on 1 March 1972. On 8 March 1972, an application was filed by an adjoining landowner to have approximately 73 acres of land, including plaintiff's land, rezoned from R-2 to an R-3 classification. Under the city zoning ordinances, multi-family dwellings are not permitted on property zoned R-3.

On 15 March 1972, plaintiff exercised its option, purchased the property for approximately $56,000.00, and applied for the necessary building permits. The permits were not issued on that date because minor changes were needed in the plans and specifications. Plaintiff proceeded to rework the plans and specifications.

Although the city's mayor served as plaintiff's attorney, drawing deeds, searching the title, and otherwise assisting in legal matters pertaining to the purchase of the property, plaintiff received no notice of the pending zoning application until it applied for the building permits on 15 March 1972.

On 28 March 1972, plaintiff submitted new plans and specifications and was advised that a bond would be required before building permits could be issued. On 30 March 1972, revised plans and specifications, along with the required bond, were delivered to the city's building inspector. The bond, application and plans were sufficient at that time to comply with the city's requirements, but the building inspector would not issue the permits until the bond was approved by the city attorney. The city attorney would not see plaintiff's agent on that date, stating that he was too busy. That same afternoon, the city council passed a purported ordinance prohibiting the issuance of building permits when the applicant's lands were the subject of a pending rezoning petition.

On 31 March 1972, notice was published that the rezoning application would be heard by the city council on 10 April 1972. On 6 April 1972, plaintiff obtained, through a civil action filed in Davidson County (72CVS620), an order restraining defendant from considering the application on 10 April 1972 and requiring defendant to issue the permits to plaintiff. The parties subsequently stipulated that the purported ordinance passed by the city council on 30 March 1972 was invalid.

On 14 April 1972, a final judgment was entered in 72CVS620 directing the city to issue the permits when plaintiff had met four conditions set forth in the judgment. Plaintiff complied with these four conditions on 17 April 1972 and the building permits were issued on that date.

On 8 May 1972, the city council adopted an ordinance rezoning the land in question from R-2 to R-3. A separate resolution was passed on the same date directing the city's building inspector to revoke the building permits issued to the plaintiff as the result of the Superior Court judgment in 72CVS620. On the following date, this action was instituted and a temporary restraining order issued, restraining defendant from revoking plaintiff's building permits pending further orders. After defendant received actual notice of this restraining order, but before it was served, the city's building inspector issued notices of revocation of the permits. On 11 May 1972, a supplemental order was issued restoring plaintiff's building permits until the hearing of this cause.

Only the plaintiff offered evidence when this cause came on for final hearing. The court, sitting without a jury, heard

the evidence and entered final judgment allowing plaintiff's motion in its entirety by granting the injunctive relief requested. The city appealed.

Craige, Brawley by C. Thomas Ross and Hamilton C. Horton, Jr., and Hooper and McGuire by E. Willis Hooper for plaintiff appellee.

Saintsing & Leonard by George W. Saintsing for defendant appellant.

GRAHAM, Judge.

" . . . [O]ne who, in good faith and in reliance upon a permit lawfully issued to him, makes expenditures or incurs contractual obligations, substantial in amount, incidental to or as part of the acquisition of the building site or the construction or equipment of the proposed building for the proposed use authorized by the permit, may not be deprived of his right to continue such construction and use by the revocation of such permit, whether the revocation be by the enactment of an otherwise valid zoning ordinance or by other means, and this is true irrespective of the fact that such expenditures and actions by the holder of the permit do not result in any visible change in the condition of the land." *Town of Hillsborough v. Smith,* 276 N.C. 48, 55, 170 S.E. 2d 904, 909.

The evidence in this case shows, and the court found, that after plaintiff obtained the building permits by court order, and in reliance upon the permits, " . . . the plaintiff began work on the building site, committed itself to a $60,000.00 earth moving contract, and moved approximately 5,000 cubic yards of earth in preparation of the building site. On May 5th, the plaintiff obligated itself by a promissory note and security agreement to the repayment of a $1,142,400.00 loan, the proceeds of which are to be expended for the completion of the housing project. A provision of the security agreement is that if the entire project is not completed within 12 months, a $274.00 per day penalty falls on the general contract. Another provision of the security agreement is that if construction on the project stops for 20 days or more the mortgagee can enter upon and take over the project."

[1] The contractual obligations set forth above are unquestionably substantial in amount, and if incurred in good faith,

plaintiff has acquired a vested right to proceed with the project irrespective of any subsequent changes in zoning classification. The trial court concluded from facts found that " . . . plaintiff has complied with all the requirements of law and has acted in good faith in the preliminary planning of and commencement of actual construction of a housing project on its land."

[2] The city challenges the court's conclusion, arguing that since plaintiff knew of the pending zoning application on 15 March 1972, its actions in making expenditures and incurring obligations thereafter were, as a matter of law, not in good faith. Conceding *arguendo* that there was evidence which would support findings leading to a conclusion that plaintiff's actions were not in good faith, we are of the opinion that under the evidence presented here, the question of good faith was one for the trial judge in its capacity as a jury.

The city relies principally on the case of *Stowe v. Burke*, 255 N.C. 527, 122 S.E. 2d 374. There, defendant builders knew for many months of opposition to apartment construction in the area in question. The individual defendant repeatedly misrepresented to neighborhood residents that he knew nothing of a proposed apartment project and that he would do all that he could to maintain the exclusive and restricted character of the subdivision. On 5 April 1961, a proposal was submitted to the Charlotte City Council by the Planning Commission to rezone the property in question to prohibit apartment construction. Defendants were aware of the ordinance as early as 6 April 1961. They nevertheless obtained permits for an apartment project on 7 July 1961 and proceeded to move forward with construction at an ". . . extraordinary pace in an attempt, as admitted by defendants' counsel in brief filed in Supreme Court, to establish a right to continue the project before the area in question could be rezoned." The rezoning ordinance was adopted 17 July 1961. The Supreme Court held that under these facts the superior court was justified in concluding that defendants did not act in good faith in doing the work and making expenditures on the project.

The facts in the instant case are strikingly different from those in *Stowe*. Plaintiff here never misrepresented its plans to develop the property for apartment purposes. Its plans were well known for many months before any movement was made to rezone the property to a lower density classification. Plain-

tiff spent approximately $120,000.00 in preliminary plans, mortgage fees, legal fees and other expenses, and it was not until its investment in the project had become substantial that its efforts to carry forward the project were frustrated by city action, some of which the city now admits was illegal. It is true that these preliminary expenditures were made before the permits were obtained and therefore were not made in reliance on the permits. *Warner v. W & O, Inc.*, 263 N.C. 37, 138 S.E. 2d 782. However, an inference arises that even though plaintiff had notice of the pending zoning change at the time the permits issued, it was important that the project continue to move forward expeditiously in order to protect the substantial investment which plaintiff had already made. The fact that plaintiff was proceeding under permits issued pursuant to a final court judgment in a case that was not appealed serves to strengthen the inference that it was acting in good faith in incurring substantial obligations relating to the apartment project after the permits were issued. Moreover, there is no indication here that plaintiff acted with extraordinary haste, or for the sole purpose of thwarting the effect of a zoning ordinance that would prohibit apartment construction on the property.

We are of the opinion and hold that the trial court, which was sitting as a jury, did not err in holding that plaintiff's actions in reliance upon the building permits were taken in good faith.

[3] The city assigns as error the admission of evidence over objection as to expenditures and commitments made by plaintiff before obtaining the building permits. These expenditures did not vest in plaintiff any right to have the zoning ordinance then in effect remain unchanged. ". . . [A] zoning ordinance does not vest in a property owner the right that the restrictions imposed by it upon his property or the property of others shall remain unaltered." *Marren v. Gamble,* 237 N.C. 680, 684, 75 S.E. 2d 880, 883. However, this evidence was nevertheless competent on the question of whether plaintiff acted in good faith once the permits were obtained. It tended to show that plaintiff's plans and negotiations to construct the apartments preceded by many months its application for a building permit, and that the actions taken by plaintiff after the rezoning petition was filed continued in a natural and customary sequence, and not in a manner suggesting plaintiff was engaging in a race with City Hall, attempting to acquire a vested right to proceed before the zoning regulations could be changed.

Finally, the city objects to the following conclusion of the trial court:

> "4. The actions of the defendant City in attempting to obstruct the issuance of building permits to the plaintiff through the enactment of the purported ordinance of March 30th and the subsequent actions of the defendant City in attempting to revoke the building permits lawfully issued to the plaintiff on April 17th were arbitrary and capricious and in violation of the rights of the plaintiff."

Plaintiff did not attack the rezoning ordinance itself and this ordinance has not been invalidated by the judgment entered in this case. Whether the city's actions were arbitrary or capricious is immaterial. The fact is, that under the findings and conclusions of the court, which we affirm, the city may not interfere with plaintiff's vested right to continue its project in accordance with the permits issued and as a non-conforming use under the present zoning regulations.

Affirmed.

Judges CAMPBELL and BROCK concur.

EDWARD LEE HAGER, PLAINTIFF v. BREWER EQUIPMENT COMPANY, DEFENDANT AND THIRD-PARTY PLAINTIFF v. E. E. YOUNTS, INC. AND JOHN S. MACBRYDE COMPANY, THIRD-PARTY DEFENDANTS

No. 7318SC109

(Filed 14 March 1973)

Limitation of Actions § 4— negligence action — cross-action for indemnity — statute of limitation as bar

In a negligence action instituted against Brewer Equipment Company seeking recovery for personal injuries allegedly sustained by plaintiff when the drive shaft of a construction elevator broke and caused the elevator to fall, the trial court erred in dismissing Brewer's third-party action for indemnity gainst MacBryde Company, from whom Brewer had purchased the elevator more than three years earlier, on the ground that the statute of limitations barred the indemnity action, since Brewer's claim for indemnity did not arise until plaintiff brought his action against Brewer and the claim for indemnity was separate and distinct from any possible claim that may have arisen at the time the elevator was purchased.

APPEAL by the original defendant, Brewer Equipment Company, from *Exum, Judge,* 25 September 1972 Civil Session of Superior Court held in GUILFORD County.

Negligence action instituted 1 July 1970 against Brewer Equipment Company (Brewer) seeking recovery for personal injuries allegedly sustained by plaintiff on 3 July 1967 when the drive shaft of a construction elevator broke and caused the elevator to fall. Plaintiff was employed as a carpenter by E. E. Younts, Inc., and the elevator, which was owned by Brewer, was furnished to the construction site under an agreement between Brewer and Younts. Plaintiff alleges, among other things, that the drive shaft to the elevator was "faulty" and that the elevator and drive shaft contained no safety devices.

On 30 October 1970, Brewer filed a third-party action against John S. MacBryde Company (MacBryde), alleging that it purchased the elevator from MacBryde in March of 1967; that if any defect or defects in the elevator proximately caused plaintiff's injuries, said defect or defects resulted from MacBryde's negligence and breach of implied warranty that the elevator was free from defects, ". . . and if Brewer is required to pay to or for the plaintiff any sum of money, then Brewer is entitled to indemnification for such sums. . . ."

MacBryde moved for summary judgment on the ground that Brewer's third-party action was barred by the three-year statute of limitations. The motion was allowed and Brewer appealed.

Smith, Moore, Smith, Schell & Hunter by Bynum M. Hunter for defendant and third-party plaintiff appellant Brewer Equipment Company.

Perry C. Henson and Thomas C. Duncan for third-party defendant appellee John S. MacBryde Company.

GRAHAM, Judge.

The question for decision is whether Brewer's third-party action for indemnity is barred by the three-year statute of limitations. G.S. 1-46; G.S. 1-52(1) and G.S. 1-52(5). We hold that it is not and reverse the judgment.

" 'In general a cause or right of action accrues, so as to start the running of the statute of limitations, as soon as the

right to institute and maintain a suit arises, . . . ' 54 C.J.S., Limitations of Actions, § 109; 34 Am. Jur., Limitation of Action, § 113; *Shearin v. Lloyd,* 246 N.C. 363, 367, 98 S.E. 2d 508." *Motor Lines v. General Motors Corp.,* 258 N.C. 323, 325, 128 S.E. 2d 413, 415. "A cause or right of action accrues, so as to start the statute of limitations running, when the right to institute and maintain a suit arises, *and not before*" (emphasis added). 54 C.J.S., Limitations of Actions, § 109, p. 11. G.S. 1-15(a) (Supp. 1971) provides that "[c]ivil actions can only be commenced within the periods prescribed in this Chapter, *after the cause of action has accrued. . . .*" (Emphasis added.)

If Brewer's claim for indemnity accrued so as to give it a right to sue at the time it purchased the elevator, the statute of limitations started to run at that time and now bars the claim. However, while Brewer may have had a right to sue at that time for damages it incurred as a result of the negligence and breach of warranty now alleged, it obviously had no right to sue at that time to recover for damages it may be forced to pay a third party as a result of MacBryde's primary liability.

The right to sue for indemnity for damages resulting from the negligence, misfeasance or malfeasance of another does not accrue until legal payment has been made. *Pritchard v. R.R.,* 166 N.C. 532, 82 S.E. 875. *See* 41 Am. Jur. 2d, Indemnity, § 39, p. 729; 42 C.J.S., Indemnity, § 25, p. 603; Annot., 20 A.L.R. 2d 925 (1951). In this jurisdiction a defendant may have his indemnity claim against a third party determined in the plaintiff's original action, but ". . . a separate action for indemnity may not be commenced until after payment and satisfaction of the debt." *Ingram v. Smith,* 16 N.C. App. 147, 152, 191 S.E. 2d 390, 394, *cert. denied,* 282 N.C. 304.

In *Pritchard v. R.R., supra,* plaintiff, an initial carrier, was compelled to pay to a shipper of peanuts damages caused by the negligence of defendant, a connecting carrier. Plaintiff sought recovery of the sum paid and defendant pleaded the statute of limitations. In an opinion rejecting the plea, it is stated: "If the cause of action arose in June, 1910, when the peanuts were injured, then we think the claim would be barred by the statute; but in our opinion the cause of action did not arise until the money was paid by the plaintiff to the owner of the peanuts, and that was in July, 1911. * * * As between the common carrier and the shipper, the cause of action would arise when the

damage ensued and the injury was inflicted; but now as between common carriers themselves, a cause of action would not arise in behalf of one carrier against the other until the common carrier suing for the same had paid the damages, as until that had been done it would have sustained no injury." *Id.* at 535-36, 82 S.E. at 876.

In the case of *Godfrey v. Power Co.*, 223 N.C. 647, 27 S.E. 2d 736, the question for decision was whether one of several defendants in an action for wrongful death arising out of a joint tort could have another joint tort-feasor brought in and made a party defendant for the purpose of enforcing contribution, when plaintiff's right of action against the other tort-feasor had been lost by the lapse of time. The Supreme Court answered in the affirmative and in an opinion by Chief Justice Stacy stated:

> "The right accrues when judgment is obtained in an action arising out of a joint tort. From this it follows that a contingent or inchoate right to enforce contribution arises to each defendant tort-feasor at the time of the institution of the action to recover on the joint tort. As long then as the plaintiff's right to recover in such suit remains undetermined, the contingent or inchoate right of each defendant tort-feasor to enforce contribution continues, and, on rendition of judgment in favor of the plaintiff, this right matures into a cause of action. 13 Am. Jur., 51. Thus it is rooted in and springs from the plaintiff's suit and projects itself beyond that suit, but it is not dependent on the plaintiff's continued right to sue all the joint tort-feasors." *Id.* at 649-50, 27 S.E. 2d at 737-38.

Numerous authorities speak to the specific point raised in this case:

In 51 Am. Jur. 2d, Limitations of Actions, § 287, at 802 we find:

> "The general rule is that where the original defendant alleges facts showing that the additional defendant is liable over to him, joinder is generally held to be proper, and the fact that the statute of limitations will bar the plaintiff from a direct recovery against the additional defendant has no effect on the defendant's right to enforce his claim of contribution or indemnity, since the cause of

action owned by the plaintiff is distinct from the cause of action arising out of the duty of the additional defendant to indemnify the original defendant."

In Annot., 20 A.L.R. 2d 925, 927 (1951), it is stated:

". . . [I]t is generally held that where one person's liability for a tort actually committed by another is secondary or constructive, the statute of limitation against his right to recover indemnity from the actual tortfeasor commences to run against him not from the time of the commission of the tort or of the resulting damage or injury, but from the time he has paid, or has been compelled to pay a judgment recovered by, the injured person."

Except in states which have enacted statutes providing otherwise, it is almost universally held that where one person's liability for a tort or breach of warranty committed by another is secondary, the statute of limitations does not start running against his right to indemnity from the party primarily liable until he has paid damages to the injured party. See for instance: *Southern Arizona York Refrigeration Co. v. Bush Mfg. Co.*, 331 F. 2d 1 (9th Cir. 1964); *De La Forest v. Yandle*, 171 Cal. App. 2d 59, 340 P. 2d 52 (1959); *McEvoy v. Waterbury*, 92 Conn. 664, 104 A. 164 (1918); *Sorensen v. The Overland Corp.*, 142 F. Supp. 354 (D. Del. 1956), *aff'd*, 242 F. 2d 70 (3rd Cir. 1957); *Klatt v. Commonwealth Edison Co.*, 55 Ill. App. 2d 120, 204 N.E. 2d 319 (1964), *rev'd on other grounds*, 33 Ill. 2d 481, 211 N.E. 2d 720 (1965); *Chicago & North Western Ry. Co. v. Chicago, R.I. & P.R. Co.*, 179 F. Supp. 33 (N.D. Iowa 1959), *aff'd*, 280 F. 2d 110 (8th Cir. 1960), *cert. denied*, 364 U.S. 931, 5 L.Ed. 2d 364, 81 S.Ct. 378 (1961); *City of Louisville v. O'Donaghue*, 157 Ky. 243, 162 S.W. 1110 (1914); *Appalachian Corporation v. Brooklyn Cooperage Co.*, 151 La. 41, 91 So. 539 (1922); *Veazie v. Penobscot Railroad Company*, 49 Me. 119 (1860); *Power v. Munger*, 52 F. 705 (8th Cir. 1892); *City of Springfield v. Clement, et al.*, 205 Mo. App. 114, 225 S.W. 120 (1920); *rev'd on other grounds*, 296 Mo. 150, 246 S.W. 175 (1922); *City of Lincoln v. First Nat. Bank of Lincoln*, 67 Neb. 401, 93 N.W. 698 (1903); *Adler's Quality Bakery, Inc. v. Gaseteria Inc.*, 32 N.J. 55, 159 A. 2d 97 (1960); *Clements v. Rockefeller*, 189 Misc. 889, 76 N.Y.S. 2d 493 (Sup. Ct. 1947); *Fruehauf Trailer Co. v. Gilmore*, 167 F. 2d 324 (10th Cir. 1948); *Ashley v. Lehigh & W.-B. Coal Co.*, 232 Pa. 425, 81 A. 442 (1911); *City of San Antonio v. Talerico*, 98 Tex. 151, 81 S.W. 518 (1904);

Culmer v. Wilson, 13 Utah 129, 44 P. 833 (1896); *Seattle v. Northern Pac. R. Co.,* 47 Wash. 552, 92 P. 411 (1907); *Northwest Airlines v. Glenn L. Martin Co.,* 161 F. Supp. 452 (D. Md. 1958); *Mims Crane Service, Inc. v. Insley Mfg. Corp.,* 226 So. 2d 836 (Fla. App. 1969), *cert. denied,* 234 So. 2d 122 (Fla. 1969); *McGlone v. Corbi,* 59 N.J. 86, 279 A. 2d 812 (1971).

MacBryde relies upon various cases which hold that where an injured party institutes an action against the manufacturer or seller of a product for injuries arising out of a defect in the product, his claim accrues and the statute of limitations starts to run at the time of the alleged act or omission, which is ordinarily at the time of the sale. *Motor Lines v. General Motors Corp., supra; Bradley v. Motors, Inc.,* 12 N.C. App. 685, 184 S.E. 2d 397; *State v. Aircraft Corp.,* 9 N.C. App. 557, 176 S.E. 2d 796. [G.S. 1-15(b), which alters this rule under certain circumstances is is not applicable here because it did not become effective until 21 July 1971, some twenty days after this action was instituted. G.S. 25-2-725, which sets forth limitations for commencement of actions for breach of contracts for sales governed by the Uniform Commercial Code, is likewise not applicable here because it became effective on 1 July 1967, which was after the March 1967 sale of the elevator here in question.]

The distinction is that Brewer, as a third-party plaintiff, is not seeking to recover for damages it sustained as a result of a defect present in the elevator at the time of purchase. Such a claim for relief would be barred because Brewer would have had a right to sue for nominal damages at least at the time it purchased the elevator. *Motor Lines v. General Motors Corp., supra.* See also *Shearin v. Lloyd,* 246 N.C. 363, 98 S.E. 2d 508. *Cf. Hooper v. Lumber Co.,* 215 N.C. 308, 1 S.E. 2d 818. Brewer's claim for indemnity is separate and distinct from any possible claim that may have arisen at the time the elevator was purchased and consequently the statute of limitations did not begin to run against the indemnity claim at that time.

Reversed.

Judges CAMPBELL and BROCK concur.

ROBERT A. GIBBS AND WIFE, MARY FRANCES GIBBS v. HERMAN WRIGHT AND WIFE, MYRTLE WRIGHT

No. 7228SC486

(Filed 14 March 1973)

1. **Easements §§ 1, 9— right to get water from spring — easement appurtenant to land conveyed**

An easement in a deed stating that the grantors "agree for the party of the second part herein to get water by conveying the same from a spring above the tract" *is held* an easement appurtenant to the land conveyed, not an easement in gross amounting to no more than a personal license limited to the original grantee.

2. **Easements § 10— easement by deed — effect of oral agreement of predecessors in title**

Where defendants' right to get water from a spring on plaintiffs' land was derived from the written and recorded deeds in their chain of title, their right was neither enlarged nor diminished by oral agreements entered into by predecessors in title to plaintiffs and defendants.

3. **Easements § 1— right to get water from "spring above the tract" — sufficiency of description**

Easement in a deed granting the right "to get water by conveying the same from a spring above the tract, with no controlling privileges" is not so vague and indefinite as to make the attempted grant void for uncertainty, the parties themselves having had no difficulty in locating the "spring above the tract."

4. **Easements § 8— right to get water from spring — meaning of "with no controlling privileges"**

The addition of the words "with no controlling privileges" to a grant of an easement "to get water by conveying the same from a spring above the tract" merely manifested the intention of the parties that the grantee was not given the exclusive control and use of the waters from the spring, but that the rights granted were to be exercised in such manner as would not interfere with the continuing right of the owners of the land upon which the spring was located also to obtain and use waters from the spring.

APPEAL by plaintiffs from *Thornburg, Judge,* 13 March 1972 Session of Superior Court held in BUNCOMBE County.

The parties submitted this civil action upon an agreed statement of facts, which may be summarized as follows:

In 1923 J. W. and J. H. Dovall, being the owners in fee of all the lands in controversy herein situated on Powers Road, Hazel Ward, Buncombe County, N. C., conveyed one acre thereof

to Willie Powers by recorded deed which contains the following words:

> "The parties of the first part herein also agree for the party of the second part herein to get water by conveying the same from a spring above the tract, with no controlling privileges."

Defendants are now the owners of the one-acre tract conveyed by said deed, having acquired title thereto in 1954 by recorded mesne conveyances, all of which refer to the above-quoted words in the deed from the Dovalls to Powers. Plaintiffs are now the owners of six acres of the original tract, having acquired title thereto in 1970 by recorded mesne conveyances from the Dovalls. Plaintiffs' six-acre tract adjoins defendants' one-acre tract on the west and south and contains the spring referred to above, which spring is near the western margin of Powers Road and is about 150 feet south of the common line between the parties. Paragraph 4 of the agreed statement of facts is as follows:

> "4. That Willie Powers and her Grantees got water from said spring with the consent and permission of the Dovalls and their Grantees by carrying it in buckets or pails, until about 1950 when Robert L. Hollifield and Clarence E. Garren entered into an oral agreement whereby Hollifield permitted Garren to put a pipe from said spring to his house on the condition that Garren would not let the water run at his house except when being actually used, so that the overflow from the spring would be available for watering Hollifield's cattle in his pasture, and on the further promise and agreement by Garren that he would take the pipe out whenever Hollifield told him to do so."

(In 1950 Hollifield was the owner of record of the tract on which the spring is located and is plaintiffs' immediate predecessor in title; in 1950 Garren was owner of record of the one-acre tract and is defendants' immediate predecessor in title.) On 19 July 1971 plaintiffs gave defendants written notice that after 20 days they would not be permitted to get water from said spring and notified defendants "not to trespass on the Gibbs property."

Based upon the agreed statement of facts, the court entered judgment making findings of fact as set forth in the agreed statement of facts, but omitting any finding with respect to

the matters set forth in paragraph 4 of the agreed statement of facts. The judgment also contained the following as findings of fact:

> "4. That the easement granted to Willie Powers was in its nature an appropriate and useful adjunct of the land conveyed to the said Willie Powers.
>
> "5. That the predecessors in title of Robert A. Gibbs and wife granted a duly recorded easement to the predecessors in title of Herman Wright and wife."

Upon these findings of fact, the court concluded as a matter of law that the words used in the deed from the Dovalls to Powers "constitute an easement appurtenant to the land conveyed to the said Willie Powers"; that plaintiffs "had due notice of the recorded easement granted by their predecessors in title"; and that "the language in the easement granted referring to 'no controlling privileges' relates to the manner in which the water is to be obtained and used and conveyed to the grantee the right to make any reasonable use of the said spring and its waters." Upon these conclusions, the court adjudged that defendants "be allowed to continue to obtain water from the spring located on the property of Robert A. Gibbs and wife, Mary Frances Gibbs, and that they be allowed to obtain and use the water from said spring in any reasonable manner." To the signing and entry of this judgment, plaintiffs excepted and appealed.

M. John DuBose for plaintiff appellants.

Bruce A. Elmore, John C. Cheesborough and George W. Moore for defendant appellees.

PARKER, Judge.

[1] Appellants assign error to the trial court's conclusion that the right granted in the deed from the Dovalls to Powers to get water from the spring was an easement appurtenant to the land conveyed. They contend that on the contrary the right in question was in gross and amounted to no more than a personal license limited to the original grantee. We do not agree.

> "Whether an easement in a given case is appurtenant or in gross depends mainly on the nature of the right and the intention of the parties creating it. If the easement is

> in its nature an appropriate and useful adjunct of the land conveyed, having in view the intention of the parties as to its use, and there is nothing to show that the parties intended it to be a mere personal right, it should be held to be an easement appurtenant and not an easement in gross. Easements in gross are not favored by the courts, however, and an easement will never be presumed as personal when it may fairly be construed as appurtenant to some other estate. If doubt exists as to its real nature, an easement is presumed to be appurtenant, and not in gross." 25 Am. Jur. 2d, Easements and Licenses, § 13, p. 427.

In the present case in our opinion the trial court correctly held that the right granted to get water by conveying the same from the spring constituted an easement appurtenant to the land conveyed to Powers. The fact that the words "heirs and assigns" were omitted after the words "party of the second part" in the sentence in which the right was granted does not control interpretation. G.S. 39-1; *Shingleton v. State,* 260 N.C. 451, 133 S.E. 2d 183. While the grant does not use the word "appurtenant," neither does it use the term "in gross." More significantly, it does not qualify the grantee's rights by the use of such terms as "personally" or "in person." Nothing indicates that the right to get water from the spring had any value apart from its exercise in connection with the use and occupancy of the one-acre tract conveyed. It is more reasonable to presume that the parties intended the right to be appurtenant to the land conveyed, for which purpose it had obvious value, than to presume they intended it to be personal to the grantee apart from her status as owner of the land conveyed, for which purpose it had no apparent value.

Appellants' assignments of error directed to findings of fact numbers 4 and 5 are also without merit. While, as appellants point out, these "findings of fact" were not included in the agreed statement of facts and while they are actually more in the nature of conclusions of law than strictly factual findings, correctly considered as conclusions of law, they are supported by the agreed statement of facts, and it is immaterial that they were incorrectly included under the heading of "findings of fact" in the judgment.

[2] Appellants' assignment of error directed to the trial court's failure to include in its judgment as a finding of fact any finding

with respect to the matters set forth in paragraph 4 of the agreed statement of facts is also without merit. Defendants' rights were derived from the written and recorded deeds in their chain of title, and their rights were neither enlarged nor diminished by the oral agreements entered into by precedessors in title to the present parties.

[3] Finally, appellants contend that the right granted "to get water by conveying the same from a spring above the tract, with no controlling privileges," is so vague and indefinite as to make the attempted grant void for uncertainty. We find this contention also without merit. We note that the parties themselves have had no difficulty in locating the "spring above the tract"; in their agreed statement of facts they locate it as being on plaintiffs' property and as being the spring "which is near the Western margin of Powers Road and is about 150 feet South of the common line" between the parties.

[4] The initial grant of the right "to get water by conveying the same from a spring above the tract" was general in its terms. "Where the grant or reservation of an easement is general in its terms, use of the easement includes those uses which are incidental or necessary to the reasonable and proper enjoyment of the easement, but is limited to those that burden the servient estate as little as possible." 25 Am. Jur. 2d, Easements and Licenses, § 74, p. 480. In our opinion, the addition of the words, "with no controlling privileges," to a grant otherwise general in its terms merely manifested the intention of the parties that the grantee was not given the exclusive control and use of the waters from the spring, but that the rights granted were to be exercised in such manner as would not unreasonably interfere with the continuing right of the owners of the land upon which the spring was located also to obtain and use waters from the spring.

We hold that the trial court was correct in its judgment that defendants "be allowed to continue to obtain water from the spring" located on the property of plaintiffs, "and that they be allowed to obtain and use the water from said spring in any reasonable manner." While it may be implied, for the sake of clarity the judgment appealed from should be modified to make clear that defendants' rights are nonexclusive of plaintiffs' con-

tinuing rights also to make reasonable use of the spring. As so modified, the judgment appealed from is affirmed.

Remanded for judgment.

Judges VAUGHN and GRAHAM concur.

HARRY SCHAFRAN v. MARION R. HARRIS

No. 7311SC234

(Filed 14 March 1973)

Bills and Notes § 8— note not signed by comaker as accommodation party

In an action to recover an amount paid by plaintiff in discharge of a promissory note executed by plaintiff and defendant in 1970 in renewal of a 1969 note which also had been cosigned by the parties, a finding by the court that "it was understood and agreed by and between the plaintiff and the defendant that each would be equally liable for one-half of the 1969 debt" was supported by the evidence and compelled a conclusion of law that defendant signed both notes as a comaker without any right as an accommodation maker.

APPEAL from *Braswell, Judge,* 28 August 1972 Session of Superior Court held in HARNETT County.

This is a civil action by one comaker of a negotiable promissory note to recover from the other comaker one-half of the total amount which plaintiff paid the payee in discharge of the note. In substance plaintiff alleged: On 10 February 1970 plaintiff and defendant executed a note in the amount of $20,000.00 payable one year after date to one Johnson. The note provided for quarterly installments of interest. As these became due plaintiff made demand on defendant to pay his proportional part but defendant refused to do so. Plaintiff paid each installment of interest and on 10 February 1971 paid the entire principal of $20,000.00 to the payee, who then assigned the note to plaintiff. Plaintiff made demand on defendant that he reimburse plaintiff for one-half of the amounts which plaintiff had paid Johnson on the note, but defendant refused to do so.

Defendant filed answer in which he admitted that he executed the note but alleged that the note was a renewal of a like note in the amount of $20,000.00 executed in February 1969, and that he "signed said note referred to in the complaint

at the request of the plaintiff and at no time received any proceeds of the same nor was it intended by the parties that he should benefit in any way from said note, and it was further understood that the defendant would not be indebted to the plaintiff in any manner as a result of signing said note; that he was simply an accommodation maker."

The parties waived jury trial. After hearing evidence offered by both parties, the trial judge signed judgment dated 28 August 1972 in which he made findings of fact, including the following:

"2. That the plaintiff and the defendant on February 10, 1970 executed and delivered to Robert Johnson their joint promissory note in the principal sum of $20,000.00 due one year after date bearing interest at the rate of six percent per annum; that said note was signed on the face thereof by the plaintiff and the defendant; that said note is under seal; that said note contains no language limiting the liability of the makers of said note either to the payee or to each other, said note being regular in all respects; that the note of February 10, 1970 was a renewal note of a similar note executed on February 10, 1969, by the same parties; that Robert Johnson, the payee, and the defendant never met each other until their appearance in this Court; that the plaintiff sent the entire proceeds of the 1969 note to the attorney for the defendant for purpose of opening up the Jumble Shop, Inc., (a clothing specialty shop in downtown Durham, N. C.); that in March 1969 the Jumble Shop, Inc. began to do business; that the interest on the 1969 note of $1200.00 was paid from monies of the Jumble Shop, Inc. to the plaintiff; that the Jumble Shop, Inc. is now in receivership.

"3. That at the time of the execution of the 1969 note, the plaintiff and the defendant agreed with one another that they jointly would borrow from Robert Johnson the sum of $20,000.00 and execute said note to him; that they would loan and did loan the proceeds of said note to the Jumble Shop, Inc., a North Carolina corporation which on or about February 10, 1969 was in business or about to engage in business in the City of Durham, North Carolina; that the proceeds of said note were, in fact, loaned by the plaintiff and the defendant to the Jumble Shop, Inc.; that

the plaintiff was at all times an officer, director and shareholder in the Jumble Shop, Inc.; that the defendant was at all times an officer, director and shareholder in the Jumble Shop, Inc.

"4. That it was understood and agreed by and between the plaintiff and the defendant that each would be equally liable for one-half of said 1969 debt to Robert Johnson, in the amount of $20,000.00.

"5. That the plaintiff paid to Robert Johnson all of the interest payments on said note of 1970 as they matured and became due, said interest being paid quarterly by the plaintiff to the said Robert Johnson; that the defendant made no interest payments whatsoever on said note of 1970 despite demands by the plaintiff.

"6. That the renewal note matured on February 10, 1971; that prior thereto the plaintiff demanded that the defendant pay his one-half of said note and one-half of the interest theretofore paid by the plaintiff to the payee in said note; that the defendant refused to do so; that the plaintiff thereupon paid the full amount of the principal to Robert Johnson, who on February 10, 1971, endorsed said note to the plaintiff."

On the findings of fact the court made the following conclusions of law:

"1. That for a valuable consideration the plaintiff and the defendant jointly executed and delivered to Robert Johnson their renewal promissory note in the sum of $20,000.00 dated February 10, 1970, due February 10, 1971, bearing interest at the rate of six percent per annum from date.

"2. That the consideration for said renewal note of February 10, 1970 was the agreement between the plaintiff and the defendant that the proceeds of the February 10, 1969 note would be loaned to the Jumble Shop, Inc., a North Carolina corporation in which both the plaintiff and the defendant were officers, directors and shareholders and in which both had a financial interest; and the payment of interest on the 1969 note with proceeds from the Jumble Shop, Inc.

"3. That the defendant, Marion Harris, was not an accommodation maker for the plaintiff in the execution of said note of February 10, 1970; that the defendant was jointly liable thereon to the payee named therein with the plaintiff.

"4. That the plaintiff having paid the principal and interest of said note to the payee, is entitled to recover one-half of the principal and one-half of the interest paid by him from his comaker."

Based on its findings of fact and conclusions of law, the court adjudged that plaintiff recover of defendant $10,000.00 principal and $600.00 interest, or a total of $10,600.00, with interest thereon from 10 February 1971.

The judgment was dated 28 August 1972 and was filed on 7 September 1972. On motion of defendant dated 21 September 1972, the trial judge signed an order dated 27 September 1972 making two additional findings of fact as follows:

"That the evidence showed that the Jumble Shop, Inc. executed a negotiable promissory note in the amount of $22,000.00 to Harry Schafran, individually, either in late February or early March, 1969.

"That the evidence showed that Robert Johnson, Payee of the original note of February 10, 1969, gave the said $20,000.00 to Harry Schafran five days before the original note of February 10, 1969 was signed by Marion Harris."

This order also added to the conclusions of law, as a first sentence to paragraph 3 of the conclusions of law, the following:

"That Marion R. Harris was an accommodation maker on the note dated February 10, 1969."

The order of 27 September 1972 did not modify the judgment of 28 August 1972 in any other respect. From the modified judgment, defendant appealed.

Bryan, Jones, Johnson, Hunter & Greene by James M. Johnson; and Woodall, McCormick & Arnold by Edward H. McCormick for plaintiff appellee.

Pearson, Malone, Johnson & DeJarmon by C. C. Malone, Jr. and W. G. Pearson II for defendant appellant.

PARKER, Judge.

A careful review of the evidence narrated in the record in this case reveals that, while the evidence was in some respects conflicting, there was competent evidence to support each of the specific findings of fact made by the trial court. These findings of fact are, therefore, conclusive on this appeal. 1 Strong, N. C. Index 2d, Appeal and Error, § 57, p. 223. Appellant does not seriously contend otherwise but in his brief directs his argument primarily to his contention that the trial court erred as a matter of law in concluding that defendant was not an accommodation maker on the note dated 10 February 1970. In this connection the appellant argues that the trial court concluded, correctly in appellant's view, that defendant was an accommodation maker on the note dated 10 February 1969, and there being no evidence that the relationship of the parties changed upon execution of the renewal note which in effect only extended the time of payment, "the conclusion follows that the defendant was an accommodation maker on the renewal note upon which this suit is sought, and therefore is not liable to the plaintiff."

We might find appellant's argument persuasive but for the fact that in our opinion the conclusion of law which the trial court made, when it modified its judgment as originally signed, "[t]hat Marion R. Harris was an accommodation maker on the note dated February 10, 1969," is itself not supported by the specific findings of fact made by the court and, indeed, is directly contrary thereto. In finding of fact number 4 the court specificaly found "[t]hat it was understood and agreed by and between the plaintiff and the defendant that each would be equally liable for one-half of said 1969 debt to Robert Johnson, in the amount of $20,000.00." This factual finding was fully supported by plaintiff's testimony. While defendant testified to the contrary, the trial court resolved this conflict in evidence by finding plaintiff's version to be true. This specific factual finding will only support a conclusion of law that defendant signed both notes as comaker without any rights as an accommodation maker. In the judgment appealed from the trial court concluded as a matter of law that defendant was not an accommodation maker as to the 1970 note. This conclusion was supported by the court's factual findings and in turn supported the judgment rendered. The additional conclusion, to the effect that defendant was an accommodation maker as to the 1969 note,

which was made when the original judgment was modified and which in our view is not supported by the factual findings, was at most harmless error.

The judgment appealed from is

Affirmed.

Judges BRITT and HEDRICK concur.

HERBERT G. HINSON v. VIRGINIA ROBBIN HINSON

No. 7310DC247

(Filed 14 March 1973)

1. **Divorce and Alimony § 16; Judgments § 37— alimony issue raised in pleadings — consent judgment — bar to future claims for alimony**

Where the wife filed a counterclaim for alimony based on abandonment and for child custody and support in the husband's action for divorce from bed and board instituted in 1967, a consent judgment entered in that action in 1968 related to child custody and support, household furnishings and the discharge of debts but made no reference to alimony, the husband instituted an action for absolute divorce in 1962 on the ground of separation for a year and the wife again counterclaimed for alimony based on abandonment, the trial court in the second action properly dismissed the wife's counterclaim for alimony on the ground that the 1968 consent judgment was a final judgment as to all issues raised in the pleadings in the former action and that the wife surrendered her right to pursue her claim for alimony when she consented to the 1968 judgment and failed to press her claim for alimony to a conclusion.

2. **Trial § 57— nonjury trial — relaxation of rules of evidence**

In a trial or hearing by the court the rules of evidence are not so strictly enforced as in a jury trial, and it will be presumed that the judge disregarded any incompetent evidence that may have been admitted unless it affirmatively appears that he was influenced thereby.

APPEAL by defendant from *Winborne, District Judge,* 9 October 1972 Session of District Court for WAKE County.

Plaintiff instituted this action on 19 July 1972 seeking an absolute divorce on the ground of one year separation. Defendant filed answer setting up a "first defense" in which she alleged the pendency of an action between the parties and a "second

defense and counterclaim" in which she alleged the following: Plaintiff and defendant were lawfully married to each other in 1941 and thereafter adopted a child, now age 16; in August 1967 plaintiff abandoned defendant without any cause or lawful provocation; that defendant is without sufficient means whereon to subsist during the pendency of this action and to defray the necessary expenses thereof; that defendant is a fit and proper person to have custody of the child; defendant asks for temporary and permanent alimony, custody of and support for the child, counsel fees and that the complaint be dismissed.

In his reply, plaintiff alleged that the matters and things alleged by defendant in her further defenses and counterclaim had been adjudicated previously and that final judgment had been entered thereon; plaintiff asked that defendant's counterclaim be dismissed.

With respect to the former action, the record reveals:

On 22 November 1967 plaintiff instituted an action in superior court against defendant asking for divorce from bed and board on the ground that defendant had subjected plaintiff to indignities which had made his condition intolerable and his life burdensome; plaintiff also asked for custody of the child, but if the court should award custody to defendant, that the court establish the amount of support plaintiff should pay. On 13 December 1967 plaintiff filed notice that on 8 January 1968 he would ask the court to enter an order regarding child custody and support. On 25 January 1968, with the consent of the parties, Judge Copeland entered an order providing, among other things, that pending a hearing of the cause by Judge Copeland at the 18 March 1968 Session of Wake Superior Court, (1) defendant would have possession of the home (which the parties owned as tenants by the entirety) and a Dodge automobile, (2) plaintiff would pay defendant $150.00 per month for support of the child, and (3) plaintiff would have certain specified child visitation privileges.

On 13 March 1968 defendant filed answer in the former action in which she denied that the separation of the parties was due to any wrongdoing on her part; she alleged wrongful abandonment by plaintiff and asked that his action be dismissed; by way of cross action she asked for temporary and permanent alimony, child custody and support, and counsel fees.

On 18 March 1968 Judge Copeland entered a five page judgment, consented to by the parties and their attorneys on each page and at the end. The judgment is summarized in pertinent part as follows (numbering ours):

(1) The cause came on to be heard upon motion of plaintiff and defendant.

(2) The court found as a fact that the action was instituted pursuant to Chapter 50 of the General Statutes, that all persons necessary to a determination of the issues were parties to the action and properly before the court; that the parties were lawfully married to each other on 20 June 1941, and lived together as husband and wife until August 1967 when they separated; that there is a 12 year old adopted child of the marriage; that defendant is a fit and proper person to have the custody of said child; that the parties own, as tenants by the entirety, property located at 1409 Kimberly Drive in the City of Raleigh and that plaintiff's interest therein has been conveyed to defendant in a deed delivered simultaneously with the entry of this judgment, the conveyance being subject to an existing mortgage in amount of approximately $22,000.00; that plaintiff earns from his employment approximately $720.00 per month; that the parties have certain financial obligations (set out in detail); that simultaneously with the entry of the order, plaintiff has caused a Renault automobile to be conveyed to defendant with plaintiff retaining a 1967 Dodge for his use.

(3) The court ordered, adjudged and decreed: that custody of the child be awarded to defendant subject to specified visitation rights of plaintiff; that defendant have the household furniture and furnishings located at 1409 Kimberly Drive; that plaintiff discharge certain listed financial obligations aggregating approximately $3,260.00 and that defendant discharge three items aggregating approximately $350.00; that plaintiff pay defendant's attorney $250.00; that plaintiff pay on the first and fifteenth of each month until 1 March 1971 the sum of $157.50 as support for the minor child; that on 15 March 1971 and on the first and fifteenth of each month thereafter plaintiff pay $182.50 for the support of said child "until such time as the said child shall attain the age of Twenty-One (21) years, or shall become emancipated, or shall substantially complete her education, or shall marry, or shall die, or the entry of the further Order of this Court, whichever shall first occur";

that plaintiff provide for the major medical expenses for said child.

(4) The judgment then provided that if plaintiff failed to make the payments as ordered, he would be punished as for contempt; it further provided "That jurisdiction of this cause is retained for such further orders as may be entered herein with respect to the custody and support of the minor child of the marriage of the parties."

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On 20 October 1972, following a hearing on plaintiff's motion in the present action to dismiss defendant's further defense and counterclaim, at which hearing Judge Winborne considered the record and oral testimony by witnesses including defendant and the attorneys who represented the parties in the former action (the parties being represented by different attorneys in this action), the court entered an order finding facts and concluding that the judgment entered by Judge Copeland was a final judgment as to all issues raised in the pleadings in the former action subject only to later orders relative to contempt, custody and support of the minor child, and ordering that defendant's defenses and counterclaim be dismissed. Defendant appealed from Judge Winborne's order.

Boyce, Mitchell, Burns & Smith by Eugene Boyce for plaintiff appellant-appellee.

Gulley & Green by Jack P. Gulley for defendant appellant.

BRITT, Judge.

[1] Did the trial court err in concluding that the judgment entered by Judge Copeland on 18 March 1968 was a *final* judgment? We answer in the negative.

G.S. 1A-1, Rule 54(a) provides: "A judgment is either interlocutory or the final determination of the rights of the parties." This definition of judgment was formerly contained in G.S. 1-208. An interlocutory judgment is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy; a final judgment is one which disposes of the cause as to all parties, leaving noth-

ing to be judicially determined between them in the trial court. *Veazey v. City of Durham,* 231 N.C. 357, 57 S.E. 2d 377 (1950).

Defendant contends that in the former action plaintiff asked for divorce from bed and board and custody of the child; that in her cross action in the former cause defendant asked for custody of and support for the child, alimony without divorce based on plaintiff's abandonment of her, and counsel fees; that inasmuch as the judgment in the former action made no determination (1) of plaintiff's claim for divorce from bed and board or (2) defendant's cross action for alimony based on plaintiff's abandonment, those issues have not been resolved. Defendant insists she is entitled to her "day in court" on her claim for alimony.

In *Bunker v. Bunker,* 140 N.C. 18, 52 S.E. 237 (1905), opinion by Justice Walker, we find:

> " * * * If there be any one principle of law settled beyond all dispute it is this, that whensoever a cause of action, in the language of the law, *transit in rem judicatam,* and the judgment thereupon remains in full force and unreversed, the original cause of action is merged and gone forever, and so it is, also, that if the plaintiff had an opportunity of recovering something in litigation formerly between him and his adversary, and but for the failure to bring it forward or to press it to a conclusion before the court, he might have recovered it in the original suit; whatever does not for that reason pass into and become a part of the adjudication of the court is forever lost to him. *U. S. v. Leffler,* 11 Peters, 101. Judge Willes thus states the rule: 'Where the cause of action is the same and the plaintiff has had an opportunity in the former suit of recovering that which he seeks to recover in the second, the former recovery is a bar to the latter action.' * * * "

Applying the principle stated in *Bunker* to the instant case, when defendant consented to the 1968 judgment and failed to press her claim for alimony to a conclusion, we think she surrendered her right to pursue the claim based upon any occurrences prior to that time.

Defendant argues that the effect of the 18 March 1968 judgment was to grant plaintiff a divorce from bed and board, something that Judge Copeland was without authority to do

inasmuch as G.S. 50-10 required issues in divorce from bed and board actions to be determined by a jury. Assuming, *arguendo,* the effect of the judgment was to grant plaintiff a divorce from bed and board, it would appear that the parties were able to waive jury trial in view of the adoption in 1962 of Sec. 12 of Article IV of the Constitution of North Carolina which in 1968 provided as follows: "In all issues of fact joined in any court, the parties in any civil case may waive the right to have the same determined by a jury; in which case the finding of the judge upon the facts shall have the force and effect of a verdict by a jury." (Note: The substance of said section appears as Sec. 14 of Article IV of the present State Constitution.)

[2] Defendant assigns as error the admission of certain evidence at the hearing. It is well settled in this jurisdiction that in a trial or hearing by the court the rules of evidence are not so strictly enforced as in a jury trial and it will be presumed that the judge disregarded any incompetent evidence that may have been admitted unless it affirmatively appears that he was influenced thereby. 7 Strong, N. C. Index 2d, Trial, § 57, p. 376. The trial court's findings of fact are fully supported by competent evidence presented at the hearing and it does not affirmatively appear that the court was influenced by any incompetent evidence presented.

We hold that the trial court properly concluded that the judgment entered by Judge Copeland was a final judgment, therefore, the order appealed from is

Affirmed.

Judges PARKER and HERRICK concur.

LIZZIE MILLER, ADMINISTRATRIX OF THE ESTATE OF MACK BUSTER MILLER, DECEASED v. CRAWFORD MONROE ENZOR

No. 7313SC19

(Filed 14 March 1973)

1. Automobiles §§ 50, 69— striking bicyclist — duty to keep vehicle under control — sufficiency of evidence to be submitted to jury

In a wrongful death action plaintiff's evidence was sufficient to take the case to the jury on the question of whether defendant main-

tained his vehicle under proper control where the evidence tended to show that defendant pulled into the left lane of a two-lane road in order to pass a vehicle traveling in the same direction, that defendant's car left the traveled portion of the road for a short distance, struck two bicycles traveling in the opposite direction but located about two or three feet onto the shoulder of the road and killed plaintiff's intestate who was riding one of the bicycles.

2. **Automobiles §§ 50, 69— striking bicyclist — duty to maintain proper lookout — sufficiency of evidence to be submitted to jury**

Evidence in a wrongful death action required the jury to pass upon the question of whether defendant was keeping a proper lookout where it tended to show that there was nothing to obstruct defendant's vision, that visibility was possible only moments before the collision for up to 200 yards, that defendant had his headlights on, yet failed to see four boys on two bicycles at any time before the collision.

3. **Automobiles §§ 85, 88— cyclist on highway without lights at night — jury question of contributory negligence**

In a wrongful death case if deceased was riding his bicycle, without lights, at night upon a public highway, he was guilty of negligence; however, whether that negligence was a proximate cause of his death if the fatal collision in fact occurred while he was completely away from the traveled portion of the highway was a question for the jury.

APPEAL by plaintiff from *Bailey, Judge,* 24 April 1972 Civil Session of Superior Court held in COLUMBUS County.

Wrongful death action to recover for the death of plaintiff's intestate, a 16-year-old boy, who was killed 5 April 1969 when struck by an automobile driven by defendant while the deceased was riding a bicycle upon or along the shoulder of N. C. Highway No. 904 in Columbus County.

Defendant moved for a directed verdict at the conclusion of plaintiff's evidence and renewed his motion at the conclusion of all the evidence. The motion was denied and issues of negligence, contributory negligence and damages were submitted to the jury. After deliberation, the jury returned to the courtroom and advised that agreement had been reached on the issue of defendant's negligence, but that agreement could not be reached on the remaining issues. The court thereupon withdrew a juror and declared a mistrial. The court then entered judgment granting defendant's motion for a directed verdict, stating as the grounds therefor that the evidence was insufficient to show actionable negligence; and even if sufficient for this purpose, the plaintiff's evidence established the contributory negligence of her intestate as a matter of law.

Williamson & Walton by Edward L. Williamson and Benton H. Walton III for plaintiff appellant.

Marshall, Williams, Gorham & Brawley by A. Dumay Gorham, Jr., for defendant appellee.

GRAHAM, Judge.

The evidence offered by plaintiff is conflicting in many respects. However, on a motion by a defendant for a directed verdict, the plaintiff's evidence must be taken in the light most favorable to him and he is entitled to the benefit of all reasonable inferences which may be drawn therefrom. *Dawson v. Jennette,* 278 N.C. 438, 180 S.E. 2d 121; *Bowen v. Gardner,* 275 N.C. 363, 168 S.E. 2d 47.

[1] The testimony of David Earl Simmons, when considered in the light most favorable to the plaintiff, tends to show the following: At about dusk on the afternoon of 5 April 1969, Simmons, deceased, and two other boys left Sam Herring's store to go to Joyce Woodell's house, about 200 yards away. It was raining a little but they could see from the store to the house. Simmons and one boy rode on one bicycle and deceased and the other boy followed on a second bicycle. The bicycles were not equipped with lights. The boys rode on the paved surface of the right side of the two-lane road until defendant's car, which was approaching them from the opposite direction, pulled into that lane to pass a car in front of it. Simmons testified that at that point " . . . we got on the shoulder of the road, about two or three foot." Defendant's car left the traveled portion of the road for a short distance, struck both bicycles, and caused the death of plaintiff's intestate.

We find this evidence sufficient to take the case to the jury on the question of whether defendant maintained his vehicle under proper control. *Greene v. Nichols,* 274 N.C. 18, 161 S.E. 2d 521. Indeed, defendant concedes that "[i]f, in fact, the Defendant's vehicle left the paved portion of the road 'for no apparent cause' then it would seem to follow that the evidence makes out a *prima facie* case of negligence on the part of the Defendant, ENZOR."

[2] Moreover, we are of the opinion that the evidence required the jury to pass upon the question of whether defendant was keeping a proper lookout. Defendant was called by plaintiff

as an adverse witness and testified: "At the time I pulled into the left lane to go around her [the car preceding] I never did see either one of the boys, and in particular the young boy here who was killed. I never did see him. I didn't see him on the highway. I didn't see him on the shoulder. In fact, I never saw him. . . . There was nothing in my way to obstruct my view. As for your question if there had been anything there in the road, I would have seen it, well, I didn't see it. I never saw the bicycle. I never saw either bicycle. I never saw any person, this little boy or anyone else, on the road. I didn't see them on the road. I heard something. I heard a sound like I had struck something. As for describing what it was like, well, it broke the windshield. . . . "

A motorist is charged with having seen what he could have seen had he looked. *Dawson v. Jennette, supra.* His liability to one injured in a collision with his vehicle is determined as it would have been had he looked, observed the prevailing conditions and continued to drive as he did. *Raper v. Byrum,* 265 N.C. 269, 144 S.E. 2d 38. There was nothing to obstruct defendant's vision. There was some evidence which tended to show that visibility was possible only moments before the collision for up to 200 yards. Defendant had his headlights on, yet he failed to see four boys on two bicycles at any time before the collision. There is no evidence which would suggest that the boys suddenly turned into his path.

[3] Whether deceased was contributorily negligent as a matter of law presents a more difficult question. However, the issue of contributory negligence was also for the jury unless plaintiff's own evidence so clearly established the contributory negligence of her intestate as one of the proximate causes of his death that no other reasonable inference could be drawn therefrom. *Jernigan v. R. R. Co.,* 275 N.C. 277, 167 S.E. 2d 269; *May v. Mitchell,* 9 N.C. App. 298, 176 S.E. 2d 3.

Defendant compares this case to the case of *Miller v. Wright,* 272 N.C. 666, 158 S.E. 2d 824. Judgment of nonsuit was affirmed in that case under facts that are in many respects similar to those involved here. There, the deceased was riding or walking beside an unlighted bicycle at night on the traveled portion of a highway. However, here, there is evidence which would permit a reasonable inference that deceased had gotten completely off the traveled portion of the roadway before the collision occurred and that he was struck on the shoulder of

the road when defendant lost control of his vehicle and permitted it to go off the road. In the *Miller* case, the collision occurred while deceased was on the paved portion of the highway. Here, if deceased was riding his bicycle, without lights, at night upon a public highway, he was guilty of negligence. G.S. 20-129(a). Whether that negligence was a proximate cause of his death if the fatal collision in fact occurred while he was completely away from the traveled portion of the highway was a question for the jury.

Defendant strenuously argues that no inference arises that the collision occurred on the shoulder of the road. It is true that there is no direct evidence as to the precise location of deceased at the time he was struck by defendant's car. However, the circumstantial evidence, when considered in the light most favorable to the plaintiff, will support an inference that the collision occurred on the shoulder of the road. Simmons testified in answer to a question on cross-examination that "I don't know exactly where it [deceased's bicycle] was at, but it wasn't in the middle of the road." In other portions of his testimony, however, he stated repeatedly that "we" got off the pavement prior to the accident. Clearly, in many portions of his testimony he was referring to both bicycles and all four boys. The testimony of a witness who arrived at the scene shortly after the collision also supports the inference that the collision occurred on the shoulder of the road. She testified that the bicycles were in a ditch about five or six feet from the paved surface of the road. She stated that there were fresh tire marks on the shoulder of the road for four or five feet. The bicycles were right at the tire marks. Chunks of human meat were on the shoulder of the road and a leg from deceased's body was hanging on a barbed wire fence. Glass was located at the bicycles and at the tire marks. The witness testified without objection that the glass had come from the windshield of defendant's car. It appears from this evidence that all of the debris was off the paved portion of the roadway and in the vicinity of the tire marks on the shoulder of the road.

We are of the opinion and so hold that the evidence was sufficient to be considered by the jury on all issues.

Reversed.

Judges CAMPBELL and BRITT concur.

T. H. YANCEY, L. H. YANCEY AND W. T. YANCEY, JR., EXECUTORS OF W. T. YANCEY, DECEASED v. LOUISE H. WATKINS, WIDOW, EXECUTRIX OF THE ESTATE OF G. B. WATKINS, AND INDIVIDUALLY

No. 739SC175

(Filed 14 March 1973)

1. **Vendor and Purchaser § 2— option to purchase — reasonable time to act**

Where an option or contract to purchase land does not specify the time within which the right to buy may be exercised, the right must be exercised within a reasonable time.

2. **Limitation of Actions § 18— bar of statute of limitation — mixed question of fact and law**

Ordinarily, the bar of the statute of limitations is a mixed question of law and fact, but where the bar is properly pleaded and all the facts with reference thereto are admitted, the question of limitations becomes a matter of law.

3. **Vendor and Purchaser § 2— reasonable time — question of law under certain conditions**

Though the determination of reasonable time is generally a mixed question of law and fact and thus for the jury, it becomes a question of law when facts are simple and admitted and only one inference can be drawn.

4. **Vendor and Purchaser § 2— option to purchase — tender of payment after 45 years — jury question as to reasonable time**

Where plaintiff was given the option to purchase an interest in land by contract of 5 November 1924 but no time within which to act was specified, a jury question as to whether he acted within a reasonable time was presented by evidence of his tender of purchase money on 10 February 1969 together with evidence of actions of the parties during the interim with respect to payment of the property taxes, cost of a survey and listing of the property as an asset of one of the parties' estates.

5. **Judgments § 35— identity of parties and subject matter — no identity of issues — res judicata inapplicable**

Where the issues in two actions involving plaintiff's interest in a parcel of land were different, the doctrine of *res judicata* did not operate to bar the subsequent action, though there may have been identity of parties and subject matter in the two actions.

APPEAL by defendant from *McKinnon, Judge,* 9 October 1972 Session of GRANVILLE Superior Court.

This civil action was instituted on 7 March 1969 by W. T. Yancey, original plaintiff, seeking specific performance of a

contract allegedly made by R. C. Watkins to convey one-third interest in a tract of land. R. C. Watkins died in 1943 and G. B. Watkins, his son, qualified as administrator of the estate. G. B. Watkins died in 1967 and this action was brought against his widow, Louise H. Watkins, individually and as executrix of the G. B. Watkins estate. After this action was instituted W. T. Yancey died and his executors were substituted as parties plaintiff.

Appeal in a former action between W. T. Yancey and defendant herein and others was before this court at the Fall Session 1968. That action began as a special proceeding in which W. T. Yancey alleged he was the owner of one-third interest in the lands in question and asked that the land be sold for partition. Defendants therein filed answer denying W. T. Yancey's title. Following a trial in superior court, judgment of involuntary nonsuit was entered and by opinion reported in 2 N.C. App. 672, 163 S.E. 2d 625, cert. den. 275 N.C. 139, we affirmed the judgment.

An appeal in the present action was before this court at the Spring Session 1971. In an opinion reported in 12 N. C. App. 140, 182 S.E. 2d 605, we vacated a judgment in favor of defendant entered on the pleadings and remanded the action to superior court for further proceedings.

Admissions in the pleadings and evidence favorable to plaintiffs tended to show:

By duly recorded deed dated 3 November 1924, R. C. Watkins took title to the 178 acre tract of timber land in question. By duly recorded deed dated 27 September 1939, R. C. Watkins and wife and N. C. Morton and others (heirs at law of S. V. Morton, deceased) conveyed one-third interest in said land to Bessie C. Morton. The deed to Bessie C. Morton contains the following proviso: " * * * Whereas, on the 5th day of November, 1924, R. C. Watkins purchased the land hereinafter described, and by a written contract agreed to convey to S. V. Morton and W. T. Yancey a one-third interest each in said land, upon payment by each of them of $314.50; AND WHEREAS, S. V. Morton, in his lifetime, paid said sum to R. C. Watkins, but never procured a deed for his interest in said land; . . . . "

During his lifetime R. C. Watkins listed the land for taxes in the names of Bessie Morton, R. C. Watkins and W. T. Yancey.

R. C. Watkins and W. T. Yancey jointly purchased, owned, and sold numerous parcels of real estate. R. C. Watkins died intestate in 1943, survived by his widow and one son, G. B. Watkins; the widow died in 1944. G. B. Watkins qualified as administrator of his father's estate and in his inventory of assets of the estate listed one-third interest in the subject property with Bessie C. Morton and W. T. Yancey as the other owners. Thereafter, G. B. Watkins listed the property for taxes under the names of "Watkins, Morton and Yancey." The land was surveyed in 1966 and the cost of the survey was paid in equal shares by G. B. Watkins, E. A. Morton and W. T. Yancey. Ad valorem taxes were paid by said persons in equal shares. G. B. Watkins died on 3 January 1967 and defendant Louise H. Watkins qualified as executrix of his estate on 12 January 1967.

On 29 September 1967 W. T. Yancey and wife instituted the partition proceeding above mentioned. Pending the litigation in that cause the parties thereto agreed that the land would be sold and that one-third of the proceeds (the portion claimed by Yancey) would be retained by the court until the rightful owner could be determined. At a judicial sale defendant Louise H. Watkins, individually, purchased the land for $24,100.00.

On 10 February 1969 following the termination of the former action, W. T. Yancey tendered to Louise H. Watkins, as executrix of the G. B. Watkins estate, the sum of $314.50 pursuant to the alleged contract between R. C. Watkins and W. T. Yancey and demanded conveyance of one-third interest in the subject property. The tender was refused.

In the complaint plaintiffs asked for specific performance of the contract, or, alternatively, for damages for breach of the contract in amount of $7,440.49 representing one-third of the net proceeds of the sale of the land.

At trial plaintiffs proceeded on the contention that the written contract from R. C. Watkins to W. T. Yancey was lost or misplaced. They introduced testimony of Bessie C. Morton relating to the contract. The trial judge ruled that due to the participation of W. T. Yancey in the former action, plaintiffs were not entitled to specific performance in this action but were entitled to go to the jury on the question of breach of contract.

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

"1. Was there a valid and subsisting contract between R. C. Watkins and W. T. Yancey under the terms of which W. T. Yancey was entitled to obtain a deed to a 1/3 interest in the land described in the complaint upon payment of the sum of $314.50 to the said R. C. Watkins?

Answer: Yes

"2. Is the Estate of the said W. T. Yancey entitled to enforce said contract against the defendants?

Answer: Yes

"3. Is the plaintiffs' action barred by the three-year statute of limitations?

Answer: No

"4. If the Estate of W. T. Yancey is entitled to damages for breach of contract, in what amount?

Answer: $6,503"

From judgment predicated on the verdict, defendant appealed.

Royster & Royster by T. S. Royster, Jr., and Perry, Kittrell, Blackburn & Blackburn by Charles F. Blackburn for plaintiff appellees.

Watkins, Edmundson & Wilkinson by Charles Wilkinson and Banzet and Banzet by Frank Banzet for defendant appellant.

BRITT, Judge.

Defendant contends first that this action as a matter of law is barred by the three years statute of limitations which statute she properly pleaded. We disagree.

[1] An agreement to sell or purchase real property is governed by the general law of contracts. 7 Strong, N. C. Index 2d, Vendor and Purchaser, § 1, p. 489. "Where an option or contract to purchase does not specify the time within which the right to buy may be exercised, the right must be exercised within a reasonable time." *Ibid,* § 2, p. 492.

In *Lewis v. Allred,* 249 N.C. 486, 106 S.E. 2d 689 (1959), Denny, J. (later C.J.) quoting from 49 Am. Jur., Statute of Frauds, § 356, p. 667 said:

> " 'A memorandum of an agreement for the sale of land is not necessarily insufficient to satisfy the requirements of the statute of frauds because the time for performance is not stated therein. In case of an executory contract of sale, where the time for the execution of the conveyance or transfer is not limited, the law implies that it is to be done within a reasonable time, and the failure to incorporate in the memorandum such a statement does not render it insufficient. * * * ' "

[2] Ordinarily, the bar of the statute of limitations is a mixed question of law and fact. But where the law is properly pleaded and *all the facts with reference thereto are admitted* the question of limitations becomes a matter of law. *Poultry Co. v. Oil Co.,* 272 N.C. 16, 157 S.E. 2d 693 (1967); *Mobley v. Broome,* 248 N.C. 54, 102 S.E. 2d 407 (1958).

In *Etheridge v. R. R.,* 209 N.C. 326, 183 S.E. 539 (1936), we find:

> While it is a maxim of English law that "how long a 'reasonable time' ought to be is not defined in law, but is left with the discretion of the judge" (Coke Litt. 50), this applies only where the facts are admitted, or clearly proved, and "Where the question of reasonable time is a debatable one, it must be referred to the jury for decision." Hoke, J., in *Holden v. Royall,* 169 N.C., 676 (678), said: "And, in this State, authority is to the effect that, where this question of reasonable time is a debatable one, it must be referred to the jury for decision. (Citations.)

In *Trust Co. v. Insurance Co.,* 199 N.C. 465, 154 S.E. 743 (1930), we find:

> " * * * If no time for the performance of an obligation is agreed upon by the parties, then the law prescribes that the act must be performed within a reasonable time. Reasonable time is generally conceived to be a mixed question of law and fact. 'If, from the admitted facts, the court can draw the conclusion as to whether the time is reasonable or unreasonable by applying to them a legal principle or a rule of law, then the question is one of law. But if differ-

ent inferences may be drawn, or the circumstances are numerous and complicated, and such that a definite legal rule cannot be applied to them, then the matter should be submitted to the jury. It is only when the facts are undisputed and different inferences cannot be reasonably drawn from them, that the question ever becomes one of law.' (Citations.)"

In *Claus v. Lee,* 140 N.C. 552, 53 S.E. 433 (1906), the court said:

"* * *The result of our examination leads us to the conclusion that what is 'reasonable time' is generally a mixed question of law and fact, not only where the evidence is conflicting, but even in some cases where the facts are not disputed; and the matter should be decided by the jury upon proper instructions on the particular circumstances of each case. (Citations.)"

[3] While supporting the principle that determination of "reasonable time" is generally a mixed question of law and fact and thus for the jury, there are cases which hold that *when facts are simple and admitted and only one inference can be drawn,* the determination of "reasonable time" is a question of law. See *Colt v. Kimball,* 190 N.C. 169, 129 S.E. 406 (1925); *Huff v. R. R.,* 171 N.C. 203, 88 S.E. 344 (1916); and *Holden v. Royall,* 169 N.C. 676, 86 S.E. 583 (1915).

[4] Applying the quoted principles to the case at bar, it is obvious that all the facts with respect to the statute of limitations were not admitted and that more than one inference could be drawn from the evidence. In this case we think the question of "reasonable time" is a debatable one and was properly submitted to the jury upon instructions to which there was no exception.

[5] Defendant contends that the trial court erred in not sustaining her plea of *res judicata.* We reject this contention.

In *Shaw v. Eaves,* 262 N.C. 656, 661, 138 S.E. 2d 520 (1964), in an opinion by Clifton L. Moore, J., we find:

"* * * In order for a judgment to constitute *res judicata* in a subsequent action there must be identity of parties, subject matter, issues and relief demanded, and it is required further that the estoppel be mutual. *Light Co. v.*

Insurance Co., 238 N.C. 679, 79 S.E. 2d 167; *Stansel v. McIntyre*, 237 N.C. 148, 74 S.E. 2d 345; *Cameron v. Cameron*, 235 N.C. 82, 68 S.E. 2d 796; *Leary v. Land Bank*, 215 N.C. 501, 2 S.E. 2d 570. In order for a party to be barred by the doctrine of *res judicata*, it is necessary not only that he should have had an opportunity for a hearing but also that the identical question must have been considered and determined adversely to him. *Crosland-Cullen Co. v. Crosland*, 249 N.C. 167, 105 S.E. 2d 655. * * * "

Relating the instant case to the former action, while there might have been identity of parties and subject matter, the issues and relief demanded in the two actions are different and the principal questions presented by the present action were not considered and determined adversely to plaintiffs in the former action. The former action presented the question as to whether W. T. Yancey was the *owner* of one-third interest in the subject property; the present action submits the questions whether there was a valid and subsisting contract between Watkins and Yancey with reference to one-third interest in the land and, if so, is Yancey entitled to enforce the contract and what amount is Yancey entitled to recover for breach of the contract.

We have carefully considered the other questions presented in defendant's brief but find them to be without merit. We hold that this action was properly submitted to the jury on appropriate issues and that the trial was free from prejudicial error.

No error.

Judges CAMPBELL and GRAHAM concur.

STATE OF NORTH CAROLINA, EX REL UTILITIES COMMISSION AND SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY, APPLICANT AND THE ERVIN COMPANY

— v. —

TOWN OF PINEVILLE, NORTH CAROLINA AND PINEVILLE TELEPHONE AND ELECTRIC COMPANY

No. 7310UC83

(Filed 14 March 1973)

1. **Utilities Commission § 7— extension of service — necessity for certificate of public convenience and necessity**

A public utility may construct and operate its utility plant or system and extend its public utility service without first obtaining a certificate of public convenience and necessity if the construction and extension is into territory which is (1) contiguous to that already occupied by such public utility and (2) not receiving similar service from another public utility.

2. **Utilities Commission § 2— municipality is not public utility**

The term "public utility" does not include a municipality. G.S. 62-3(23)d.

3. **Telephone and Telegraph Companies § 1; Utilities Commission § 7— extension of telephone service — area already served by municipality — certificate of public convenience and necessity**

No certificate of public convenience and necessity was required for Southern Bell to extend its telephone service into an area already served by a telephone company operated by the Town of Pineville where the Utilities Commission found upon competent evidence that (1) the area is contiguous to the territory presently occupied by Southern Bell, and (2) the area is not presently receiving similar service from another "public utility" since the Town of Pineville operates its telephone company as a municipality and the Pineville Telephone Company is not a separate legal entity.

APPEAL by Town of Pineville from Order of North Carolina Utilities Commission dated 27 June 1972.

This is the second time this case has reached this Court. The factual background and prior procedural history of this case are set forth in the opinion of this Court rendered on the first appeal reported in 13 N.C. App. 663, 187 S.E. 2d 473. They will not be repeated here. After this case was remanded to the Utilities Commission as result of the decision of this Court on the first appeal, further hearings were held before the Commission on 3, 19 and 26 May 1972. At the conclusion of these hear-

ings the Commission issued its order dated 27 June 1972 in which it made, among others, the following findings of fact:

"1. Southern Bell is a public utility as defined in Chapter 62 of the North Carolina General Statutes and is a corporation engaged in the business of conveying and transmitting messages and communications by telephone and by other means of transmission for the public for compensation within its certificated service area within the State of North Carolina and is, therefore, subject to the jurisdiction of this Commission and is properly before the Commission with respect to the subject matter of this proceeding.

"2. As Southern Bell has expanded its existing service areas into contiguous areas it has historically filed revised exchange service area maps with the Commission in the Charlotte Service Area. Its service area maps have been revised on seventeen occasions over a twenty year period to reflect its expanding service territory into contiguous territories to meet the demands of the public for service.

"3. Upon request by The Ervin Company, a developer of the Raintree Subdivision within the area of the proposed extension, on March 23, 1971, Southern Bell filed with the Commission its Eighteenth Revised Map reflecting an extension of its Charlotte Exchange Service Area to include that part of the Raintree Development north of Four Mile Creek and other adjacent area not presently served by another public utility, which said map on its face reflects that the area within the city limits of the Town of Pineville has been excluded from said map.

"4. The territorial extension reflected in the Eighteenth Revised Map is into an area contiguous to the presently occupied service area of Southern Bell as reflected by a comparison of its Seventeenth Revised Map with the Eighteenth Revised Map and the testimony of Mr. Selden given both before and after the appeal of this matter.

"5. The territorial extension proposed by the Eighteenth Revised Map is into an area not presently receiving telephone service from another public utility.

"6. The Town of Pineville is a municipality, having been incorporated by an Act of the General Assembly of North Carolina effective February 28, 1873. . . .

"7. The Town of Pineville has owned and operated a telephone system as a municipality in the area of the Eighteenth Revised Map since the telephone system was purchased by the Town on March 28, 1938. The designations 'Pineville Telephone Company' or 'Pineville Telephone and Electric Company' are simply designations in the nature of trade names variously used to identify telephone operations of the Town of Pineville, a municipal corporation.

* * * * *

"11. There is no separate legal entity under the designation 'Pineville Telephone Company' or 'Pineville Telephone and Electric Company' as a partnership, a co-operative association, business corporation, non-profit corporation, or an unincorporated association of people."

On these findings, the Commission entered its order approving the Eighteenth Revised Map which had been filed by Southern Bell on 23 March 1971, allowing it to become effective, and denying the motion of the Town of Pineville for an order requiring Southern Bell to cease and desist operations in the area. From this order the Town of Pineville appealed.

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

James M. Kimzey for Southern Bell Telephone & Telegraph Company, appellee.

Cansler, Lockhart & Eller by Thomas R. Eller, Jr. for The Ervin Company, appellee.

Broughton, Broughton, McConnell & Boxley by J. Melville Broughton, Jr., J. Mac Boxley, Charles P. Wilkins and Kenneth R. Downs for the Town of Pineville, appellant.

PARKER, Judge.

[1] G.S. 62-110 provides as follows:

"§ 62-110. *Certificate of convenience and necessity.*— No public utility shall hereafter begin the construction or operation of any public utility plant or system or acquire

ownership or control thereof, either directly or indirectly, without first obtaining from the Commission a certificate that public convenience and necessity requires, or will require, such construction, acquisition, or operation: Provided, that this section shall not apply to construction into territory contiguous to that already occupied and not receiving similar service from another public utility, nor to construction in the ordinary conduct of business."

Under this statute a public utility may construct and operate its utility plant or system and extend its public utility services, without first obtaining a certificate of public convenience and necessity, if the construction and extension is into territory which is (1) contiguous to that already occupied by such public utility and (2) not receiving similar service from another public utility.

[2, 3] On competent, material and substantial evidence the Utilities Commission has found that the territorial extension involved in the present case "is into an area contiguous to the presently occupied service area of Southern Bell," and such area is "not presently receiving telephone service from another public utility." It has also found on such evidence that the Town of Pineville is a municipality and that as a municipality it has owned and operated a telephone system within the area of Southern Bell's proposed extension. However, by statutory definition the term "public utility" does not include a municipality. G.S. 62-3(23)d. Consequently, a municipal corporation such as the Town of Pineville, which furnishes telephone services to its inhabitants and to others in its vicinity, is not subject to regulation by the North Carolina Utilities Commission, and the provisions of Chapter 62 of the General Statutes do not apply to it, except as otherwise stated therein. *Dale v. Morganton*, 270 N.C. 567, 155 S.E. 2d 136. Appellant Town of Pineville admits that it owns the telephone system which serves its citizens and others living outside but near to its municipal borders but continues to insist that the system is operated by a separate legal entity known as "Pineville Telephone Company" or "Pineville Telephone and Electric Company" and that this separate legal entity is a public utility within the meaning of Chapter 62 of the General Statutes and particularly within the meaning of G.S. 62-110. The evidence, however, is to the contrary. The finding by the Commission that there is no separate legal entity under the designation "Pineville Telephone Com-

pany" or "Pineville Telephone and Electric Company" is fully supported by competent, material and substantial evidence in view of the entire record as submitted. Such a finding is conclusive on this appeal. *Utilities Comm. v. Telephone Co.*, 281 N.C. 318, 189 S.E. 2d 705.

Thus, findings by the Commission which are binding on this appeal establish that the territory into which Southern Bell proposes to extend its services in the present case is both contiguous to the territory presently occupied by it and is not receiving similar service from another public utility as the term "public utility" is defined for purposes of G.S. Chapter 62. This brings the extension of Southern Bell's services involved in the present case within the proviso to G.S. 62-110, and no certificate of public convenience and necessity was required. The Commission's findings support its order.

We have carefully reviewed all of appellant's assignments of error and find them without merit. The order appealed from is

Affirmed.

Judges CAMPBELL and MORRIS concur.

STATE OF NORTH CAROLINA v. HERBERT R. BLUE

No. 7314SC146

(Filed 14 March 1973)

1. **Criminal Law § 99— comments by trial judge — no prejudicial error**

In an armed robbery and felonious breaking and entering case, comments by the trial judge as to the location of a witness's residence and as to drinking habits of the witness, defense counsel and the judge himself were not so prejudicial as to have affected the result of the trial, though the comments are not approved by the Court of Appeals.

2. **Criminal Law § 86— cross-examination of defendant — inquiry as to arrest for unrelated offenses**

Reference to arrest warrants issued against defendant on the day before the trial and charging him with unrelated offenses was properly made before the jury only after an unresponsive answer from defendant to a proper question from the solicitor, and defendant was particularly in no position to complain where he objected to but did not move to strike the answer.

3. Criminal Law §§ 86, 88— impeaching question — denial by defendant — further inquiry by solicitor

When defendant in an armed robbery and felonious breaking and entering case denied the solicitor's impeaching question as to whether he had ever been convicted of assault with a deadly weapon, his answer was conclusive in the sense that it could not be rebutted by other evidence, but even so, the solicitor could press his cross-examination of defendant by rephrasing his question so as to make it more specific.

APPEAL by defendant from *Bailey, Judge,* 25 September 1972 Regular Criminal Session of Superior Court held in Durham County.

By separate bills of indictment, proper in form, defendant was charged with (1) armed robbery and (2) felonious breaking and entering. The two cases were consolidated for trial and defendant pleaded not guilty to both charges. The jury found defendant guilty of common-law robbery and of felonious breaking and entering. From judgments imposing prison sentences, defendant appealed.

Attorney General Robert Morgan by Assistant Attorney General Raymond W. Dew, Jr. for the State.

E. C. Harris for defendant appellant.

PARKER, Judge.

[1] At the trial two witnesses for the State, each of whom had previously known the defendant, positively identified him as the person who, on the early morning of 26 March 1972, broke into their residence, threatened them with what appeared to be a pistol, stole a watch and money from one of them, hit the robbery victim "up side" of his head with his fist, and then fled. On cross-examination of the victim, defendant's counsel asked him as to the address of the house in which he lived in Durham. A portion of this testimony is narrated in the record as follows:

> "I say that I live at 406 Canal Street so far as I can remember, 401 is where the other man live. I said as far as I know, 401, but I say 406 I think. I don't even say I am sure of that. I am not certain what my home address is. I know that it is on Canal Street."

At this point the record shows that the following exchange occurred:

"Q. [by defense counsel] Now your house is located on the corner?

"A. Corner?

"Q. That is right?

"A. No sir.

"Q. But you have testified it is 401 Canal Street?

"The Court: Well, what difference does it make? He lives in some house on some place."

This remark of the court is the subject of appellant's Exception No. 7.

Later, during the further cross-examination of the same witness, defendant's counsel questioned him concerning whether he had been drinking on the night before the alleged robbery. The witness answered that he and the State's other eyewitness "were drinking together on the night before." He then testified:

"I couldn't recall how much or what I had to drink. I do not drink the same thing all the time.

"Q. [by defense counsel] You drink different things?

"The Court: He drinks like you and me, whatever we can get."

This remark of the court is the subject of appellant's Exception No. 9.

The duty of absolute impartiality imposed on the trial judge by G.S. 1-180 has been many times the subject of comment by our Supreme Court. As stated by Justice Huskins, speaking for the Court in *State v. Holden,* 280 N.C. 426, 185 S.E. 2d 889:

"Jurors respect the judge and are easily influenced by suggestions, whether intentional or otherwise, emanating from the bench. Consequently, the judge 'must abstain from conduct or language which tends to discredit or prejudice the accused or his cause with the jury.' "

We do not approve the remarks made by the trial judge which are the subjects of appellant's Exceptions 7 and 9. How-

ever, we find the further language contained in the opinion in *State v. Holden, supra,* particularly applicable to the present case:

> "The judge's critical remarks were indiscreet and improper and should not have been made. In a different setting they could be prejudicial so as to require a new trial. Here, however, in light of the evidence and considering the totality of circumstances, we hold that the comments from the bench of which defendant complains constituted harmless error. Not every ill-advised expression by the trial judge is of such harmful effect as to require a reversal. The objectionable language must be viewed in light of all the facts and circumstances, 'and unless it is apparent that such infraction of the rules might reasonably have had a prejudicial effect on the result of the trial, the error will be considered harmless.' *State v. Perry,* 231 N.C. 467, 57 S.E. 2d 774 (1950); *State v. Hoover,* 252 N.C. 133, 113 S.E. 2d 281 (1960)."

In the present case two eyewitnesses, both of whom were already acquainted with the defendant, positively identified him as the person who committed the offenses for which he was tried. The record reveals that both before and after the remarks from the bench of which appellant now complains his counsel was allowed full freedom to cross-examine the State's witnesses. However ill-advised the judge's comments may have been, in our opinion they could not reasonably be held to have had any prejudicial effect on the result of the trial, and appellant's assignment of error based on his Exceptions 7 and 9 are overruled.

[2] The only other assignment of error brought forward in appellant's brief relates to rulings of the trial court made during cross-examination of the defendant. Defendant took the stand and testified to an alibi. In his brief defendant's counsel contends that on cross-examination the solicitor was permitted to pursue a line of interrogation which brought before the jury the fact that on the day before the trial defendant had been arrested on warrants charging unrelated offenses, and he contends this evidence was admitted against him in violation of the rule announced in *State v. Williams,* 279 N.C. 663, 185 S.E. 2d 174. The record, however, does not support defendant's contention. Reference to the arrest warrants was made before the jury only as result of an unresponsive answer from defend-

ant to a proper question from the solicitor. Defendant's counsel objected to the answer but did not move to strike, and his motions for mistrial were properly overruled. On this record defendant is in no position to complain that the jury received information which he voluntarily furnished it.

[3] During the cross-examination of defendant the solicitor asked if he had ever been convicted of assault with a deadly weapon to which he replied that he had not. On being pressed further by the solicitor he admitted he had been convicted in the district court and explained he had appealed. He now contends that the solicitor should have been bound by his original denial and had no right to press his cross-examination further. When defendant denied the impeaching question, his answer was conclusive in the sense that it could not be rebutted by other evidence, but this did not preclude the solicitor from pressing his cross-examination of the defendant by rephrasing his question so as to make it more specific. *State v. Weaver,* 3 N.C. App. 439, 165 S.E. 2d 15. The extent of cross-examination for purposes of impeachment rests largely in the discretion of the trial judge, *State v. Warren,* 4 N.C. App. 441, 166 S.E. 2d 858, and on the present record no prejudicial error has been shown.

We have examined all of appellant's remaining exceptions which are brought forward in his brief on this appeal and no prejudicial error has been made to appear.

No error.

Judges BRITT and HEDRICK concur.

HELEN BENNETT LANGDON, EXECUTRIX OF THE ESTATE OF DR. BENJAMIN BRUCE LANGDON, DECEASED v. DR. THOMAS GRAY HURDLE AND DR. CHARLES A. HOFFMAN, JR.

No. 7312DC192

(Filed 14 March 1973)

Partnership § 9— partnership at will — withdrawal is not breach of contract

A partnership for the practice of urology was a partnership at will where the partnership agreement did not provide that the partner-

ship was to continue for any specified time and expressly provided that a withdrawing partner was to receive payment for his share of the partnership assets; and the withdrawal of a partner is not a breach of contract for which that partner may be held liable in damages to his copartner.

APPEAL by codefendant Hurdle from *Herring, Judge,* 13 November 1972 Session of District Court held in CUMBERLAND County.

Plaintiff's intestate and defendants entered into a partnership agreement, on 1 August 1966, to engage as partners in the practice of medicine, specializing in the field of urology. Plaintiff's intestate died in 1970. The parties agreed as to the amount due his estate under the partnership agreement and for a period of time defendants made monthly payments on the account in amounts that had been agreed upon by the parties. Beginning 2 August 1971, defendants ceased the practice of medicine as partners. A dispute thereafter arose as to whether defendants were personally liable for the payments required to the estate of the deceased partner, absent an exhaustion of the partnership assets. Plaintiff brought this action seeking an adjudication of her rights under the agreement. The trial court granted summary judgment in January of 1972, holding that defendants were personally liable to the estate of the deceased partner without the partnership assets first having been exhausted. This Court affirmed. *Langdon v. Hurdle,* 15 N.C. App. 158, 189 S.E. 2d 517.

In an answer filed in this action, Hoffman cross-claimed against his codefendant, asking that the partnership be dissolved; that Hurdle be required to account for partnership assets in his possession; and that a receiver be appointed to take charge of the assets, pay the partnership debts and distribute the remaining proceeds according to the partnership agreement. Hurdle filed a counterclaim to Hoffman's cross-action, alleging therein that Hoffman had breached the partnership agreement through various acts of misconduct and that Hurdle was entitled to recover damages for the breach. Hurdle also asked that the partnership be wound up and dissolved and for incidental relief in connection with such dissolution.

After plaintiff's claim had been adjudicated, defendant Hoffman moved for summary judgment against his codefendant, asking that his codefendant's counterclaim be dismissed and

that the movant receive the relief requested in his cross-action. Judgment was entered allowing the motion, dismissing the counterclaim of Hurdle and appointing a referee and receiver to wind up the partnership and distribute any remaining assets under the supervision of the court.

Hurdle appeals from the entry of this judgment.

McCoy, Weaver, Wiggins, Cleveland & Raper by Neil V. Davis for defendant appellant Dr. Thomas Gray Hurdle.

Williford, Person & Canady by N. H. Person for codefendant appellee, Dr. Charles A. Hoffman, Jr.

GRAHAM, Judge.

The position taken by appellant in his brief is that his codefendant has wrongfully dissolved the partnership and that appellant is entitled to recover for damages resulting therefrom. His counterclaim, however, seems grounded more upon the theory that during the existence of the partnership, appellee failed to perform in the manner contemplated by the agreement. Among the many grievances set forth by Hurdle are that Hoffman permitted his wife to engage in discussions of partnership business with Hurdle; took excessive time off from his professional duties; refused to visit Hurdle's patients on weekends and afternoons when Hurdle would be off duty; was unfriendly, hostile, uncooperative, and failed to observe professional courtesy and ethics with Hurdle.

In view of the unsatisfactory relationship between the partners, as reflected by the complaints as set forth above, it would seem reasonable to expect appellant to rejoice at the termination of the partnership. However, he alleges that Hoffman wrongfully left the partnership office on 1 August 1971 and set up a separate office, abandoning the partnership. Hurdle says Hoffman had no right to do this and that in doing so he breached the partnership agreement and must respond in damages. We disagree.

The partnership agreement did not provide that the partnership was to continue for any specified period. Paragraph 10 of the agreement expressly provides that a withdrawing partner is to receive payment for his share of the partnership assets. The only penalty set forth for withdrawal is a provision that should Hoffman leave the partnership during the first

five years of the partnership, he would be prohibited from practicing urology in Fayetteville or within a thirty-five mile radius thereof for five years from the date of his departure. This provision is not applicable since the alleged withdrawal by Hoffman did not occur within five years after the partnership originated.

The partnership contemplated by the agreement entered by the partners was a partnership at will. A partnership is a partnership at will unless some agreement to the contrary can be proved. *Campbell v. Miller*, 274 N.C. 143, 161 S.E. 2d 546. In the opinion by Justice Lake in this case we find:

> " 'The significance of the partnership being one at will, *i.e.*, without any definite term or undertaking to be accomplished, is that the termination by the election of a partner is not a breach of contract. Having the legal right to terminate, it would seem that there is no liability for its exercise whatever the motive, and whatever may be the injurious consequences to co-partners, who have neglected to protect themselves by an agreement to continue for a definite term.' Crane on Partnerships, 2d ed., § 74(b). 'According to the majority view, the only difference, so far as concerns the rights of dissolution by one partner, between a partnership for an indefinite period and one for a specified term is that in the case of a partnership for a definite term a dissolution before the expiration of the stipulated time is a breach of agreement which subjects such partner to a claim for damages for breach of contract if the dissolution is not justified, whereas the dissolution of a partnership at will affords the other partner no ground for complaint; in either case the action of one partner actually dissolves the partnership.' 40 Am. Jur., Partnership, § 236. Similarly, in 68 C.J.S., Partnership, § 108, it is said, 'In view of the rule * * * that a partner may exercise his right to dissolve a partnership at will for any reason which he deems sufficient, or even arbitrarily, he is not liable for damages which have resulted to his copartners by reason of such action.' The Uniform Partnership Act, G.S. 59-61, provides that dissolution of the partnership is brought about 'without violation of the agreement between the partners * * * by the express will of any partner when no definite term or particular undertaking is specified.' " *Id.* at 150, 161 S.E. 2d at 551.

We hold that the trial judge correctly determined that no genuine issue of material fact exists in this case. As a matter of law, Hoffman committed no legal wrong in withdrawing from the partnership.

Appellant raised certain matters in his counterclaim relating to the appropriation of partnership funds by appellee to his own personal use. For instance, it is alleged that appellee purchased personal stationery and paid certain attorney's fees from the partnership account; also, that he has not accounted for some of the fees received and that he has removed records and x-rays which were partnership property. All of these matters can properly be resolved by the referee and receiver, with appellant retaining full rights to appeal from any adverse rulings of the referee as by law provided.

Affirmed.

Judges CAMPBELL and BRITT concur.

H & B COMPANY OF STATESVILLE, PLAINTIFF

— V. —

ROBERT C. HAMMOND AND WIFE, MYRTLE WINSTON HAMMOND AND ROBERT C. HAMMOND, PRESIDENT OF INDUSTRIAL BUILDING CORP., DEFENDANTS

— AND —

JAMES C. MESSICK AND WIFE, HAZEL K. MESSICK, INTERVENING DEFENDANTS

No. 7322SC2

(Filed 14 March 1973)

1. **Laborers' and Materialmen's Liens § 8; Judgments § 6; Rules of Civil Procedure § 60— failure to make default judgment a specific lien — amendment — innocent third parties**

Where plaintiff filed an action seeking a money judgment for materials furnished for the improvement of property owned by defendants and seeking to have the judgment declared a lien upon property described in a notice of lien previously filed by plaintiff, but a default judgment entered in the action did not include a provision declaring it to be a specific lien upon such property because the secretary of plaintiff's counsel who prepared the default judgment failed to include that provision, the trial court had no authority to allow plaintiff's motion under Rule 60 "to correct" the judgment to make

it a specific lien on defendants' property so as to affect adversely the rights of innocent third parties since (1) plaintiff was not seeking relief from a judgment within the meaning of Rule 60(b) but was attempting to have its rights under the judgment extended, and (2) the omission was not a clerical mistake subject to correction pursuant to Rule 60(a).

2. **Laborers' and Materialmen's Liens § 8; Judgments § 6— attorney's failure to make default judgment a specific lien — amendment — equity — innocent third persons**

Where the rights of innocent third persons would have been adversely affected, equitable principles did not require the court to amend a default judgment to make it a specific lien against property of defendants described in a notice of lien previously filed by plaintiffs on the ground that plaintiffs should not be penalized for the mistake of their counsel in failing to include such provision in the default judgment.

3. **Laborers' and Materialmen's Liens § 8; Registration § 3— notice of claim of lien — enforcement — title examination**

An attorney examining the title to property located in Davie County is under no duty to examine the records of all counties in the State to ascertain whether an action had been brought in any of those counties to enforce a notice and claim of lien filed against the property.

4. **Laborers' and Materialmen's Liens §§ 4, 8; Registration § 3— default judgment — amendment to make specific lien — constructive notice**

Default judgment on file in Davie County did not constitute constructive notice that it was subject to be amended to make it a specific lien against property described in a notice and claim of lien previously filed by plaintiff in that county.

APPEAL by intervening defendants from *Kivett, Judge,* 20 March 1972 Session of Superior Court held in IREDELL County.

On 28 August 1970, plaintiff filed in the office of the Clerk of the Superior Court of Davie County a Notice and Claim of Lien in the sum of $2,227.97 for materials allegedly furnished for the improvement of real property owned by the original defendants, Robert C. Hammond and wife, Myrtle Winston Hammond. The notice alleged that materials were furnished during May 1970 and from time to time through 12 June 1970 pursuant to a contract entered by Robert C. Hammond, individually and Robert C. Hammond as President of Industrial Building Corporation. The property described in the notice is located entirely in Davie County.

No action to perfect the lien was ever filed in Davie County; however, on 24 November 1970 plaintiff filed suit

against original defendants in the Superior Court of Iredell County seeking (1) a money judgment for $2,227.97, with interest from 12 June 1970 until paid, and (2) to have the judgment declared a lien upon the property described in the notice filed in Davie County; for execution to issue against the property, and for the property to be sold with the proceeds therefrom to be applied to the payment of the judgment.

The record indicates that summons was returned by the Sheriff of Iredell County with a notation that defendants "could not, after due and diligent search be found in this County." On 8 December 1970, an attorney of the Iredell County Bar purported to accept service for defendants, as their attorney.

On 7 December 1970, the action was transferred by a court order to the Superior Court, pursuant to G.S. 7A-259(b). No answer or other pleading was filed by original defendants, and at plaintiff's request, the clerk entered a judgment by default on 19 January 1971. Except for the preamble, the sole content of the judgment is as follows:

> "IT IS NOW, THEREFORE, ORDERED that the plaintiff recover of the defendants the sum of TWO THOUSAND TWO HUNDRED TWENTY-SEVEN and ..... 97/100 ($2,227.97) DOLLARS, with interest from June 12th, 1970, at the rate of 6% per annum until paid in full, together with the costs of this action.
>
> This the 19th day of January, 1971."

The above judgment was transcribed to Davie County and docketed there on 22 January 1971. Execution was thereafter issued and returned unsatisfied with the notation: "Subject is living in Florida."

The original defendants defaulted in payments required under a deed of trust executed by them 21 July 1970 to the Federal Land Bank of Columbia and recorded in the Davie County Registry on 4 August 1970. The deed of trust, which covered the property described in the lien notice, was foreclosed. The Federal Land Bank purchased the property, and its deed from the trustee, dated 15 June 1971, was recorded in the office of the Register of Deeds of Davie County on 24 June 1971. On 28 July 1971, the Federal Land Bank, for valuable consideration, executed a deed to the property to the intervening defend-

ants. This deed was recorded in the office of the Register of Deeds of Davie County on 2 September 1971.

On 6 December 1971, plaintiff filed a motion in the Superior Court of Iredell County alleging that "through oversight or omission" the default judgment entered against defendants on 19 January 1971 " . . . failed to direct a sale of the real property subject to the lien thereby enforced as required of a judgment enforcing a lien by N.C.G.S. 44A-13(b)." Plaintiff sought through the motion to have the judgment " . . . corrected pursuant to Rule 60 of the N. C. Rules of Civil Procedure so as to order *that said judgment be declared a lien on the property described in plaintiff's Notice and Claim of Lien. . . .* " The motion was denied by Judge Collier on 17 December 1971. However, on 28 January 1972, Judge Collier allowed a motion by plaintiff for a rehearing and ordered the rehearing held before Judge Kivett. No notice was given to intervening defendants of this motion.

On 20 March 1972, an order was entered allowing the motion of James C. Messick and Hazel K. Messick to intervene as parties defendant.

At the rehearing a secretary employed by plaintiff's counsel testified that she was instructed by an associate in the firm to prepare a default judgment granting those things specifically prayed for in the original complaint. She did not recall which attorney instructed her, but she did recall that the judgment was not dictated but was prepared solely by her and was delivered by her to the Clerk of Superior Court of Iredell County after one of the attorneys with the law firm had checked it. She stated that sometime later she learned that she had failed to include in the judgment a provision declaring the judgment to be a specific lien upon the property described in the notice of lien on file in Davie County.

The court made findings consistent with the facts set forth above and concluded "as a matter of law and in its discretion" that plaintiff was entitled to relief pursuant to G.S. 1A-1, Rule 60(b). Based upon this conclusion, the court ordered the default judgment amended to provide that it is a lien upon the property described in plaintiff's Notice and Claim of Lien filed in Davie County; that execution issue against the property; that the property be sold according to law, and that the proceeds therefrom be applied to the payment of the judg-

ment and costs of this action. The intervening defendants appealed.

Collier, Harris, Homesley & Jones by Edmund L. Gaines for plaintiff appellee.

Chamblee & Nash by Fred Chamblee for intervening defendant appellants.

GRAHAM, Judge.

[1] In moving "to correct" the default judgment entered on 19 January 1971, plaintiff was not seeking relief from the judgment pursuant to G.S. 1A-1, Rule 60(b) which allows a court to "relieve" a party or his legal representative from a final judgment under certain circumstances. The default judgment was in no way adverse to plaintiff, and rather than seeking to be relieved from its operation, plaintiff was attempting to have its rights under the judgment extended to include additional and entirely different relief. In allowing plaintiff's motion, the court amended the judgment so as to make it a specific lien against the property now owned by appellants. Appellants acquired title to the property without any notice that it was, or might become, subject to a lien superior to the interest which they acquired. In our opinion, plaintiff was not entitled to any change in the judgment which would adversely affect the intervening rights of innocent third parties and we therefore reverse the court's judgment allowing plaintiff's motion.

Plaintiff contends that the omission was simply a clerical mistake that was subject to correction pursuant to Rule 60(a). This rule provides in pertinent part that "[c]lerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the judge at any time on his own initiative or on the motion of any party and after such notice, if any, as the judge orders."

The amendment to the judgment allowed here is much more extensive than a mere technical correction such as contemplated by Rule 60(a). Rule 60(a) simply codifies the body of law in existence in this State at the time the new rules of civil procedure were adopted. 2 McIntosh, N. C. Practice 2d, § 1711 (Phillips Supp. 1970). While courts have always had the inherent authority to correct clerical errors or errors of expression in a judgment, they have never been deemed to

have the authority, outside of a term, to correct an error in decision, or to amend a judgment so as to adversely affect the rights of third parties. *See* 2 McIntosh, N. C. Practice 2d, § 1711. It is noted that under the present rules of civil procedure a motion to alter or amend a judgment must be served not later than ten days after the entry of the judgment. G.S. 1A-1, Rule 59(e).

[2, 3] Plaintiff says the amendment is required by equitable principles and points to Rule 60(b)(6) which permits the court to relieve a party from a final judgment for any reason justifying relief. In support of this contention plaintiff argues that it should not be penalized for the mistake of its counsel in failing to apply to the clerk for all of the relief prayed for in the complaint. To so hold, however, would be to say that it is the appellants who should be penalized for the mistake of plaintiff's counsel. Equity here weighs heavily on the side of appellants. The money judgment on record in Davie County at the time intervening defendants' deed to the property was recorded did not affect the interest which they were acquiring. While a Notice and Claim of Lien against the property was also on file in Davie County, the record there indicated that no action to perfect the lien had been brought in that county within the time required by G.S. 44A-13(a) (Supp. 1971), which also provides that "[a]n action to enforce the lien created by this article may be instituted in any county in which the lien is filed." Certainly, an attorney examining the title to the property acquired by appellants would have been under no duty to examine the records of all counties in the State to ascertain whether an action had been brought in any of those counties to enforce a notice and claim of lien filed against property located solely in Davie County.

[4] Plaintiff's contention that the default judgment on file in Davie County should have placed appellants on notice that it was subject to be amended so as to make it a specific lien against the property in question is without merit. It is true that the Notice and Claim of Lien filed against the property in Davie County on 28 August 1970 was for the almost identical monetary amount awarded in the judgment. Even if this should have suggested that the judgment was for the same debt as that claimed in the notice of lien, it does not follow that anyone should have been put on constructive notice that plaintiff was also entitled to have the judgment declared a specific lien upon

the property. Parties often seek a specific lien on real estate when they are entitled to a money judgment only. Indeed, plaintiff's Notice and Claim of Lien suggests this to be the case here. The notice specifically alleges that the materials furnished by plaintiff were furnished original defendants pursuant to "an entire and indivisible contract made and entered into by Robert C. Hammond, individually, and Robert C. Hammond as President of Industrial Building Corporation. . . ." The property against which the notice was filed was owned by the original defendants as tenants by the entireties. If the wife were not also a party to the contract which allegedly was entered by the husband and a corporation, plaintiff would not be entitled to have a lien enforced against the property. *Leffew v. Orrell,* 7 N.C. App. 333, 172 S.E. 2d 243.

The case comes down simply to this: The default judgment, obtained by plaintiff in Iredell County on 19 January 1971 and subsequently docketed in Davie County, constituted only a general lien against all of the real property owned by original defendants in Davie County. It was subject to prior liens, including the lien of the deed of trust to Federal Land Bank of Columbia recorded 4 August 1970. Consequently, when appellants' deed to the property was recorded in Davie County, there was nothing on record in that county to indicate that plaintiff's judgment was or could become a specific lien which would relate back to a date preceding the recording date of the deed of trust and become superior to the interest appellants acquired in the property by deed. Appellants were entitled to rely upon the records as they then existed in Davie County.

Reversed.

Judges CAMPBELL and BROCK concur.

JOSEPHINE B. CRUTCHER v. R. DAVID NOEL

No. 739SC16

(Filed 14 March 1973)

1. Evidence § 29— hospital records — insufficient identification and authentication — exclusion proper

Where the only evidence of the authenticity of hospital records relating to plaintiff was testimony by the Director of Medical Records

at the hospital that she had been employed there since 1 January 1972 and that the records had been kept and maintained on the premises, the trial court in a malpractice case properly excluded the records from the evidence since plaintiff entered the hospital almost five years prior to the Medical Director witness's employment and since the witness's testimony failed to show that the entries were made at or near the time of the act, conditions or event recorded, that the records were made by persons having knowledge of the data set forth and that said records were made *ante litem motam.*

2. **Evidence § 47— expert testimony — opinion based on facts not in evidence**

Answer of a doctor witness to a hypothetical question was properly stricken where the witness testified that in arriving at his opinion he took into account certain records containing information which was not within his personal knowledge and was not a part of the evidence.

3. **Evidence § 48— failure to find witness an expert — exclusion of testimony proper**

Exclusion of a doctor's testimony as an expert is not presented for review on appeal where there was no admission by defendant that the doctor was a medical expert and plaintiff did not ask the court to so find.

4. **Trial § 11— jury argument — matter outside record — no error**

The trial court in a malpractice case did not err in permitting defendant's counsel to "travel outside the record" in his argument to the jury where plaintiff's counsel in his preceding argument "opened the door."

APPEAL by plaintiff from *Godwin, Judge,* 17 April 1972 Session of GRANVILLE Superior Court.

Plaintiff instituted this malpractice action against defendant, a physician and surgeon engaged in the practice of his profession in Oxford, North Carolina, and surrounding areas, to recover for permanent injuries to her person. Plaintiff contends that her injuries resulted from defendant's negligence in the performance of an arthrotomy on her right knee and application of a pneumatic tourniquet which constricted circulation in her lower right leg thereby producing necrosis or death of the tissues making it necessary that said leg be amputated. A jury answered the issue of negligence in defendant's favor and from judgment allowing plaintiff no recovery, plaintiff appealed.

Yarborough, Blanchard, Tucker & Denson by Charles F. Blanchard for plaintiff appellant.

Smith, Anderson, Blount & Mitchell by John H. Anderson and Royster & Royster by Stephen S. Royster for defendant appellee.

BRITT, Judge.

[1] Plaintiff first assigns as error the trial court's excluding from evidence official records of the Medical College of Virginia relating to plaintiff. The excluded records included various surgical, radiological and pathological reports of doctors who attended or examined plaintiff at the Medical College of Virginia Hospital after her transfer from Granville Hospital where she was under defendant's care and treatment.

Plaintiff contends that in offering said records into evidence, she substantially met the requirements as to proper identification and authentication of hospital records set forth in *Sims v. Insurance Co.*, 257 N.C. 32, 125 S.E. 2d 326 (1962), by having Mrs. Margaret Binder, Director of Medical Records at the Medical College of Virginia, personally testify as to the identity of said records.

Justice Clifton L. Moore, writing for the Court in *Sims* on the admissibility into evidence of hospital records, pointed out:

> Hospital records, when offered as primary evidence, are hearsay. However, we think they come within one of the well recognized exceptions to the hearsay rule—entries made in the regular course of business. Modern business and professional activities have become so complex, involving so many persons, each performing a different function, that an accurate daily record of each transaction is required in order to prevent utter confusion. An inaccurate and false record would be worse than no record at all. Ordinarily, therefore, records made in the usual course of business, made contemporaneously with the occurrences, acts, and events recorded by one authorized to make them and before litigation has arisen, are admitted upon proper identification and authentication. [Citations.]
>
> * * * *
>
> In instances where hospital records are legally admissible in evidence, proper foundation must, of course, be laid for their introduction. The hospital librarian or custodian of the record or other qualified witness must testify to the identity and authenticity of the record and the mode of its preparation, and show that the entries were made at or near to the time of the act, condition or event recorded, that they were made by persons having knowledge of the

data set forth, and that they were made *ante litem motam.* * * *

In the recent case of *Iredell Knitting Mills v. Princeton Realty Corporation,* 17 N.C. App. 428, 194 S.E. 2d 359 (1973), this court noted that in Stansbury N. C. Evidence, 2d Ed., § 155, p. 390, the author, after reviewing the business entries rule in this State and its liberalization due to changing business conditions, says: " * * * If the entries were made in the regular course of business, at or near the time of the transaction involved, and are authenticated by a witness who is familiar with them and the system under which they were made, they are admissible. * * * "

Mrs. Binder testified: "I have been with Medical College since the first of January, 1972. I am responsible for the care and custody of the medical records of all patients treated at Medical College of Virginia. I brought with me the original records of Mrs. Josephine B. Crutcher, which records were kept and maintained on the premises of the Medical College of Virginia."

Plaintiff entered the Medical College of Virginia Hospital in April 1967, almost five years prior to Mrs. Binder's employment as director of medical records there. Mrs. Binder's testimony that the "records were kept and maintained on the premises of the Medical College of Virginia" falls short of the *Sims* requirements by failing to show that the entries were made at or near the time of the act, conditions or event recorded, that the records were made by persons having knowledge of the data set forth and that said records were made *ante litem motam.* Since plaintiff failed to have said records properly identified and authenticated we hold that the trial court did not err in excluding them from evidence.

[2] By her second assignment of error, plaintiff contends that the trial court erred in granting defendant's motion to strike Dr. Coleman's answer to a hypothetical question relating to the soundness of surgical practice carried out on plaintiff and his explanation of his answer. Although Dr. Coleman was permitted to answer the hypothetical on direct examination, the trial court allowed defendant's motion to strike the answer and further explanation of the answer when on cross-examination Dr. Coleman testified that in arriving at the opinion expressed in his

answer to the hypothetical he took into account the records of the Medical College of Virginia.

Justice Sharp in stating the rule for presenting expert opinion testimony to the jury in *Todd v. Watts,* 269 N.C. 417, 152 S.E. 2d 448 (1967), said:

> "Since it is the jury's province to find the facts, the data upon which an expert witness bases his opinion must be presented to the jury in accordance with established rules of evidence. Stansbury, N. C. Evidence § 136 (2d Ed. 1963). 'It is well settled in the law of evidence that a physician or surgeon may express his opinion as to the cause of the physical condition of a person if his opinion is based either upon facts within his personal knowledge, or upon an assumed state of facts supported by evidence and recited in a hypothetical question.' *Spivey v. Newman,* 232 N.C. 281, 284, 59 S.E. 2d 844, 847. * * * "

The records which Dr. Coleman took into account contained facts and information which were not within his personal knowledge and were not a part of the evidence.

Assuming, *arguendo,* that Dr. Coleman had an entirely proper basis for the opinion expressed in his answer to the hypothetical question, there is at least one other well established ground for sustaining the court's exclusion of his answer.

[3] The record discloses that although plaintiff questioned Dr. Coleman extensively concerning his medical training and experience, there was no admission by defendant that Dr. Coleman was a medical expert and plaintiff did not ask the court to so find. This court in the recent case of *Dickens v. Everhart,* 17 N.C. App. 362, 194 S.E. 2d 221 (1973), quoting from Stansbury, N. C. Evidence, 2d Ed., § 133, p. 318, said: " * * * On objection being made, the party offering a witness as an expert should request a finding of his qualification; if there is no such request, and no finding or admission that the witness is qualified, the exclusion of his testimony will not be reviewed on appeal." Therefore, the exclusion of Dr. Coleman's testimony as an expert is not presented for review. For the reasons stated, we find no merit in this assignment of error.

[4] Finally, plaintiff contends that the court erred in permitting counsel for defendant to "travel outside the record" in his argument to the jury.

It is well settled that attorneys have wide latitude in arguing a case to the jury, *Pence v. Pence,* 8 N.C. App. 484, 174 S.E. 2d 860 (1970), and that the trial judge has considerable discretion in controlling jury arguments of counsel, *Kennedy v. Tarlton,* 12 N.C. App. 397, 183 S.E. 2d 276 (1971).

In the instant case defendant offered no evidence, therefore, his counsel had the closing argument to the jury. Although defendant's counsel in his argument departed from the record, we think plaintiff's counsel in his preceding argument "opened the door" and that the response of defendant's counsel was not unreasonable. We hold that on the facts appearing in this case, the trial court did not err in permitting the argument complained of.

No error.

Judges CAMPBELL and GRAHAM concur.

FRANKLIN GILLISPIE, BY HIS GUARDIAN AD LITEM, FLORENCE TROXLER v. THOMASVILLE COCA-COLA BOTTLING COMPANY

No. 7322SC144

(Filed 14 March 1973)

1. **Judgments § 35— prerequisites to res judicata plea — exception**

Identity of parties and mutuality of estoppel generally must exist as prerequisites to a plea of *res judicata;* however, a personal injury action by plaintiff against a soft drink bottler is an exception to that rule where the action is instituted subsequent to the conclusion of an action for the same injury against A & P, retailer of the bottler's goods, in A & P's favor.

2. **Judgments § 37— actions against manufacturer and retailer — identity of issues — res judicata plea allowed**

Plaintiff's personal injury action against defendant soft drink bottler based on defendant's alleged breach of implied warranty of merchantability was barred where plaintiff, in a prior action against retailer of the soft drink, had ample opportunity for a judicial investigation of his asserted rights and the identical issue was considered and determined adversely to him.

Judge BROCK concurring.

APPEAL by plaintiff from *Long, Judge,* 2 October 1972 Session of Superior Court held in DAVIDSON County.

Plaintiff, Franklin Gillispie, a minor, instituted this action through his guardian ad litem to recover damages for injuries to his left hand and wrist allegedly suffered when two bottles of the soft drink Sprite exploded while plaintiff was carrying them to the checkout counter of an A & P store in Thomasville.

The following facts are uncontroverted:

Prior to the institution of the present action, plaintiff, on 6 August 1970, filed complaint against The Great Atlantic and Pacific Tea Company (A & P), seeking to recover for the same injuries which are the subject of the present action allegedly resulting from a "contractual breach of warranty for the products [*sic*] use and intended purpose." A & P filed a cross claim for indemnity from the present defendant, Thomasville Coca-Cola Bottling Company, the alleged bottler and supplier of the Sprite. By pretrial order, the court in the prior suit severed trial of plaintiff's action against A & P from the trial of A & P's cross action against the present defendant, Thomasville Coca-Cola Bottling Company.

At the trial of plaintiff's action against A & P in May, 1971, A & P moved for a directed verdict at the close of plaintiff's evidence, which motion was allowed. On appeal, this court reversed, stating:

> "The evidence presented would support a jury finding that plaintiff purchased the Sprite drinks by taking them into his possession with the intention of paying for them. Should the jury so find, the question would then become: Was the warranty of implied merchantability breached by defendant, and if so, did the breach proximately cause the injuries sustained by the plaintiff? We are of the opinion the evidence is sufficient to go to the jury on these questions." *Gillispie v. Tea Co.*, 14 N.C. App. 1, 6, 187 S.E. 2d 441, 444-45 (1972).

On retrial of plaintiffs cause against A & P on 8 May 1972, the following issue was submitted to and answered negatively by the jury:

> "Did the defendant [A & P] breach an implied warranty of merchantability between the plaintiff and the defendant which proximately caused plaintiff's injuries as alleged in the complaint?"

Judgment for defendant A & P was entered on the verdict.

On 7 July 1972, plaintiff instituted the *present* action against the Thomasville Coca-Cola Bottling Company, alleging, *inter alia,* that:

> "The injuries plaintiff complains of were the result of and were proximately caused by the defendant's breach of its warranty that the Sprite bottles were fit for the ordinary purposes for which such products are used and were adequately contained."

Defendant filed answer, denying the material allegations of the complaint and pleading in bar the judgment of the trial court rendered in *Gillespie v. A & P* on 10 May 1972. Motion for summary judgment was filed on 5 September 1972 and on 4 October 1972 an order was entered granting summary judgment for defendant. Plaintiff appealed to this court.

Charles F. Lambeth, Jr., for plaintiff appellant.

Hudson, Petree, Stockton, Stockton & Robinson by R. M. Stockton, Jr., J. Robert Elster, and James H. Kelly, Jr., for defendant appellee.

HEDRICK, Judge.

Plaintiff contends that "the prior action against A & P should not work as a collateral estoppel to the present action. . . . " because of an alleged lack of identity of parties, identity of issues and mutuality of estoppel.

[1] In *Light Co. v. Insurance Co.,* 238 N.C. 679, 691, 79 S.E. 2d 167, 175 (1953) it is stated:

> "Generally, in order that the judgment in a former action may be held to constitute an estoppel as *res judicata* in a subsequent action there must be identity of parties, of subject matter and of issues. It is also a well established principle that estoppels must be mutual, and as a rule only parties and privies are bound by the judgment. These rules are subject to exception."

Logic and precedent mandate that this case be an exception to the general rule that identity of parties and mutuality of estoppel exist as a prerequisite to a plea of *res judicata.* As

stated in *Crosland-Cullen Co. v. Crosland,* 249 N.C. 167, 170, 105 S.E. 2d 655, 657 (1958):

> "Public policy demands that every person be given an opportunity to have a judicial investigation of the asserted invasion of complainant's rights . . . . But public policy is equally as adamant in its demand for an end to litigation when complainant has exercised his right and a court of competent jurisdiction has ascertained that the asserted invasion has not occurred. (citation omitted)
>
> To make the plea effective it is necessary not only that the party have an opportunity for a hearing but that the identical question must have been considered and determined adversely to the complaining party." See also 47 N.C. Law Rev. 690 (1969).

[2] Thus the question before us is whether the requisite identity of issues exists between plaintiff and defendant in the present case and between plaintiff and A & P in the former case.

In both cases, plaintiff premises his theory of liability on an alleged breach of the implied warranty of merchantability, G.S. 25-2-314. The warranty of fitness, either express or implied, is contractual and the contract extends no further than the parties to it and their privies. *Tedder v. Bottling Co.,* 270 N.C. 301, 154 S.E. 2d 337 (1967). "[P]rivity to the contract is the basis of liability." *Tedder,* 270 N.C. at 304, 154 S.E. 2d at 339.

In *Tedder,* privity, sufficient to support plaintiff's claim of alleged breach of implied warranty, was found in "the manner in which the Pepsi-Cola was advertised and traveled from the bottler to the plaintiff." *Tedder,* 270 N.C. at 306, 154 S.E. 2d at 340. In 4 Wake Forest Intra. L. Rev. 169, 179 (1968), it is stated:

> "The theory of liability applied by the court [in *Tedder*] . . . was that an implied warranty is communicated to the consumer by the method in which the product is advertised and traveled from the bottler to the eventual consumer. It was held that the implied warranty attached through the representations made by the bottler in its manner of advertisement."

In its answer, defendant admits that it is "in the business of filling, processing and selling to retail stores bottles of . . . 'Coca-Cola' and 'Sprite' . . . . " , that A & P is "one of its customers," and that " 'Sprite' and 'Coca-Cola' bottled drinks are advertised extensively by various persons and corporations, and to some extent by the defendant." Clearly privity of contract between plaintiff and defendant is shown by the manner in which the soft drink was advertised and traveled from the bottler to plaintiff. It is also clear that the implied warranty of merchantability applies equally to both the retailer and the manufacturer of goods. *Tedder; Gillispie v. Tea Co.;* Official Comment 2 to G.S. 25-2-314.

In the prior action against A & P, plaintiff had ample opportunity for a judicial investigation of his asserted rights and the identical issue was considered and determined adversely to him. "Where both of these factors exist, sound public policy dictates that the court should refuse permission for further litigation on that question." *Crosland-Cullen Co.,* 249 N.C. at 170, 105 S.E. 2d at 657.

For the reasons stated, the judgment of the trial court is

Affirmed.

Judge MORRIS concurs.

Judge BROCK concurring.

The record of the trial of plaintiff's action against A & P was filed in this action in support of defendant's motion for summary judgment. That record apparently contained the full transcript of the trial judge's instructions to the jury. If the instructions given did not require the jury to determine the exact principle of liability presented by the present action, the plaintiff doubtless would have included it in the record on appeal in this case. In its absence, we presume that the allowance of defendant's motion for summary judgment in this action was based upon a determination from the record of the former trial that the identical issue had already been determined adversely to plaintiff.

STATE OF NORTH CAROLINA v. CARL L. DEGRAFFENREIDT AND LONNIE DEGRAFFENREIDT

No. 7315SC104

(Filed 14 March 1973)

1. **Conspiracy § 6— burning of school building — sufficiency of evidence of conspiracy**

There was sufficient evidence of conspiracy by defendants and others to burn a Board of Education office building to warrant submission of the case to the jury where the evidence tended to show that defendants and others were engaged together for a considerable time on the evening in question in making fire bombs from a common source of gasoline, that the group talked of going to the school building, that the group did in fact go to the building at which time defendants were seen with fire bombs in their possession and that the building sustained considerable damage from a fire caused by fire bombs.

2. **Conspiracy § 7— accomplice testimony — conspiracy definition — instructions proper**

The trial court in a conspiracy to burn case gave proper instructions as to the scrutiny to be given an accomplice's testimony and as to the definition of conspiracy.

APPEAL by defendants from *Cooper, Judge,* 31 July 1972 Session of Superior Court held in ORANGE County.

Defendants were tried under separate bills of indictment charging them with the unlawful burning, on 26 March 1971, of the administrative offices of the Chapel Hill-Carrboro City Board of Education in violation of G.S. 14-59, and with conspiring with each other and various other individuals named in the indictments to burn the offices.

At the conclusion of the State's evidence, the court allowed the motion of Lonnie DeGraffenreidt for nonsuit as to the charge of unlawful burning. Defendants presented no evidence and the court submitted to the jury the charge of unlawful burning as to Carl DeGraffenreidt and the charges of conspiracy as to each defendant.

The jury found both defendants guilty of the conspiracy charges, but they were unable to reach a verdict on the charge of unlawful burning against Carl DeGraffenreidt. The court thereupon withdrew a juror and declared a mistrial as to that charge. Both defendants appeal to this Court from judgments of imprisonment entered upon the verdicts.

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

Paul, Keenan & Rowan by James E. Keenan for defendant appellants.

GRAHAM, Judge.

[1] Defendants' first assignment of error is to the refusal of the court to nonsuit the charges of conspiracy. This assignment of error is overruled.

The State's evidence was sufficient to show that in response to a call in the early morning hours of 26 March 1971, members of the Chapel Hill Fire Department went to the Old Northside School which was located in Chapel Hill and was being used as administrative offices for the Chapel Hill-Carrboro City Board of Education. The building was constructed on two different levels and fires were burning on both levels. The fire chief found broken soft drink bottles about the premises of both levels. The bottles smelled of a flammable liquid. Rags smelling of the same liquid were found on one level of the building. Damage to the building was estimated at around $116,000.00.

An S.B.I. agent testified: "The fire in my opinion was caused by an inflammable liquid being placed in soft drink bottles, with a rag or some type of wick in the neck of the bottle, the rag was ignited and the bottle was thrown through the window, and when it broke the fire set the inflammable liquid afire. It is sometimes referred to as a Molotov Cocktail."

Nathaniel Jones, who was alleged in the indictments as a co-conspirator, testified for the State. He stated that on the date in question he met defendants and others at the Roberson Community Center in Chapel Hill. He observed several persons there filling bottles with gas and placing rags in them. The group went from there to Tintop, which is a community in Chapel Hill. The witness saw defendants and others making more gas bottles with rags in them at that time. He testified that he purchased the gas for the bottles. From Tintop, some of the group, including the witness and the defendants, went back to the Roberson Community Center and then to the administrative building in question. Defendants had bottles in both their hands. Jones testified: " . . . after things looked clear, the

bottles were lit. All I saw was that they had bottles in their hands that were burning. . . . I could see the two defendants. I was standing about twenty feet behind. . . . I saw them walk from where I was to where I saw them at the building." Jones stated that he left the scene when he saw lights from a car. He did not see any bottles thrown; however, he did hear windows break and could see the school flaming up.

Tommy Noell testified that he went to the Community Center on the evening of 26 March 1971 because he had heard that " . . . there was going to be a march uptown. . . . " Defendants and others were there. About 10:00 p.m. Nathaniel Jones came to the center with gas. The group then went to the community called Tintop and started mixing fire bombs. He saw both defendants mix the fire bombs but he did not remember how many. The group returned to the Community Center and people started getting fire bombs out of cars. The witness stated that "I saw Carl and Lonnie DeGraffenreidt [get] out of the car back at the center. I saw Carl and Lonnie DeGraffenreidt with fire bombs at that point. I saw them in their personal possession. They had fire bombs in the pockets and in their hands. Lonnie DeGraffenreidt had two in his pockets. He had them in his back pocket. One was in one and one in the other. He had two in his hands. He had four altogether. At that point I saw Carl DeGraffenreidt with four fire bombs. It was the same arrangement as Lonnie. . . . When I saw Carl and Lonnie at the center that second time, everybody started talking about going to Northside School." The witness saw Carl DeGraffenreidt the next day and Carl stated, "Man, I've landed all of mine."

Defendants insist that this evidence was insufficient to show that there was a union of wills for the unlawful purpose charged in the bill of indictment. We disagree.

Direct proof of the charge of conspiracy is rarely obtainable. *State v. Oliver,* 268 N.C. 280, 150 S.E. 2d 445. "In fact, circumstantial evidence is usually the only proof obtainable, and the results accomplished, the divergence of these results from the course which would ordinarily be expected, the situation of the parties and their relations to each other, together with surrounding circumstances and the inferences legitimately deducible therefrom, may furnish ample proof of conspiracy. . . ." 2 Strong, N. C. Index 2d, Conspiracy, § 6, p. 177.

The evidence here would permit the jury to find that defendants and others were engaged together for a considerable period on the evening in question in making fire bombs from a common source of gasoline. One witness testified that while defendants were present, "everybody started talking about going to Northside School." Defendants and others, armed with a substantial number of fire bombs, went to that school building, which at that time was being used as the administrative offices of the Chapel Hill-Carrboro City Board of Education. While defendants were present with their fire bombs, certain bombs were thrown through the windows of the school and caused a fire resulting in substantial damage. These findings certainly raise a legitimate and logical inference that defendants and the others entered into an unlawful scheme or agreement to unlawfully burn the building in question.

[2] Defendants' second assignment of error is to the court's failure to give the precise instructions requested by defendants as to the rule requiring careful scrutiny of an accomplice's testimony. The charge which the court gave with respect to this rule was a charge that has been approved by our Supreme Court. *See State v. Hairston* and *State v. Howard* and *State v. McIntyre,* 280 N.C. 220, 185 S.E. 2d 633. The additional statement which defendants desired read to the jury was more in the nature of an argument than an instruction. This assignment of error is also overruled.

Finally, defendants complain about the court's definition of conspiracy in its charge to the jury. The court's charge to the jury with respect to conspiracy was thorough and accurate in every respect. We fail to see where the jury could have been confused by any portions of these instructions.

It is our opinion that defendants had a fair trial which was free from prejudicial error.

No error.

Judges CAMPBELL and HEDRICK concur.

BEATRICE W. ROBERTS v. PEGGY BUFFALOE WHITLEY AND DWIGHT AVERY WHITLEY

No. 7311SC101

(Filed 14 March 1973)

1. **Automobiles § 72— loss of control due to emergency — summary judgment improper**

Where plaintiff contended that she lost control of her car and suffered personal injuries solely because of an emergency and her reaction thereto arising when defendant pulled into plaintiff's lane of travel to pass a truck without seeing that she could do so in safety, the issue of whether plaintiff's loss of control of her car constituted actionable negligence on her part was a triable one and summary judgment was improperly entered for defendant.

2. **Automobiles § 76— following too closely — summary judgment improper**

Whether plaintiff in a personal injury action was following a vehicle too closely or whether, assuming she was following too closely, such negligence was a proximate cause of her injuries was a triable issue and summary judgment was improperly entered for defendant.

APPEAL by plaintiff from *Braswell, Judge,* 28 August 1972 Session of Superior Court held in HARNETT County.

Negligence action brought by plaintiff to recover for personal injuries sustained in an automobile-truck collision on Highway 55 near Angier. Plaintiff alleges in her complaint, among other things, the following:

On 27 April 1971, at approximately 10:15 a.m., plaintiff was operating her Chevrolet automobile in a northerly direction along Highway 55. At the same time and place, defendant Peggy Buffaloe Whitley was operating an Oldsmobile automobile belonging to Dwight Avery Whitley in a southerly direction along said highway. Defendant Peggy Whitley ". . . negligently turned the 1963 Oldsmobile . . . into the left lane of traffic in an attempt to pass another vehicle causing this plaintiff who was directly in front of the defendant to be forced to run off the east side of Highway 55 in order to avoid a head-on collision with the defendant. That in attempting to avoid a head-on collision this plaintiff was forced to take evasive action and leave the highway thereby causing damage to her vehicle and to her person. . . . " It is further alleged that defendants were guilty of negligence in operating the automobile to the left of the center

line; improperly passing a vehicle in the face of oncoming traffic; failing to keep a proper lookout; driving at an excessively high rate of speed; failing to take evasive action to avoid a head-on collision; and driving in a careless and reckless manner.

Defendants moved for summary judgment and offered the adverse examination of plaintiff in support of the motion. Plaintiff's husband testified in opposition to the motion. The evidence presented would support, but not compel, the following findings: Plaintiff was alone in her car traveling from Dunn and following her husband who was driving their son's car immediately in front of plaintiff. They were traveling within the stated speed limit at approximately 50 miles per hour. Plaintiff was driving 150 feet behind the car being operated by her husband. As the two cars approached a truck, Mrs. Whitley pulled her car suddenly around the truck and into the lane of travel then occupied by the vehicles being driven by plaintiff and her husband. Plaintiff did not see defendants' car until her husband applied brakes and pulled off the highway. At that time the Whitley car was right on plaintiff. In order to avoid a head-on collision, plaintiff applied her brakes as hard as she could hit them and pulled her car to the right. This caused her car to go into a skid, strike the right side of the road and cross back over the road into the rear end of the truck. There was no contact between plaintiff's car and Mrs. Whitley's vehicle.

The court allowed defendants' motion for summary judgment, finding: The complaint fails to state a claim upon which relief can be granted; that independent of this conclusion " . . . the Court also concludes as a matter of law that no issue of negligence on the part of the defendant arises under any of the evidence . . . and in the alternative the Court further concludes that even if an issue of actionable negligence is made to appear, . . . there is contributory negligence as a matter of law on the part of the plaintiff in failing to keep a proper lookout in her direction of travel so as to bring her car under control prior to a collision, and in failing to keep her automobile under control as she went to the shoulder of the road," and in following the vehicle in front of her more closely than was reasonable and prudent under the conditions then existing. The plaintiff appealed to this Court from the entry of summary judgment.

Stewart and Hayes by Gerald Hayes, Jr., for plaintiff appellant.

Bryan, Jones, Johnson, Hunter & Greene by Robert C. Bryan for defendant appellee.

GRAHAM, Judge.

We find the complaint, although sparse in detail, sufficient to meet the requirements of G.S. 1A-1, Rule 8. Fact pleading is no longer required. "A pleading complies with the rule if it gives sufficient notice of the events or transactions which produced the claim to enable the adverse party to understand the nature of it and the basis for it, to file a responsive pleading, and—by using the rules provided for obtaining pretrial discovery—to get any additional information he may need to prepare for trial." *Sutton v. Duke,* 277 N.C. 94, 104, 176 S.E. 2d 161, 167. See also *Roberts v. Memorial Park,* 281 N.C. 48, 187 S.E. 2d 721; *Acceptance Corp. v. Samuels,* 11 N.C. App. 504, 181 S.E. 2d 794; *Cassels v. Motor Co.,* 10 N.C. App. 51, 178 S.E. 2d 12.

[1] We further find that defendants, as the moving parties, failed to carry their burden of establishing the lack of a triable issue of fact. We therefore reverse the entry of summary judgment. As stated in *Page v. Sloan,* 281 N.C. 697, 706, 190 S.E. 2d 189, 194:

> "'. . . [I]ssues of negligence . . . are ordinarily not susceptible of summary adjudication either for or against the claimant, but should be resolved by trial in the ordinary manner.' 6 Moore's Federal Practice (2d ed. 1971) § 56.17[42] at 2583; 3 Barron and Holtzoff, Federal Practice and Procedure (Wright ed. 1958) § 1232.1, at 106. It is only in exceptional negligence cases that summary judgment is appropriate. *Rogers v. Peabody Coal Co.,* 342 F. 2d 749 (C.A. 6th 1965); *Stace v. Watson,* 316 F. 2d 715 (C.A. 5th 1963). This is so because the rule of the prudent man (or other applicable standard of care) must be applied, and ordinarily the jury should apply it under appropriate instructions from the court. . . .
>
> Moreover, the movant is held by most courts to a strict standard in all cases; and 'all inferences of fact from the proofs proffered at the hearing must be drawn against the movant and in favor of the party opposing the motion.' 6

Moore's Federal Practice (2d ed. 1971) § 56.15[3], at 2337; *United States v. Diebold, Inc.*, 369 U.S. 654, 8 L.Ed. 2d 176, 82 S.Ct. 993 (1962)."

The fact there was no contact between the car defendant was driving and plaintiff's car is not decisive. Plaintiff's theory is that the loss of control which she experienced over her vehicle was caused solely by the emergency, and her reaction thereto, arising when feme defendant passed the approaching truck without seeing that she could do so in safety and operated her car in the plaintiff's lane and toward a "head-on collision with plaintiff's vehicle." Whether plaintiff's loss of control of her car under these circumstances constituted actionable negligence on her part is a triable issue. *See Davis v. Connell,* 14 N.C. App. 23, 187 S.E. 2d 360.

[2] On the question of whether plaintiff was following the preceding vehicle too closely, it is noted that the evidence, when considered in the light most favorable to her, would indicate that she was traveling 150 feet behind her husband's vehicle at approximately 50 miles per hour. This evidence, standing alone, does not put to rest the question of whether plaintiff was following her husband's car at a closer distance than was reasonable and prudent under conditions existing, or whether, assuming she was guilty of following too closely, such negligence was a proximate cause of plaintiff's injuries.

Reversed.

Judges BROCK and VAUGHN concur.

STATE OF NORTH CAROLINA ON RELATION OF THE BANKING COMMISSION, AND PEOPLES BANK AND TRUST COMPANY v. LUCAMA-KENLY BANK

No. 7310SC191

(Filed 14 March 1973)

Banks and Banking § 1— application to establish branch bank — findings as to solvency of new branch and existing bank

In a proceeding upon an application to establish a branch bank, the record supports the Banking Commission's findings that the probable volume of business and reasonable public demand in the primary

service area of the proposed branch are sufficient to assure and maintain the solvency of the new branch and that of the existing bank in the community. G.S. 53-62(b).

APPEAL by Lucama-Kenly Bank from a judgment of *Canaday, Judge,* 2 October 1972 Session of Superior Court held in WAKE County.

On 22 February 1972, Peoples Bank and Trust Company applied to the Commissioner of Banks for authority to establish a branch bank in Bailey. Lucama-Kenly protested the application in proceedings before the Commission. The application was approved. Under the provisions of G.S. 143-306, *et seq.*, Lucama-Kenly filed a petition for judicial review in the Superior Court of Wake County. Judgment was entered affirming the decision of the Banking Commission and Lucama-Kenly, the protestant bank, appealed.

Sanford, Cannon, Adams & McCullough by Hugh Cannon, E. D. Gaskins, Jr., and Robert W. Spearman, for applicant appellee.

Jordan, Morris and Hoke by John R. Jordan, Jr., and William R. Hoke; J. Russell Kirby, attorneys for defendant appellant.

VAUGHN, Judge.

Any bank doing business under the provisions of Chapter 53 of the General Statutes of North Carolina may establish branches after obtaining the written approval of the Commissioner of Banks. Approval may be granted or withheld by the Commissioner *in his discretion.* G.S. 53-62. The applicable statute further provides:

"The Commissioner of Banks, in exercising such discretion, shall take into account, but not by way of limitation, such factors as the financial history and condition of the applicant bank, the adequacy of its capital structure, its future earnings prospects, and the general character of its management. Such approval shall not be given until he shall find (i) that the establishment of such branch or teller's window will meet the needs and promote the convenience of the community to be served by the bank, and (ii) that the probable volume of business and reasonable public demand in such community are sufficient to assure and main-

tain the solvency of said branch or teller's window and of the existing bank or banks in said community."

* * *

"(f) Any action taken by the Commissioner of Banks pursuant to this section shall be subject to review by the State Banking Commission which shall have the authority to approve, modify or disapprove any action taken or recommended by the Commissioner of Banks."

Unless otherwise provided by statute, final administrative decisions may be judicially reviewed under the provisions of Article 33 of Chapter 143 of the General Statutes. Lucama-Kenly Bank argues that the decision of the Banking Commission is (1) unsupported by competent, material and substantial evidence in view of the entire record and (2) is arbitrary or capricious [G.S. 143-315(5)(6)] and that the Superior Court was in error when it failed to so hold.

The record discloses that, in exercising his discretion, the Commissioner took into account the financial history and conditions of the applicant bank, the adequacy of its capital structure and its future earning prospects and found them to be satisfactory and further found that the applicant's management was capable. These findings are supported by the evidence and do not appear to be seriously questioned by protestant.

Some of the findings of the Commission may be summarized as follows.

Applicant has its principal office in Rocky Mount and operates 32 banking offices in 16 communities in eastern North Carolina. It is the 12th largest bank in the State. Protestant has its principal office in Lucama and operates two additional banking offices in Kenly and Bailey. It has received approval to establish a third branch in Sims in Nash County. The "primary service area" of the proposed branch extends approximately 6.3 miles north, 4.1 miles east, 5.8 miles south and 2.5 miles west from the town of Bailey and contains between 5,378 and 6,918 people. Applicant already has considerable amount of existing business in the area. For example, applicant has 488 deposit accounts totaling $812,318 and 200 loan accounts totaling $274,135, all within the primary service area of the proposed branch, and presently has a branch located at Middlesex which is five miles west of Bailey. There is little evidence of economic

growth in the Bailey community which has declined in population in recent years. Middlesex, however, located only five miles to the west, has succeeded in achieving healthy economic growth and has attracted both retail businesses and industries. Applicant has been instrumental in the economic growth of Middlesex, not only by making loans but by the participation of its management in assuming active and vigorous leadership in the economic growth of the community. Similar participation by the applicant in Bailey will tend to be beneficial and will stimulate the economic growth thereof.

Applicant presented a large number of witnesses whose testimony provided competent, material and substantial evidence that the proposed branch would meet the needs and promote the convenience of the community. Some witnesses testified as to general as well as specific dissatisfaction with the attitude of and services available through protestant. There was other evidence tending to show the need for specific banking services not available through protestant and for which it is presently necessary to travel elsewhere.

Officers of protestant admitted that, in the past, they had not provided the service that they should have provided but contended, and offered evidence which tends to show, that there has been a change of attitude and an improvement in services. The Commission found that an examination of the range of banking services presently offered by protestant discloses that such services are consistent with those offered by other North Carolina banks of comparable size but that there are a number of banking services which are not available through protestant's bank but which will be available through the applicant as well as some services which are quantitatively superior; although protestant is currently attempting to improve its conservative loan policies, on April 30, 1972, the Bailey branch of protestant had a loan to deposit ratio of approximately 20%; the State average of loans to deposits on April 18, 1972 was 61.9%.

The Commission found that the additional competition which will result from the location of the proposed branch in the Bailey community will not only stimulate the economy but also insure that Lucama continues to upgrade and improve the quality and quantity of its banking services and facilities. In this connection the evidence discloses that, whether stimulated by the prospect of increasing competition or a change in man-

agement and beneficial ownership, protestant has begun to make dramatic changes in its banking policies and posture in the community.

Although protestant contended that the profitability of its branch at Bailey would be affected by the location of applicant's proposed branch, it admitted that its profitability would also be affected by the construction of its own new banking house at Bailey as well as its new branch at Sims. In this connection it is worthy of note that construction of protestant's new facility at Bailey was started after the filing of the application under consideration and that application for protestant's new branch at Sims, approximately three miles east of Bailey, was also made after the present application. In any event, the record supports the Commission's findings that the probable volume of business and reasonable public demand in the primary service area are sufficient to assure and maintain the solvency of applicant's new branch and that of the existing bank in the community, as required by G.S. 53-62(b).

The record of the proceedings before the Commission is bulky and we have considered it in detail. It is clear to us that the Commission diligently applied itself to its statutory duties. We hold that the decision is supported by competent, material and substantial evidence in view of the entire record and that it is neither arbitrary nor capricious. The judgment of Judge Canaday from which protestant appealed is affirmed.

Affirmed.

Judges BROCK and GRAHAM concur.

STATE OF NORTH CAROLINA v. LARRY EUGENE EVANS

No. 7310SC181

(Filed 14 March 1973)

1. **Criminal Law § 66— in-court identification of defendant — sequence of testimony and voir dire — no error**

Where defendant in a robbery prosecution conceded that an identification of him by one of his victims was admissible, he was in no position to complain that the witness was allowed to give her testimony prior to the conducting of a *voir dire*.

2. **Criminal Law § 90— question as clarification and not impeachment — no error**

A second question asked one of its witnesses by the State concerning identification of defendant served to clarify without contradicting or impeaching his answer to the first question.

3. **Criminal Law § 75— in-custody statements — admission for impeachment — failure to hold voir dire**

The trial court did not err in allowing a police officer to relate, over objection, statements made to him by defendant without having first made a finding that the statements were given voluntarily since the credibility of the defendant may appropriately be impeached by the use of earlier conflicting statements made by him during in-custody interrogation without counsel and without a waiver of his rights.

4. **Criminal Law § 113— mistake in recapitulation of evidence — no prejudicial error**

Though the trial judge in recapitulating the testimony of one witness referred to testimony given on *voir dire* rather than before the jury, there was no prejudicial error since substantially the same evidence referred to was given before the jury but by another witness and since defendant failed to object to the charge at trial.

APPEAL by defendant from *Brewer, Judge,* 31 July 1972 Session of Superior Court held in WAKE County.

Defendant was indicted for and found guilty of the robbery with firearms of Phyllis Johnson and Rixie Ann Williams. He was sentenced to serve not less than twenty nor more than thirty years imprisonment and was given credit for time served while awaiting trial.

Attorney General Robert Morgan by William F. O'Connell, Assistant Attorney General for the State.

Carlos W. Murray, Jr., for defendant appellant.

VAUGHN, Judge.

[1] One of the victims of the robbery, Phyllis Johnson, was asked if she saw defendant at the scene of the robbery. Defendant's objection to the question was overruled. Defendant then moved to strike the witness's affirmative answer. The court immediately conducted a *voir dire* and, after appropriate findings and conclusions, allowed the victim to testify as to the identity of the defendant. Defendant does not contend that the court's findings and conclusions are in error but argues that, after objection, it was prejudicial error to allow the witness to

answer prior to conducting the *voir dire.* Since it is conceded that the evidence was admissible, the rationality of defendant's argument that the foregoing constituted prejudicial error eludes us.

[2] Defendant's third assignment of error asserts that the court erred when the State, over objection, was permitted to impeach the State's witness, O. Royster Miles. The record discloses that the State asked witness Miles, "Now does your identification today, Mr. Miles, today in Court *have anything to do with* the photographs that you saw when Detective Tant showed you those photographs?" [Emphasis added.] The witness answered in the affirmative, then was asked, "Had you never saw (sic) the photographs that were shown to you by Detective Tant, would you still be able to identify him?" Defendant objected to this question and contends that the second question impeaches the witness and the jury should have been permitted to weigh the first answer only. The witness's affirmative answer to the second question clarifies without contradicting or impeaching the first answer. The competence of the question should be decided upon whether it is harmful and is likely to result in an answer that could not be otherwise obtained. *State v. Johnson,* 272 N.C. 239, 158 S.E. 2d 95. Rulings on the use of leading questions will not be reviewed on appeal in the absence of a showing of abuse of discretion. *State v. Staten,* 271 N.C. 600, 157 S.E. 2d 225.

[3] Defendant's sixth assignment of error asserts that the court erred in allowing Detective Tant to relate, over objection, statements made to him by defendant without having first made a finding that these statements were given voluntarily. Defendant attempted to establish an alibi by stating that he had broken his nose on 3 June 1972 and had spent the day at home on 5 June, the date of the alleged robbery. In rebuttal, the State offered the testimony objected to, to the effect that defendant stated to officers that he had broken his nose on the night of 7 June or early in the morning of 8 June 1972. The credibility of the defendant may be appropriately impeached by the use of earlier conflicting statements made by him during in-custody interrogation, without counsel and without a waiver of his rights. *Harris v. New York,* 401 U.S. 222, 28 L.Ed. 2d 1, 91 S.Ct. 643; *State v. Bryant,* 280 N.C. 551, 187 S.E. 2d 111; *State v. Dunlap,* 16 N.C. App. 176, 191 S.E. 2d 385.

[4] During the course of his charge and while recapitulating the testimony of Phyllis Johnson, the court attributed testimony to her with reference to her having viewed photographs in the presence of Detective Tant. In fact, this witness's testimony as to viewing the photographs had been given on *voir dire* and not in the presence of the jury. Substantially the same facts had been testified to in the presence of the jury by Detective Tant. No objection to the charge was made at trial. The general rule is that objections to the charge in reviewing evidence must be made before the jury retires so as to afford an opportunity for correction; otherwise, they are deemed to have been waived and will not be considered on appeal. *State v. Virgil,* 276 N.C. 217, 172 S.E. 2d 28. We have carefully considered this assignment of error and hold that no projudicial error has been made to appear.

Defendant's assignments of error number five, eight and fourteen challenge denial of motions for nonsuit and in arrest of judgment. He concedes, however, that determination of the merits of these assignments of error depend upon a resolution of preceding assignments of error in his favor. All of defendant's assignments of error have been considered and are overruled.

In the trial from which defendant appealed we find no prejudicial error.

No error.

Judges BROCK and HEDRICK concur.

THE PLANTERS NATIONAL BANK & TRUST COMPANY v. DALE RUSH AND WIFE, MARY SUE RUSH

No. 7319SC117

(Filed 14 March 1973)

Rules of Civil Procedure § 56— motion for summary judgment — failure to serve in apt time

The trial court erred in allowing plaintiff's motion for summary judgment where plaintiff failed to serve his motion at least 10 days *before* the time fixed for the hearing as required by Rule 56(c), and failed to give defendant the extra three days notice required by Rule 6(e) when service is by mail.

APPEAL from *McConnell, Judge,* at the 2 October 1972 Session of Superior Court held in RANDOLPH County.

Plaintiff instituted this action on 4 September 1970 to recover a judgment of $32,181.28, plus interest and costs, from defendants on three notes alleged to be due. Ancillary to this action, plaintiff instituted claim and delivery proceedings against certain personal property of defendants, *i.e.,* pigs, hogs, sows and other livestock described in a security agreement executed contemporaneously with the first note alleged to be due. Defendants posted sufficient bond for the retention and possession of this personal property. Subsequent to posting this bond, defendants filed a counterclaim against plaintiff alleging, in part, that plaintiff "continues to harass . . . and to attempt to thwart" the sale of certain of defendants' livestock.

On 21 September 1972, plaintiff filed a motion for summary judgment for the relief prayed for in the complaint. The motion was accompanied by supporting affidavits. Notice of the motion for summary judgment was served on defendants' counsel by depositing same in the mail on 21 September 1972, setting 2 October 1972 as the time for a hearing on said motion.

Judgment was entered on 10 October 1972 granting plaintiff's motion for summary judgment and ordering that plaintiff recover the sum of $33,296.84 and the costs of the action. The judgment also dismissed defendants' counterclaim. Defendants appealed from this judgment.

Coltrane and Gavin, by T. Worth Coltrane, for plaintiff.

Ottway Burton for defendants.

BROCK, Judge.

Defendants assign as error plaintiff's failure to comply with Rule 56(c) of the North Carolina Rules of Civil Procedure which provides in part: "The motion *shall* be served at least 10 days *before* the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits." (Emphasis added.)

Rule 6(a) of the Rules of Civil Procedure provides:

> "In computing any period of time prescribed or allowed by these rules . . . the day of the act, event, default or publication after which the designated period of time be-

gins to run is not to be included. The last day of the period so computed is to be included, *unless* it is a Saturday, Sunday or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, Sunday, or a legal holiday." (Emphasis added.)

In the present case, notice of plaintiff's motion for summary judgment was mailed to defendants' counsel on 21 September 1972, and the hearing on that motion was set for 2 October 1972. According to Rule 6(a), the 10 day time period required by Rule 56(c) would start to run on 22 September 1972 and end on 2 October 1972, since 1 October 1972 was a Sunday. Plaintiff failed to serve his motion at least 10 days *before* the time fixed for the hearing as required by Rule 56(c). *See Ketner v. Rouzer,* 11 N.C. App. 483, 182 S.E. 2d 21. The allowance of the motion for summary judgment was, therefore, error.

If the notice had been personally served, plaintiff would have failed, by one day, to give 10 days notice *before* the hearing; however, plaintiff also failed to comply with G.S. 1A-1, Rule 6(e) because in this case notice was given by mail. Rule 6(e) provides:

"Whenever a party has the right to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him *by mail, three days shall be added to the prescribed period.*" (Emphasis added.)

Defendants had the right to file opposing affidavits up through the day before the date fixed for hearing the summary judgment motion. Rule 6(e), in effect, extends the minimum 10 day notice period to 13 days when the notice is by mail. *See* 6 J. Moore, Federal Practice, par. 56.14[1] (2d ed. 1948), p. 2255. This rule serves to alleviate the disparity between constructive and actual notice when the mailing of notice begins a designated period of time for the performance of some right. Because of plaintiff's failure to give defendant the extra three days notice as required by Rule 6(e) when service of notice is by mail, the allowance of the motion for summary judgment was error.

Defendants also assign as error the inclusion of their counterclaim in the summary judgment. Even if plaintiff had complied with notice requirements, that portion of the judgment granting summary judgment on defendants' counterclaim was

error. Plaintiff did not move for summary judgment on defendants' counterclaim.

For failure of plaintiff to give the required notice of the hearing on the motion for summary judgment, the entry of summary judgment for plaintiff was error.

Reversed.

Judges CAMPBELL and GRAHAM concur.

JAMES R. SMITH v. JAMES H. HOUSE

No. 7311DC34

(Filed 14 March 1973)

Automobiles § 57— intersection collision — sufficiency of findings to support conclusion

The trial court's findings of fact in a personal injury and property damage action that plaintiff was driving on a dominant street at a lawful rate of speed and that plaintiff observed defendant's automobile entering an intersection when he was approximately one car length from the intersection supported the judge's conclusion that plaintiff was injured by defendant's negligence and that plaintiff was not contributorily negligent.

APPEAL by defendant from *Lyon, District Judge,* at the 15 May 1972 Session of District Court held in LEE County.

This is a civil action to recover for personal injuries and property damage sustained in an automobile collision.

The collision occurred at the intersection of Seventh Street and North Avenue in Sanford, N. C., at approximately 6:55 p.m. on 21 March 1970. Seventh Street runs in a general north-south direction and has two traffic lanes for northbound traffic and two for southbound traffic; North Avenue runs in a general east-west direction and has one lane for eastbound traffic and one lane for westbound traffic. These streets intersect at right angles. There are legally erected and maintained stop signs on North Avenue just before its intersection with Seventh Street controlling traffic approaching and entering Seventh Street from both the east and west. Seventh Street is the domi-

nant street or highway and North Avenue is the servient street or highway.

At the time of the accident, plaintiff was driving his 1967 Oldsmobile Cutlass in a northern direction on Seventh Street approaching the intersection of North Avenue and Seventh Street; defendant was driving a 1966 Plymouth in an eastern direction on North Avenue approaching the intersection of Seventh Street and North Avenue. The southwest corner of the intersection of Seventh Street and North Avenue is a "blind corner" for traffic moving north on Seventh Street and east on North Avenue because of a house and shrubbery located near the south line of North Avenue and the west line of Seventh Street. A person approaching Seventh Street from the west on North Avenue, as defendant did in this case, cannot see traffic approaching the intersection from the south on Seventh Street until he almost reaches the curb line of Seventh Street.

Defendant stopped for the stop sign on North Avenue at a point where he could not see down Seventh Street to the south, the direction from which plaintiff was approaching. He then eased up to the curb line of Seventh Street, looked to both the right and left, and pulled out in to the intersection intending to cross Seventh Street and continue east on North Avenue. Defendant crossed the two southbound lanes of Seventh Street and collided with plaintiff near the line dividing the inside and outside lanes of travel for northbound traffic on Seventh Street. The right front and side of the automobile driven by defendant struck the left front and side of plaintiff's automobile. As plaintiff approached the intersection he was driving 30 m.p.h. in a 35 m.p.h. zone. Plaintiff did not observe defendant's automobile until he was approximately one car length from the intersection, at which time the automobile driven by defendant was entering the intersection.

After a trial without a jury, the District Court Judge found that plaintiff was damaged by the negligence of defendant, and that plaintiff did not contribute to such injury. From a judgment for plaintiff, defendant appealed.

Pittman, Staton & Betts, by William W. Staton and R. Michael Jones, for plaintiff.

Adams, Kleemeier, Hagan, Hannah & Fouts, by Clinton Eudy, Jr., for defendant.

BROCK, Judge.

Defendant's sole assignment of error relates to the Court's conclusion that plaintiff was injured by defendant's negligence and plaintiff was not contributorily negligent. Defendant has not brought forward the evidence at trial in his record on appeal and does not dispute the findings of fact in the judgment. Defendant contends that as a matter of law from the findings of fact in the judgment, either plaintiff was contributorily negligent or the injuries he sustained were the result of an unavoidable accident.

We find no merit in defendant's contention. From the finding of fact in the judgment, plaintiff was driving on a dominant street at a lawful rate of speed. When he was approximately one car length from the intersection, plaintiff observed defendant's automobile entering the intersection from North Avenue. Under these facts, it cannot be concluded as a matter of law that plaintiff was contributorily negligent or the accident unavoidable. *See Hathcock v. Lowder,* 16 N.C. App. 255, 192 S.E. 2d 124.

Affirmed.

Judges HEDRICK and VAUGHN concur.

STATE OF NORTH CAROLINA v. WILLIAM THURMAN WASHINGTON AND LARRY OAKLEY

No. 7310SC139

(Filed 14 March 1973)

Larceny § 7— larceny of tray of rings — sufficiency of evidence

Evidence in a felonious larceny case was sufficient to withstand nonsuit where such evidence tended to show that defendants and a companion entered the jewelry shop of one Hayes, that defendant Oakley was shown several rings from a tray in a showcase, that defendant Washington engaged Hayes in exhibiting watches to him while defendant Oakley remained near the showcase containing the rings, that defendants and their companion left the shop to obtain money to purchase a watch and that within 20 seconds Hayes discovered that the showcase door was open and a tray of rings was missing.

APPEAL by defendants from *Canaday, Judge,* August, 1972 Session of Superior Court held in WAKE County.

State v. Washington

Defendants, William Thurman Washington and Larry Oakley, were charged in separate bills of indictment, proper in form, with the felonious larceny of jewelry of the value of $5,063.00 from J. P. Hayes on 24 May 1972. Defendants pleaded not guilty but were found guilty as charged. From judgments imposing prison sentences of 8 to 10 years each, defendants appealed.

Attorney General Robert Morgan and Staff Attorney Donald A. Davis for the State.

Clyde A. Douglass II for defendant appellant, Washington, and Garland L. Askew for defendant appellant, Oakley.

HEDRICK, Judge.

Defendants assign as error the denial of their timely motions for judgments as of nonsuit.

The material evidence offered by the State tends to show the following:

On 24 May 1972, defendants and a companion entered the J. P. Hayes Jewelry Store at 507 Hillsborough Street, Raleigh. The jewelry store is small, approximately 5 feet wide and 15 feet long. The customer area of the store encompasses only that area in front of the showcase and measures approximately 5 feet by 5 feet.

When defendants and their companion entered the store, Hayes was seated at a workbench behind the showcase. No other patrons were in the store. Defendant Oakley asked to be shown two or three rings which were in the showcase in front of Hayes. Hayes testified: "I showed him two or three rings. He did not like them and did not seem to be very interested." The rings were then replaced in the showcase and the sliding door covering the back of the showcase was closed but not locked. Defendant Washington then asked to be shown certain watches in the wall case of the store. Hayes testified:

> "When I left Mr. Oakley remained in the vicinity of the showcase, near the end of it. When I left him, Mr. Oakley was approximately 2 feet from the tray of diamonds.
>
> As I went toward the window, I turned and saw Oakley approach the showcase. I looked at him in the face and

he stepped back. I then proceeded to show Mr. Washington the watches that were in the wall case in the window.

* * *

My back was to Mr. Oakley only a short period of time when I showed Mr. Washington the first watch. I was trying to watch Mr. Oakley after I saw him approach the showcase."

Washington did not want any of the watches he had been shown; but before Hayes could return to his workbench behind the showcase, Washington, for the third time, asked to be shown a watch in the wall case of the store. Hayes stated:

"This time I had my back to Mr. Oakley for approximately 15 to 20 seconds. Immediately before turning my back I saw Mr. Oakley still near the end of the showcase.

During the time that my back was to Mr. Oakley, I talked with Mr. Washington about the watch I was showing him. The green dial of the watch matched a ring he was wearing perfectly. He never bought the watch but we agreed on a price. He said he would return as soon as he got his money from the car. He never said where his car was.

I did not turn around to look at Mr. Oakley again as Mr. Washington had attracted my attention so much I forgot to watch Mr. Oakley."

After defendants and their companion left the store for the alleged purpose of enabling Washington to procure money from his automobile with which to purchase the watch, Hayes, who had become suspicious, began looking through the directory for the telephone number of the police. Hayes testified:

"After I picked up the directory, I turned and saw the showcase door was open and the tray of rings missing."

"It was approximately 20 seconds after the men left that I noticed the tray of diamonds was missing."

No one other than the defendants, their companion, and Hayes were in the store during this period. Hayes promptly telephoned the police and reported the theft.

In support of this assignment of error, defendants cite *State v. Gaines,* 260 N.C. 228, 132 S.E. 2d 485 (1963). Suffice it to say, *Gaines* is clearly distinguishable.

We are of the opinion and so hold that when the foregoing evidence is considered in the light most favorable to the State, it is sufficient to raise an inference that defendant Oakley removed the tray of jewelry from the showcase while defendant Washington, by word and deed, deliberately distracted Hayes' attention. This assignment of error is overruled.

Defendants had a fair trial free from prejudicial error.

No error.

Judges BROCK and VAUGHN concur.

STEPHEN BENFIELD v. PAUL C. TROUTMAN AND TRAVELERS INSURANCE COMPANY

No. 7322IC84

(Filed 14 March 1973)

1. **Master and Servant § 93— workmen's compensation — denial of motion for further hearing**

In this workmen's compensation proceeding, plaintiff failed to show that the hearing commissioner abused his discretion in the denial of plaintiff's motion for a further hearing in order to present rebuttal testimony where plaintiff's motion did not state the nature of the rebuttal testimony or show that it would differ from testimony adduced at the original hearing.

2. **Master and Servant § 94— findings of Industrial Commission — appellate review**

Findings of fact of the Industrial Commission are binding on appeal when supported by any competent evidence, even though there be evidence that would have supported contrary findings.

APPEAL by plaintiff from an opinion and award of the North Carolina Industrial Commission entered 24 August 1972.

Plaintiff, Stephen Benfield, instituted this action pursuant to the provisions of the North Carolina Workmen's Compensation Act to recover compensation for injuries suffered by him on 23 January 1967. At a hearing in Statesville on 19 November 1970 before Deputy Commissioner Delbridge, the parties stipulated that "the plaintiff sustained an injury by accident arising out of and in the course of his employment. . . . " At the hearing Dr. Tom Van Goode testified that plaintiff had a 25 per-

cent permanent disability to his feet as a result of the injury. The hearing was continued to Charlotte for the purpose of taking additional medical testimony. On 9 August 1971, Dr. J. R. Hicks testified before Deputy Commissioner A. E. Leake in Charlotte that in his opinion "there was no residual disability as a result of the injury." On 23 August 1971 counsel for plaintiff wrote to the North Carolina Industrial Commission in Raleigh requesting "that the Commission, in its discretion, set this matter for a further hearing in Statesville, North Carolina, in order that Mr. Benfield may present certain rebuttal testimony in regard to this claim." At a hearing in Durham on 16 November 1971 before Deputy Commissioner Ben E. Roney, Jr., plaintiff renewed his motion for an additional hearing in which to present rebuttal testimony. Ruling on this motion was deferred to Deputy Commissioner W. C. Delbridge, the original hearing officer. On 14 December 1971 it was stipulated that the report of Dr. Lenox D. Baker dated 16 September 1968 could be received into evidence without an additional hearing in which to take testimony. In his report Dr. Baker states, "I would give him a 5% disability of the right foot as a minimum and this is probably liberal."

On 28 January 1972 Deputy Commissioner Delbridge denied plaintiff's motion for an additional hearing in which to present rebuttal testimony.

From an opinion and award of Deputy Commissioner Delbridge filed 28 January 1972, plaintiff appealed to the Full Commission.

From an opinion and award of the Industrial Commission dated 24 August 1972 overruling plaintiff's exceptions and affirming the order of Deputy Commissioner Delbridge, plaintiff appealed to this court.

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

Spears, Spears, Barnes & Baker by Alexander H. Barnes for defendant appellees.

HEDRICK, Judge.

[1] Plaintiff first contends "[t]he trial court erred in denying plaintiff's motion for further hearing in order to present rebuttal testimony."

The motion for a further hearing in which to present rebuttal testimony was addressed to the sound discretion of the deputy commissioner and his ruling thereon is not reviewable on appeal absent a showing of abuse of discretion. *Harris v. Construction Co.*, 10 N.C. App. 413, 179 S.E. 2d 148 (1971); *Mason v. Highway Commission*, 273 N.C. 36, 159 S.E. 2d 574 (1968).

Plaintiff did not show in his motion the nature of the rebuttal testimony or that it would differ from testimony adduced at the original hearing. Plaintiff failed to show anything which would have justified a further hearing and has therefore failed to show an abuse of discretion by the hearing officer.

Plaintiff next asserts that "[t]he commission's findings are not supported by competent evidence and do not justify its legal conclusions and decision" but then "candidly concedes . . . that although there is substantial evidence contrary to the Commission's findings and conclusions, its findings appear to be supported by competent evidence and to support the decision."

[2] Findings of fact of the Industrial Commission are binding on appeal when supported by any competent evidence, even though there be evidence that would have supported a contrary finding. G.S. 97-86; *Hales v. Construction Co.*, 5 N.C. App. 564, 169 S.E. 2d 24 (1969), cert. denied 275 N.C. 594 (1969).

The opinion and award of the Industrial Commission is

Affirmed.

Judges MORRIS and VAUGHN concur.

REAL ESTATE EXCHANGE & INVESTORS, INC., A CORPORATION v. BEN TONGUE AND WIFE, CANDACE S. TONGUE; SAM STRAIN AND WIFE, HELEN S. STRAIN; WARREN DEAN AND WIFE, MARGARET S. DEAN; HENRY KERNEY BAKER AND WIFE, RUTH S. BAKER; F. THOMAS SCARBOROUGH AND WIFE, GRACE S. SCARBOROUGH; SUE S. GRIFFIN; GIBSON S. MARTIN, WIDOW; HUBERT G. SCARBOROUGH AND WIFE, ANN T. SCARBOROUGH; ROBERT E. SCARBOROUGH AND WIFE, ELIZABETH C. SCARBOROUGH; A. G. SCARBOROUGH, JR., AND WIFE, JEAN D. SCARBOROUGH, AND W. T. SCARBOROUGH, JR., AND WIFE, EDNA J. SCARBOROUGH

No. 7310SC52

(Filed 14 March 1973)

1. **Appeal and Error § 39— failure to docket appeal in apt time**

Appeal is subject to dismissal for failure to docket the record on appeal within the time allowed by Court of Appeals Rule 5 where the record on appeal was docketed more than ninety days from the date of the judgment and no order of the trial tribunal extending the time for docketing appears in the record.

2. **Brokers and Factors § 4; Principal and Agent § 10— real estate agent — right to purchase principal's property**

An agent employed to sell his principal's property may not himself become the purchaser absent both a good faith full disclosure to the principal of all material facts surrounding the transaction and consent to the transaction by the principal after receiving such disclosure.

3. **Brokers and Factors § 6; Principal and Agent § 10— action to recover real estate agent's commission — agent's offer to purchase — insufficiency of complaint**

Allegations by plaintiff real estate agent that it was granted for a period of time the exclusive right to sell defendants' property for a certain price and upon specified terms, and that during such period plaintiff itself offered to purchase the property at the price and upon the terms specified, but that defendants refused the offer *are held* insufficient to state a claim for relief in an action to recover a real estate agent's commission since plaintiff's allegations establish that it had no lawful right to effect a sale of the property to itself.

APPEAL by plaintiff from *Canaday, Judge,* 12 June 1972 Session of Superior Court held in WAKE County.

Civil action to recover a real estate agent's commission. Plaintiff alleged that defendants listed their real property with plaintiff under an "exclusive listing contract" by which plaintiff was granted for a period the exclusive right to negotiate for the sale of and to sell the property for the price and upon

terms specified in the listing contract, that during such period plaintiff itself offered to purchase the property at the price and upon the terms specified, but defendants refused the offer. Plaintiff sued for the agent's sales commission computed on the listed price at the rate specified in the listing contract. The court allowed defendants' motion under Rule 12(b) (6) to dismiss the complaint for failure to state a claim upon which relief can be granted, and from judgment dismissing the action with prejudice, plaintiff gave notice of appeal.

Cotten & Cotten by Michael A. Cotten for plaintiff appellant.

James M. Kimzey for defendant appellees.

PARKER, Judge.

[1] The judgment appealed from was dated 15 June 1972. The record on appeal was docketed in this Court on 2 November 1972, which was more than ninety days from the date of the judgment. No order of the trial tribunal extending the time for docketing appears in the record. For failure of appellant to docket the record on appeal within the time allowed by the rules of this Court, this appeal is subject to dismissal. Rule 5, Rules of Practice in the Court of Appeals. *State v. Hunt,* 14 N.C. App. 626, 188 S.E. 2d 546; *Phillips v. Wrenn Brothers,* 12 N.C. App. 35, 182 S.E. 2d 285; *Smith v. Starnes,* 1 N.C. App. 192, 160 S.E. 2d 547.

[2, 3] Nevertheless, we have reviewed the record and find the judgment in accord with applicable principles of law. An agent employed to sell his principal's property may not himself become the purchaser absent both a good faith full disclosure to the principal of all material facts surrounding the transaction and consent to the transaction by the principal after receiving such disclosure. This general rule applies although no positive fraud or unfairness may have been practiced by the agent and although he purchases the property "at a fair market price, or at the price set by the principal, and even though he was unable to sell to anyone else at the price fixed." 3 Am. Jur. 2d, Agency, § 226, p. 600. Decisions of our Supreme Court support this statement of the general rule. *Cotton Mills v. Manufacturing Co.,* 221 N.C. 500, 20 S.E. 2d 818; *Mealor v. Kimble,* 6 N.C. 272. In the present case the allegations in plaintiff's complaint establish that defendants did not consent that plaintiff might become the purchaser; plaintiff expressly alleged that no response was re-

ceived from their offer to purchase and that their subsequent tender was refused by the defendants. Since plaintiff's own allegations establish that it had no lawful right to effect a sale of the property to itself, it was not entitled to commissions for attempting to negotiate such a sale, and judgment dismissing the action on the pleadings was proper.

Appeal dismissed.

Judges CAMPBELL and MORRIS concur.

STATE OF NORTH CAROLINA v. LONNIE McLEOD, JR.

No. 7311SC249

(Filed 14 March 1973)

1. **Criminal Law § 43— facsimile of knife used in robbery — admission proper**

In a prosecution for robbery with a dangerous weapon, there was no prejudicial error in the admission of a knife into evidence where, at the time it was offered, the knife was described as a facsimile of the one used in the alleged robbery and where the knife was used by the victim of the robbery to illustrate and explain his testimony.

2. **Criminal Law § 88— cross-examination — invasion of province of jury**

The trial court did not err in sustaining the State's objection to a question on cross-examination of a State's witness as to whether testimony elicited from a prior State's witness was inconsistent with evidence presented by this witness since a conclusion concerning the consistency or inconsistency of various bits of testimony is a matter for the jury to determine and not for the witness.

3. **Robbery § 5— failure to instruct on lesser degree of crime — no error**

The trial court was not required to give an instruction on lesser included offenses in a prosecution for robbery with a dangerous weapon where there was no evidence to support such a charge.

APPEAL by defendant from *Braswell, Judge,* 23 October 1972 Session of Superior Court held in LEE County.

Defendant was indicted for and convicted of robbery with a dangerous weapon. He was sentenced to serve fifteen years imprisonment and was given credit for time served awaiting trial.

The State's evidence tended to show that at about 10:00 a.m. on 19 September 1972, defendant and two others entered W. P. Suggs' Army and Men's Store in Sanford and one, not the defendant, made some purchases. At about noon of the same day, defendant returned to the store, tried on a pair of pants and, at his request, was shown a knife with a four-inch blade. Defendant grabbed Mr. Suggs by the arm and, placing the knife to Mr. Suggs' throat, ordered him to remove $195.00 in cash from the cash register and place it in a paper sack. Suggs was then locked in a dressing room at the rear of the store where he remained some five or six minutes. In addition to the cash, it was determined that some articles of clothing were also missing. Defendant was seen coming from the direction of the store in question at about noon and was carrying "a couple of paper bags." Defendant was located by the police that same day and voluntarily went with them to the store where Mr. Suggs identified defendant and stated that defendant was wearing the stolen pants.

Defendant's evidence tended to show that he went to Suggs' store with two friends at about 10:00 a.m. on the date in question and that one friend purchased some clothing. Subsequently, the three men went to a market where one of defendant's friends purchased some wine and tomatoes. Defendant was given the wine and the bag of clothes to carry and was told to go to a particular location, which he did. Defendant stated that he drank some wine and that sometime after noon he went to a poolroom and then to two different houses. He fell asleep at the second house and was awakened by police officers and voluntarily went with them to Suggs' store where he was placed under arrest. He denied going to the store at noon and denied having tried on any clothing there.

Attorney General Robert Morgan by Ralf F. Haskell, Associate Attorney for the State.

A. B. Harrington III for defendant appellant.

VAUGHN, Judge.

[1] Defendant objects to the introduction of a knife into evidence, arguing that the weapon had no direct connection with the alleged robbery and was inadmissible. The record discloses that, at the time it was introduced, the knife was described as a facsimile of the knife used in the alleged robbery. The knife

was used by the victim of the robbery to illustrate and explain his testimony and the jury was so instructed. No prejudicial error has been made to appear from the introduction of the knife in evidence.

Defendant next complains that the court erred in allowing testimony tending to show that articles of clothing were missing from the store as a result of the robbery when the indictment is silent as to such items. There is no merit to this argument.

[2] Defendant contends the court erred in sustaining the State's objection to a question on cross-examination of a State's witness. Defendant asked the witness whether testimony elicited from a prior State's witness was inconsistent with evidence presented by this witness. The question was improper. A conclusion concerning the consistency or inconsistency of various bits of testimony is a matter for the jury to determine and not for the witness. See *State v. Vestal,* 278 N.C. 561, 180 S.E. 2d 755.

[3] Defendant also challenges the court's failure to instruct the jury that they might return a verdict of guilty of some lesser degree of the crime charged. The necessity for such an instruction arises only when there is evidence from which the jury could find that such included crime of lesser degree was committed. *State v. Carnes,* 279 N.C. 549, 184 S.E. 2d 235. The defendant's evidence tended to show that he committed no crime while the State offered evidence to the effect that defendant committed a completed robbery by the use of a dangerous weapon. There was no evidence that would warrant a finding that defendant was guilty of any other included offense of lesser degree. This and defendant's other assignments of error to the charge of the court are overruled.

No error.

Judges BROCK and GRAHAM concur.

STATE OF NORTH CAROLINA v. HARRY D. REED

No. 7312SC165

(Filed 14 March 1973)

1. **Robbery § 4— armed robbery of a restaurant — sufficiency of evidence**

State's evidence in an armed robbery prosecution was sufficient to withstand nonsuit where it tended to show that defendant entered a restaurant where a witness worked, that he held a gun on the witness and removed money from her presence, that the witness observed defendant for some five minutes in the well-lighted restaurant and that the witness identified defendant directly and unequivocally at the trial as the man who had robbed the restaurant.

2. **Criminal Law § 34— evidence of subsequent robbery — no error**

Reference by a witness to a robbery subsequent to the one in question did not constitute prejudicial error where the reference was necessary to explain the witness's out-of-court confrontation with defendant and where the State made no effort to connect defendant with the subsequent robbery.

3. **Criminal Law § 77— voluntary statements to companion — admissibility**

Voluntary statements made by defendant to a companion while they were both being served with warrants did not result from custodial police interrogation and were properly received in evidence.

APPEAL by defendant from *Brewer, Judge,* 9 October 1972 Session of Superior Court held in CUMBERLAND County.

Defendant was tried under a bill of indictment, proper in form, for the offense of armed robbery. The State offered evidence which tended to show the following:

On 14 January 1972, at approximately 10:30 p.m., defendant entered a Kentucky Fried Chicken restaurant in Fayetteville and placed a gun in the side of the manager, Mrs. Kay Rothgeb. Defendant stated that it was a holdup and removed from Mrs. Rothgeb's presence approximately $820.00. The lighting in the restaurant was good and Mrs. Rothgeb observed defendant's face for about five minutes during the robbery. Several other employees were present and defendant forced them to lie down on the floor. A companion remained at the rear door keeping watch over the employees. The companion was never identified.

In May of 1972, Mrs. Rothgeb saw two men at a bus stop as she drove through Ft. Bragg. She recognized one of the men (Gonzalis) as the man who had robbed her at the same restau-

rant in the latter part of April, 1972. Defendant was not connected with this later robbery. Mrs. Rothgeb summoned a military policeman and while Gonzalis was being arrested, Mrs. Rothgeb noticed that his companion, the defendant, was the man who had robbed her in January of 1972.

Defendant offered evidence which tended to establish an alibi.

The jury returned a verdict of guilty as charged and defendant appeals from a judgment of imprisonment entered upon the verdict.

Attorney General Morgan by Associate Attorney Maddox for the State.

Anderson, Nimocks & Broadfoot by Henry L. Anderson, Jr., for defendant appellant.

GRAHAM, Judge.

[1] Defendant assigns as error the denial of his motion "for a directed verdict and for a mistrial of the case on the grounds that the State's evidence, taken in the light most favorable for the State, fails to show the crime of armed robbery."

The testimony of Mrs. Rothgeb indicates that she had ample opportunity to observe the defendant while the robbery was taking place and her identification of him at the trial was direct and unequivocal. Certainly the evidence was sufficient to take the case to the jury.

The motion for a mistrial was joined with the motion for a directed verdict. No grounds were stated for this motion and we find nothing in the record which would have justified a mistrial.

[2, 3] Other assignments of error, all of which relate to the admission or the exclusion of evidence, have been carefully reviewed and found without merit. The reference of Mrs. Rothgeb to the subsequent robbery of April, 1972 was necessary in order for her to explain how her out-of-court confrontation with defendant in May of 1972 occurred. Since no effort was made by the State to connect defendant with this later robbery, the reference to it in Mrs. Rothgeb's testimony was not sufficiently prejudicial to require a new trial. Voluntary statements made by defendant to Gonzalis while they were both

being served with warrants did not result from custodial police interrogation and were properly received in evidence. *State v. Perry,* 276 N.C. 339, 172 S.E. 2d 541. The exclusion of self-serving statements made by defendant to a police officer was not error. *State v. Chapman,* 221 N.C. 157, 19 S.E. 2d 250.

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

No error.

Judges CAMPBELL and BRITT concur.

BETTY WILLIAMS MEDLIN v. CHARLES THOMAS MEDLIN

No. 7310DC210

(Filed 14 March 1973)

1. **Divorce and Alimony § 18— temporary alimony — insufficient findings to support award**

Since the trial court made no finding that the dependent spouse did not have sufficient means whereon to subsist during the prosecution of the suit and to defray the necessary expenses thereof, the order awarding temporary alimony to plaintiff dependent spouse is vacated.

2. **Divorce and Alimony §§ 23, 24— child custody and support — sufficiency of findings to support award**

Though it would have been better for the trial court to be more specific in stating its findings of fact and conclusions of law in a child custody and support case, there was substantial compliance with applicable statutes and the order is affirmed.

APPEAL by defendant from *Winborne, District Judge,* at the 23 October 1972 Session of District Court for WAKE County.

In this action, instituted 3 August 1972, plaintiff asks for temporary and permanent alimony, custody of and support for minor children, and counsel fees, charging defendant with adultery and abandonment. Following a hearing, the court entered separate orders providing for (1) temporary alimony and (2) child custody and support. Defendant appealed from both orders.

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

Hollowell, Ragsdale & Kirschbaum, P.A. by William L. Ragsdale and Tharrington, Smith & Hargrove by Roger W. Smith for defendant appellant.

BRITT, Judge.

ALIMONY ORDER

[1] This order recites a stipulation by defendant that he had committed the act or acts set forth in G.S. 50-16.2(1). The court found facts including findings that defendant is a supporting spouse, being a practicing physician with a 1971 income of approximately $74,000.00, and that plaintiff is unemployed and a dependent spouse substantially dependent upon defendant for support. The court made conclusions of law based on its findings of fact, awarded plaintiff possession of the home and furnishings, and ordered that defendant pay plaintiff $720.00 per month, pay ad valorem taxes on real and personal property owned by the parties, and pay plaintiff's medical, dental and drug expenses.

Defendant contends the findings of fact and conclusions of law are insufficient to support the alimony order. We reluctantly agree with this contention.

In *Peoples v. Peoples,* 10 N.C. App. 402, 179 S.E. 2d 138 (1971), in an opinion by Chief Judge Mallard, this court, as set forth in headnote 10 of the opinion, held: "To support an award of alimony *pendente lite* to a dependent spouse, there must be factual findings that (1) the dependent spouse is entitled to such relief and (2) the dependent spouse does not have sufficient means whereon to subsist during the prosecution of the suit and to defray the necessary expenses thereof. G.S. 50-16.3(a)(1), (2)."

In the instant case the trial court made no finding that dependent spouse does not have sufficient means whereon to subsist during the prosecution of the suit and to defray the necessary expenses thereof. For that reason the alimony order is vacated and with respect to temporary alimony, the cause is remanded for further proceedings.

CHILD CUSTODY AND SUPPORT ORDER

[2] This order awarded custody of the two minor children of the parties to plaintiff, with specified visitation privileges in

defendant, and provided that defendant would pay $635.00 per month for the support of said children and also pay their medical, dental and drug bills. Defendant contends the trial court failed to "find the facts specially and state separately its conclusions of law thereon" as required by G.S. 1A-1, Rule 52(a)(1). We hold that while it would have been better if the court had been more specific in stating its findings of fact and conclusions of law, there was substantial compliance with applicable statutes. All assignments of error pertaining to the child custody and support order are overruled.

Our decision is: The alimony order is vacated and with respect to temporary alimony, the cause is remanded; the child custody and support order is affirmed.

Judges PARKER and HEDRICK concur.

MARY L. COHEN v. MONUMENTAL LIFE INSURANCE COMPANY

No. 7311SC231

(Filed 14 March 1973)

Insurance § 14; Appeal and Error § 26— death during war — exclusion of liability — no error

There was no error in judgment of the trial court that plaintiff was precluded from recovering for the death of insured who was killed in a helicopter crash in Thailand within one year after effective date of the insurance by a clause in the policy excluding coverage for death within one year resulting from war or any act of war.

APPEAL by plaintiff from *Braswell, Judge,* 20 November 1972 Session of LEE Superior Court.

Plaintiff instituted this action to recover $10,000.00 allegedly due her as beneficiary under a policy of life insurance. Jury trial was waived and the controversy was submitted upon an agreed statement of facts and certain exhibits. The court found facts summarized in pertinent part as follows: (Numbering ours.)

1. On 3 February 1969, Harry Cohen (Cohen) became insured under a policy of insurance issued by defendant. Said policy contained the following exclusion:

"The insurance provided for any Member insured on or after March 1, 1966 shall not cover death within one year after the effective date of such member's insurance which death results directly or indirectly, wholly or partly, from war or any act of war, declared or undeclared."

2. Cohen's death occurred on 19 July 1969 within the boundaries of an air base in Thailand as a result of injuries he sustained on that date when a U. S. Air Force helicopter in which he was riding crashed. At the time of his death Cohen was serving on active duty in the U. S. Air Force as a pararescue and survival technician and was engaged in a rescue mission involving a U. S. Air Force aircraft which had sustained an accident while taking off. The aircraft exploded causing the helicopter to crash. The aircraft was scheduled for a combat mission. Thailand adjoins Vietnam and in July 1969 the United States of America was engaged in armed hostilities in and around Vietnam.

The court concluded that the armed hostilities in which the U.S.A. was engaged in and around Vietnam in July 1969 constituted an undeclared war or act of war within the meaning of the insurance policy aforesaid; that Cohen's death occurred within one year after the effective date of said policy and resulted directly or indirectly, wholly or partly, from an undeclared war or act of war; that Cohen's death resulted from a cause expressly excluded from said policy; therefore, defendant is not liable to the beneficiary for death benefits.

The court adjudged that plaintiff recover nothing from defendant. Plaintiff appealed.

Love & Ward by Jimmy L. Love for plaintiff appellant.

Pittman, Staton & Betts by Lowry M. Betts for defendant appellee.

BRITT, Judge.

Plaintiff's sole exception and assignment of error is to the signing of the judgment. In *Fishing Pier v. Carolina Beach*, 274 N.C. 362, 163 S.E. 2d 363 (1968), in an opinion by Parker, Chief Justice, our Supreme Court said:

"This sole assignment of error to the signing of the judgment presents the face of the record proper for review,

but review is limited to the question of whether error of law appears on the face of the record, which includes whether the facts found or admitted support the judgment, and whether the judgment is regular in form. * * * "

See also *Hall v. Board of Elections,* 280 N.C. 600, 187 S.E. 2d 52 (1972) and *Morris v. Perkins,* 11 N.C. App. 152, 180 S.E. 2d 402 (1971), cert. den. 278 N.C. 702.

In the case at bar, we hold that the facts found by the trial court, or admitted, support the judgment, that the judgment is regular in form, and that error does not appear on the face of the record.

The judgment appealed from is

Affirmed.

Judges PARKER and HEDRICK concur.

STATE OF NORTH CAROLINA v. JOHN HENRY ALLEN

No. 7311SC245

(Filed 14 March 1973)

Criminal Law § 145.1— probation revocation — due process

Defendant was accorded full procedural due process in probation revocation proceedings in the district and superior courts.

APPEAL by defendant from *Braswell, Judge,* 23 October 1972 Session of Superior Court held in LEE County.

On 27 September 1971 defendant pleaded guilty in the District Court to five charges of nonfelonious larceny. He was sentenced to a term of one year in each case, said five one-year sentences to run consecutively. These sentences were suspended and defendant was placed on probation for a period of five years.

On 13 October 1972 defendant was brought before the District Court upon allegations of violations of the terms of his probation. The District Court Judge found that defendant had violated the terms of the probationary judgment and probation was revoked. Defendant appealed to the Superior Court.

On 27 October 1972 Judge Braswell found that defendant had failed to make certain monetary payments required by the probationary judgment; that defendant was convicted on 19 September 1972 of temporary larceny of an automobile; and that defendant was convicted on 26 September 1972 of driving a motor vehicle without an operator's license. Judge Braswell found that defendant had thereby wilfully and without lawful excuse violated the terms and conditions of the probationary judgment. The defendant's probation was revoked and commitment was issued to place the 27 September 1971 sentences into effect. Defendant appealed to this court.

Attorney General Morgan, by Associate Attorney General Heidgerd, for the State.

A. B. Harrington III for the defendant.

BROCK, Judge.

After defendant's trial in September 1971 the trial judge provided defendant with an opportunity for rehabilitation without confinement. Defendant breached the faith the trial judge placed in him.

In the proceedings to inquire into alleged violations by defendant of the terms of his probation, defendant was accorded full procedural due process—and the right of two appeals. We have carefully reviewed the entire record and we find

No error.

Judges VAUGHN and GRAHAM concur.

STATE OF NORTH CAROLINA v. LARKIN MONROE ST. JOHN

No. 7315SC90

(Filed 14 March 1973)

Automobiles § 126; Criminal Law § 34— driving under the influence, second offense — evidence of prior convictions admissible

In a prosecution charging defendant with driving under the influence, second offense, and operating a motor vehicle without first being licensed by the State Department of Motor Vehicles, there was

no error in allowing the State to introduce evidence of defendant's prior conviction and permitting the solicitor to read to the jury the warrant which alleged the prior convictions.

APPEAL by defendant from *Cooper, Judge,* 7 August 1972 Session of Superior Court held in ALAMANCE County.

Defendant, Larkin Monroe St. John, was charged in a warrant, proper in form, with operating a motor vehicle (1) while under the influence of intoxicating liquor, second offense, and (2) without first being licensed by the North Carolina Department of Motor Vehicles. Defendant pleaded not guilty and was found guilty as charged. From a judgment imposing a prison sentence of six months on each count charged in the warrant, defendant appealed.

Attorney General Robert Morgan and Assistant Attorneys Genaral William W. Melvin and William B. Ray for the State.

Latham, Pickard, Cooper and Ennis by M. Glenn Pickard for defendant appellant.

HEDRICK, Judge.

The record contains no exceptions or assignments of error. The following appears in the record as appellant's statement of case on appeal.

> "I have made a study of this record, and I am unable to find any error save the very severe procedure which allows the State to introduce evidence of the defendant's prior conviction and to permit the Solicitor to read to the jury the warrant which alleged the prior convictions."

The procedure complained of was approved and held to be without error in the case of *State v. Owenby,* 10 N.C. App. 170, 177 S.E. 2d 749 (1970).

We have carefully examined the record and find no error on the face thereof. The defendant had a fair trial free from prejudicial error.

No error.

Judges CAMPBELL and GRAHAM concur.

STATE OF NORTH CAROLINA v. DORETHA THOMPSON

No. 7316SC221

(Filed 14 March 1973)

Criminal Law § 143; Intoxicating Liquor § 5— illegal possession of whiskey — illegal possession of beer for sale — revocation of probation — no error

There was no prejudicial error in defendant's trial for illegal possession of whiskey and illegal possession of beer for the purpose of sale, nor was there error in a subsequent hearing in which defendant's probation was revoked and a prison sentence imposed.

APPEALS by defendant from judgments of *McKinnon, Judge,* entered at the 28 August 1972 and 16 October 1972 Sessions of ROBESON Superior Court.

By warrant proper in form defendant was charged with (1) illegal possession of whiskey and (2) illegal possession of beer for purpose of sale. The offenses were allegedly committed on 12 May 1972. Defendant was found guilty in district court and from judgment imposed there, she appealed to superior court where she pleaded not guilty. Following the introduction of evidence by the State in superior court, defendant expressed her desire to change her plea to guilty. After due inquiry to determine if the guilty plea was freely, understandingly and voluntarily made, the court adjudged that it was, accepted the plea and entered judgment that defendant serve 12 months in prison. Defendant gave notice of appeal from said judgment which was entered on 7 September 1972.

On 22 September 1972, following a hearing, the District Court of Robeson County determined that defendant had wilfully violated the terms of a probation judgment entered on 24 January 1972; the court revoked defendant's probation and ordered the activation of a 12 months prison sentence. From the order revoking her probation, defendant appealed to superior court.

On 26 October 1972, following a hearing, Judge McKinnon entered judgment confirming the district court order revoking defendant's probation and ordered the prison sentence activated immediately. Defendant appealed to the Court of Appeals.

Attorney General Robert Morgan by Richard B. Conely for the State.

Musselwhite & Musselwhite by William E. Musselwhite for defendant appellant.

BRITT, Judge.

A careful review of the record reveals no prejudicial error. The judgments appealed from are

Affirmed.

Judges MORRIS and VAUGHN concur.

STATE OF NORTH CAROLINA v. DAN BRINKLEY GODWIN

No. 7314SC196

(Filed 14 March 1973)

Criminal Law § 23— appeal from guilty plea

Defendant's plea of guilty to felonious receiving was freely, understandingly and voluntarily made, and the acceptance of the plea will not be disturbed on appeal.

APPEAL by defendant from *Tillery, Judge,* 23 October 1972 Session of Superior Court held in DURHAM County.

By a three-count bill of indictment proper in form defendant was charged with (1) felonious breaking and entering, (2) felonious larceny, and (3) felonious receiving of certain particularly described chattels of the value of $740.00, well knowing said chattels to have been feloniously stolen. Represented by court-appointed counsel, defendant pled guilty to the charge contained in the third count. From judgment sentencing defendant to prison for a term of not less than three nor more than five years, with recommendation for work release, defendant appealed.

Attorney General Robert Morgan by Assistant Attorney General James E. Magner, Jr. for the State.

Lina Lee S. Stout for defendant appellant.

PARKER, Judge.

Before accepting the plea, the trial judge examined defendant and found his plea was freely, understandingly and volun-

tarily made. Defendant's signed transcript of plea supports these findings. The acceptance of the plea will not be disturbed on this appeal. *State v. Roberts,* 279 N.C. 500, 183 S.E. 2d 647; *State v. Witherspoon,* 279 N.C. 490, 183 S.E. 2d 552. We have carefully examined the record and find

No error.

Judges BROCK and MORRIS concur.

STATE OF NORTH CAROLINA v. JAMES PETTY

No. 7311SC244

(Filed 14 March 1973)

Criminal Law § 23— acceptance of guilty plea

The acceptance of defendant's plea of guilty will not be disturbed on appeal where the trial judge examined defendant before accepting the plea and found that his plea was freely, understandingly and voluntarily made, and defendant's signed transcript of plea supported these findings.

APPEAL by defendant from *Braswell, Judge,* 23 October 1972 Session of Superior Court held in LEE County.

Defendant was indicted for first-degree burglary. He pled guilty to felonious breaking and entering. From judgment sentencing defendant to prison for the term of five years with direction that he receive credit for all time spent in jail awaiting trial, defendant appealed.

Attorney General Robert Morgan by Special Consultant Wade E. Brown for the State.

A. B. Harrington III for defendant appellant.

PARKER, Judge.

Since defendant pled guilty this appeal presents only the question whether error appears on the face of the record proper. *State v. Roberts,* 279 N.C. 500, 183 S.E. 2d 647. None does. Before accepting the plea, the trial judge examined defendant and found that his plea was freely, understandingly and voluntarily made. Defendant's signed transcript of plea supports these

findings. The acceptance of the plea will not be disturbed on this appeal. *State v. Jones,* 278 N.C. 259, 179 S.E. 2d 433.

No error.

Judges CAMPBELL and MORRIS concur.

DOULTON HILL AND MORGAN D. CAMPBELL, T/A CLUB RIVIERA v. STATE BOARD OF ALCOHOLIC CONTROL

No. 7310SC194

(Filed 14 March 1973)

1. **Intoxicating Liquor § 2— suspension of ABC permits — sale of liquor on premises**

In a proceeding to revoke petitioners' on premise beer, restaurants and related places and social establishment permits, there was sufficient evidence to support the State's charge that petitioners sold liquor on the licensed premises in violation of G.S. 18A-3(a), though the evidence was insufficient to support the State's charge that petitioners violated G.S. 18A-25(b) by selling on the licensed premises liquor purchased from a county or municipal store.

2. **Intoxicating Liquor § 2— suspension of ABC permits — identification of club based on hearsay**

Contention that the charges brought by the ABC Board against the operators of a club should be dismissed because the ABC officer's identification of the club where the alleged violations occurred as the Club Riviera was based on hearsay evidence is untenable where the officer's testimony was uncontradicted and both permittees were present on the premises when the violations allegedly occurred.

APPEAL by petitioners from *Bone, Judge,* Civil Session of Superior Court held in WAKE County.

Petitioners operate Club Riviera, located on a Kernersville rural route near Winston-Salem. They hold on premise beer, restaurants and related places, and social establishment permits issued by the State Board of Alcoholic Control. Notice was served upon petitioners to appear before a hearing officer of the State Board of Alcoholic Control on 17 August 1972 and show cause why their permits should not be revoked or suspended for:

"(1) Possession, possession for the purpose of sale and selling and/or allowing the possession, possession for the purpose of sale and the sale of tax-paid liquor and unforti-

fied wine on your retail licensed premise on or about June 2, 1972, 10:30 and 11:30 p.m. and June 4, 1972, 12:15 a.m. in violation of G.S. 18A-3(a) and G.S. 18A-25(b).

(2) Permitting and/or allowing the sale of beer during illegal hours on your retail licensed premise on or about June 3, 1972, 2:10 a.m. in violation of G.S. 18A-33(a).

(3) Failing to give your retail licensed premise proper supervision on or about June 2, 1972, 10:30 and 11:30 p.m., June 3, 1972, 2:10 a.m. and June 4, 1972, 12:15 a.m. G.S. 18A-43(a).

(4) No longer considered to be suitable persons or place to hold a State retail beer, wine, Alcoholic Beverage Restaurants and Related Places and Special Occasions permits. G.S. 18A-43(b)."

Petitioners appeared at the hearing with counsel; however, only the Board presented evidence. Its evidence tended to show that a State ABC officer assigned to the Charlotte-Mecklenburg area was sent to the Club Riviera because of complaints by members of the Winston-Salem Police Department that liquor was being sold at that Club. The officer, accompanied by a confidential informer, arrived at the Club at approximately 10:30 p.m. on 2 June 1972. He testified that he purchased drinks for himself, his informer, and two young women who joined them at their table. One drink was gin and the others were scotch. The drinks were served by a waitress called "Me-Me" and were prepared by one of the petitioners, Morgan Campbell, who is sometimes called "Frog." Payment for the drinks was made to the waitress. The other petitioner, Doulton Hill, was at the door receiving cover charges and stamping customers' hands as they entered. The witness testified that he remained at the Club until the morning of 3 June 1972, and at approximately 2:10 a.m. on that morning he ordered two bottles of Budweiser beer. The beer was served by the same waitress and the witness paid her $1.70 for both bottles.

At 12:15 a.m. on 4 June 1972, the witness went back to the Club and ordered two scotch and 7-Ups. The same waitress, "Me-Me," served the drinks and the witness paid her $2.20 for them. While at the Club on this occasion, the witness saw the same bartender, petitioner Campbell, sell or serve six 4/5 pints of Boone's Farm Wine.

The hearing officer made findings of fact consistent with the evidence and recommended that petitioners' permits be suspended for sixty days. On 11 September 1972, the State Board of Alcoholic Control reviewed the record and findings of the hearing officer and found as a fact that petitioners did "on June 4, 1972, possess and possess for the purpose of sale and did sell liquor on your retail licensed premises and permitted and allowed the sale of beer during illegal hours on your retail licensed premise on or about June 3, 1972, at 2:10 a.m., in violation of G.S. 18A-33(a)."

Based upon these findings, the petitioners' permits were suspended for a period of sixty days. Petitioners appealed to the Wake County Superior Court and from a judgment of that court affirming the action of the Board of Alcoholic Control, petitioners appealed to this Court.

Attorney General Morgan by Associate Attorney Kramer for the State.

Charles J. Alexander III and Robert H. Sapp for petitioner appellants.

GRAHAM, Judge.

[1] Petitioners contend that in order for them to be found in violation of G.S. 18A-25(b), it was necessary for the State to charge and prove that the liquor sold was purchased from a county or municipal store. G.S. 18A-25(b) prohibits the possession for sale, or sales, of any liquor *purchased from any county or municipal store.* While this statute is cited in the notice served upon petitioners, G.S. 18A-3(a) is also cited therein, and the uncontradicted evidence before the Board clearly shows that petitioners violated this section. G.S. 18A-3(a) provides that "[n]o person shall manufacture, sell, barter, transport, import, export, deliver, furnish, purchase, or possess any intoxicating liquor except as authorized in this Chapter." Suffice to say, there is no provision in Chapter 18A of the General Statutes, or in any other law in this State, that authorizes the sale of liquor in private or public clubs or restaurants in this State.

[2] Petitioners further contend that the charges should have been dismissed because the ABC officer's identification of the Club as the Club Riviera was based upon hearsay evidence. This

argument is without merit. The testimony of the witness as to the identification of the Club was not contradicted. Moreover, both of the permittees were present on the premises. One was collecting cover charges at the door and the other was working as a bartender.

Any one of the two violations found by the Board would support the suspension of petitioners' permits. *C'est Bon, Inc. v. Board of Alcoholic Control,* 279 N.C. 140, 181 S.E. 2d 448. The evidence fully supports the findings of the Board as to both violations.

Affirmed.

Judges BROCK and VAUGHN concur.

STATE OF NORTH CAROLINA v. LEONARD GREEN

No. 7310SC252

(Filed 14 March 1973)

ON *certiorari* to review the order of *Braswell, Judge,* November 1971 Session of Superior Court held in WAKE County.

Defendant was charged in six bills of indictment with four counts of armed robbery, one count of kidnapping, and one count of assault with a deadly weapon with intent to kill, inflicting serious injury. The cases were consolidated for trial. During the course of the trial, defendant announced through his counsel that he wished to change his plea of not guilty to a plea of guilty as to all six charges. The court examined the defendant under oath relating to the voluntariness of his plea and the transcript of plea, signed by defendant under oath, appears in the record. Based upon findings made from defendant's response to the inquiries made, the court adjudged that plea of guilty was freely, understandingly and voluntarily made, without undue influence, compulsion or duress, and without promise of leniency. The plea was ordered entered in the record. Three of the armed robbery cases and the kidnapping case were consolidated for judgment and defendant was sentenced to a term of 25 years imprisonment, with credit to be given for 49 days which he had spent in jail awaiting trial. The remain-

ing armed robbery case and the case of assault with a deadly weapon with intent to kill, inflicting serious injury not resulting in death, were consolidated for judgment and defendant was sentenced to a prison term of ten years on these charges, with this sentence to run concurrently with the sentence imposed in the other cases.

Defendant's appeal was not timely perfected; however, on 11 October 1972 we allowed his petition for a writ of certiorari.

Attorney General Morgan by Associate Attorney Heidgerd for the State.

Carlos W. Murray, Jr., for defendant appellant.

GRAHAM, Judge.

The only assignment of error appearing in the record is that the court erred in signing and entering the judgment and commitments against the defendant. Defendant's court appointed attorney states in his brief that he is unable to detect error upon the face of the record proper. We have reviewed the entire record and conclude that there was no error.

No error.

Judges BROCK and VAUGHN concur.

STATE OF NORTH CAROLINA v. JIMMY T. DICKERSON

No. 7314SC239

(Filed 14 March 1973)

APPEAL by defendant from *Bailey, Judge,* 28 August 1972 Session of Superior Court held in DURHAM County.

Attorney General Robert Morgan by Emerson D. Wall, Assistant Attorney General, for the State.

Jerry B. Clayton for defendant appellant.

VAUGHN, Judge.

This is another appeal at the State's expense by an indigent defendant after a plea of guilty. Defendant's plea of guilty to

escape was accepted by the court only after due inquiry and proper adjudication that the same was freely and voluntarily made. The one year sentence imposed was well within the statutory limit. The appeal is without merit.

Affirmed.

Judges BRITT and MORRIS concur.

STATE OF NORTH CAROLINA v. RALPH M. HAITH

No. 7315SC150

(Filed 14 March 1973)

APPEAL by defendant from *Cooper, Judge,* 7 August 1972 Session of Superior Court held in ALAMANCE County.

Attorney General Robert Morgan and Special Counsel Ralph Moody for the State.

T. Paul Messick for defendant appellant.

HEDRICK, Judge.

The defendant, Ralph M. Haith, was charged in a bill of indictment, proper in form, with felonious escape.

The record affirmatively discloses that the defendant, represented by court appointed counsel, freely, understandingly, and voluntarily pleaded guilty to the charge of felonious escape. The judgment imposing a prison sentence of twenty-four months is within the limits prescribed by statute for the offense charged. G.S. 148-45.

We have carefully reviewed the record and no prejudicial error appears on the face thereof. The judgment is

Affirmed.

Judges BRITT and PARKER concur.

(MRS.) EVELYN BARTLETT, WIDOW OF ROBERT B. BARTLETT, DECEASED EMPLOYEE-PLAINTIFF v. DUKE UNIVERSITY, EMPLOYER AND GLENS FALLS INSURANCE COMPANY, CARRIER, DEFENDANTS

No. 7314IC112

(Filed 28 March 1973)

1. **Master and Servant § 60— workmen's compensation — travel away from employer's premises — acts within course of employment**

An employee whose work entails travel away from the employer's premises is within the course of his employment, continuously during the trip, except when distinct departure on a personal errand is shown.

2. **Master and Servant §§ 56, 60— workmen's compensation — choking to death in restaurant — accident arising out of and in course of employment**

Where an employee of Duke University went to Washington, D. C., to interview prospective employees for his department, the employee traveled a distance of 17.3 miles from the office where he was to conduct the interviews to the home of a personal friend and 15.3 miles from there with the friend to a restaurant, and the employee died from choking on a piece of meat in the restaurant, it was held (1) that the employee's death arose "in the course of" his employment since at the time of the accident he was engaged in a necessary act incidental to his trip for the employer, and (2) that his death arose "out of" his employment since the accidental choking resulted from a risk involved in the act of eating.

Judge CAMPBELL dissenting.

APPEAL by defendant from opinion and award of the North Carolina Industrial Commission, filed 24 August 1972.

This is a proceeding under the Workmen's Compensation Act to recover compensation for the death of Robert B. Bartlett who died from choking on a piece of meat in a restaurant near Washington, D. C.

Bartlett, a retired navy commander, was employed by Duke University as the Construction Administrator in the Department of Physical Planning and University Architecture. On 12 March 1970 he was in the Washington, D. C. area to interview several retiring military personnel as prospective employees of his department. He arrived at a naval office near the Pentagon area at about 1:00 p.m. on that date and made arrangements to interview two individuals there on the following morning. Bartlett left that office at approximately 3:30 p.m. At approximately 5:00 p.m. on that date, he arrived at the home of Mrs.

Arline M. Rigoulot who had been a friend of Bartlett and his wife for a period of twenty-one years. The Rigoulot home is located in Fairfax, Virginia, 17.3 miles from the naval office where the interviews were to take place.

After arriving at the Rigoulot home, Bartlett called a motel and cancelled reservations which he had previously made in his name for the night of 12 March 1970. Mrs. Rigoulot testified that Bartlett planned to stay in her home for the night. Mrs. Rigoulot's twenty-six year old son was also there. Bartlett had one drink, a bourbon and water, served by Mrs. Rigoulot's son. About 6:00 p.m., he and Mrs. Rigoulot drove to a restaurant in Arlington, Virginia. The restaurant is 15.3 miles from the Rigoulot home and about 2 miles from the office where Bartlett was to conduct the interviews the next morning.

Bartlett and Mrs. Rigoulot had one cocktail at the restaurant and then ordered shish kebab. None of the meal was eaten. Mrs. Rigoulot noticed that Bartlett was putting a large piece of meat into his mouth. He attempted to swallow the piece of meat, immediately began to choke, and lost consciousness. Bartlett was taken to an Arlington hospital where he died, 10 June 1970, without regaining consciousness. The parties stipulated that his death resulted from complications arising from his inhalation of the piece of meat on 12 March 1970 at the restaurant.

Bartlett had drawn a travel advance of $70.00 from his employer prior to leaving Durham and was to have been reimbursed for reasonable expenses incurred during the trip, including expenses for meals and lodging.

Commission Chairman Bunn found facts substantially as set forth above and concluded: "On March 12, 1970, deceased employee sustained an injury by accident arising out of and in the course of his employment with defendant employer, which injury by accident resulted in the death of the deceased employee on June 10, 1970." An award of compensation was ordered accordingly. Upon appeal to the Full Commission, the opinion and award of Chairman Bunn was affirmed.

Bryant, Lipton, Bryant & Battle by F. Gordon Battle, Theodore H. Jabbs and James B. Maxwell for plaintiff appellee.

Newsom, Graham, Strayhorn, Hedrick & Murray by Josiah S. Murray III for defendant appellants.

GRAHAM, Judge.

Defendants insist that the accident and injury resulting in the death of the deceased employee neither arose out of nor was suffered in the course of his employment.

"Under the Workmen's Compensation Act a compensable death is one which results to an employee from an injury by accident *arising out of* and *in the course of* his employment. G.S. 97-2(6) (1965); *Cole v. Guilford County,* 259 N.C. 724, 131 S.E. 2d 308 (1963). The two italicized phrases are not synonymous; they 'involve two ideas and impose a double condition, both of which must be satisfied in order to bring a case within the Act.' *Sweatt v. Board of Education,* 237 N.C. 653, 657, 75 S.E. 2d 738, 742 (1953)." *Robbins v. Nicholson,* 281 N.C. 234, 238, 188 S.E. 2d 350, 353.

The words "out of" refer to the origin or cause of the accident, and the words "in the course of" refer to the time, place and circumstances under which it occurred. *Bass v. Mecklenburg County,* 258 N.C. 226, 128 S.E. 2d 570, and cases cited.

[1, 2] We hold that Bartlett was in the course of his employment at the time of his accidental choking. An employee whose work entails travel away from the employer's premises is within the course of his employment, continuously during the trip, except when a distinct departure on a personal errand is shown. *Martin v. Georgia-Pacific Corp.,* 5 N.C. App. 37, 167 S.E. 2d 790, and authorities therein cited. "Thus, injuries arising out of the necessity of sleeping in hotels or eating in restaurants away from home are usually held compensable." 1 A. Larson, Workmen's Compensation Law, § 25.00, p. 5-172 (1972).

In *Martin v. Georgia-Pacific Corp., supra,* this Court affirmed an award of compensation for the death of an employee who was struck and killed by an automobile while he was in Milwaukee, Wisconsin attending a one week training program at the request of his employer. At the time of the accident, deceased and some other students were walking to a steak house for dinner after having walked several blocks from their place of lodging to see some yachts moored on the Milwaukee River. In the opinion by Chief Judge Mallard it is noted:

> "In order to attend the training program Martin [the deceased employee] had to travel from North Carolina to Milwaukee. He had to eat and he had to sleep. These were

necessities incidental to the trip. It is clear that he could not accomplish that which was assigned to him by the employer without traveling to Milwaukee, and eating and sleeping while there. We think there was a reasonable relationship between Martin's employment and the eating of meals. The eating of meals was reasonably necessary to be done in order that he might perform the act he was employed to do, to wit, attendance at the training program in Milwaukee. We are of the opinion and so hold that while Martin was on his way to eat the evening meal, under the circumstances of this case, that he was at a place where he might reasonably be at such time and doing what he, as an employee, might reasonably be expected to do, and that in so doing he was acting in the course of and scope of his employment." *Id.* at 43-4, 167 S.E. 2d at 794.

Defendants contend here that deceased was engaged in an activity completely personal to himself at the time of the fatal accident. They rely in particular upon *Perry v. Bakeries Co.*, 262 N.C. 272, 136 S.E. 2d 643, and *Sandy v. Stackhouse, Inc.*, 258 N.C. 194, 128 S.E. 2d 218.

In *Perry, t*he employee was injured while swimming in the pool of a hotel where he was attending a sales meeting at the request of his employer. In *Sandy,* the employee was in South Carolina to assist in repairing power lines for his employer. He was released from duty at about 6:00 p.m. to return the following morning at 6:00 a.m. At about 9:00 p.m. he went to a restaurant approximately a quarter of a mile from the motel where he was staying to purchase a soft drink and some beer to take back to the motel. While returning to the motel he was struck by an automobile and killed.

In neither of the above cases was the employee engaged in an activity essential to the performance of the task assigned him by the employer. It was not necessary for Perry to swim or for Sandy to go to the restaurant after the dinner hour to obtain refeshments for his personal enjoyment. The function in which each was engaged at the time of his injury was of a strictly personal nature. It is true that in the instant case Mrs. Rigoulot was not connected with the duties which deceased was to perform for his employer in the Washington area. Moreover, visiting in her home and dining with her on the occasion in question was undoubtedly for the personal pleasure of deceased. The distinction, however, is that it was necessary for deceased to

eat while away from home on his employer's business. The fact he chose to engage in this essential activity under pleasurable conditions made it no less an act incidental to his employment than would have been the case had he dined alone or at a lunch counter beside a complete stranger.

In explaining that the act of eating by an employee who is away from his home on his master's business is in the course of his employment, the Georgia Supreme Court stated: "The eating of meals, while a pleasure indulged in by a traveling salesman and all mankind, is as necessary to the continuance of his duties as the breath of life; and where his duties take him away from his home, his acts of ministration to himself should not—and we believe do not—take him outside the scope of his employment, so long as he performs these acts in the normal and prudent manner. Such activities, the performance of which are necessary to his health and comfort, while in a sense personal to himself, are nevertheless incidents of his employment and acts of service therein within the meaning of the workmen's compensation act, although only remotely and indirectly conducive to the object of the employment." *Thornton v. Hartford Accident & Indemnity Co.*, 198 Ga. 786, 790, 32 S.E. 2d 816, 819 (1945).

The fact deceased traveled a distance of 17.3 miles from the office where he was to conduct the interviews to the home of Mrs. Rigoulot, and 15.3 miles from there to the restaurant does not, under the circumstances of this case, constitute a deviation from employment which would defeat recovery. At the time of the accident, he was only 2 miles from where his work required him to be the following morning. The record does not show that his employer placed any limitation on where he was to sleep or where he was to eat. Even if we assume that deceased deviated from the course of his employment in going to Mrs. Rigoulot's home for a personal visit, the record shows that at the time of the accident he was engaged in a necessary act "incidental to the trip."

A more difficult question is whether the accident arose out of deceased's employment. ". . . [I]t is generally said that an injury arises out of the employment 'when it is a natural and probable consequence or incident of the employment and a natural result of one of its risks, so there is some causal relation between the injury and the performance of some service of the

employment.' *Perry v. Bakeries Co.*, 262 N.C. 272, 274, 136 S.E. 2d 643, 645 (1964). In other words, to be compensable, '[t]he injury must spring from the employment or have its origin therein.' *Bolling v. Belk-White Co.*, 228 N.C. 749, 750, 46 S.E. 2d 838, 839 (1948)." *Robbins v. Nicholson, supra* at 239, 188 S.E. 2d at 354.

We find no North Carolina case that involves a similar factual situation. However, the case of *Snyder v. General Paper Corp.*, 277 Minn. 376, 152 N.W. 2d 743 (1967), dealt with an identical type of accidental death. There, the deceased employee was a salesman for a paper wholesaler located in Minneapolis. He choked to death on a piece of meat while eating in a Chicago hotel during a business trip for his employer. The Minnesota court divided sharply on the question of whether the accident arose out of deceased's employment. Three justices held unequivocally that it did, reasoning that the event causing injury had its origin in circumstances created by the employer for the purpose of furthering the employer's business, and that the death or injury flowed as a natural consequence therefrom. A fourth justice concurred for the stated reason that deceased, who was dining with a customer at the time of his death, may have lapsed into careless eating habits because he was under stress and tension in attempting to make a sale. The Chief Justice and two justices dissented in separate opinions. The Chief Justice stated that the employee simply took a chunk of meat that was too big, attempted to swallow it without chewing, and choked. He was of the opinion this had no relationship to deceased's employment. One justice was of the opinion that the conditions of deceased's employment had no bearing on the fact that he choked to death while eating. He stated: "His injury resulted entirely from an unintentional but self-inflicted mishap. There is no evidence whatever that the choking was induced by any business activity." *Id.* at 390, 152 N.W. 2d at 752. The justice filing the third dissent agreed with the first two and expressed the further opinion that cases relied upon by the Industrial Commission in awarding compensation were similar but distinguishable.

The closeness of the decision in *Snyder* and the variety of positions taken in the five separate opinions illustrate the closeness of the question involved.

Construing the Workmen's Compensation Act liberally, as we must do, 5 Strong, N. C. Index 2d, Master and Servant, § 47,

and cases cited therein, we hold that the accidental choking in this case did arise out of deceased's employment.

As has been previously noted, the authorities are in general agreement that while an employee is away from home on the business of his employer, eating is a necessary act incidental to his employment. As stated by the Georgia Supreme Court, it is an act of service within the meaning of the Workmen's Compensation Act, "although only remotely and indirectly conducive to the object of the employment." *Thornton v. Hartford Accident & Indemnity Co., supra* at 790, 32 S.E. 2d at 819. In other words, an employee's act of eating under such circumstances is an act of employment. An accident "arises out of" the employment when it results from a risk involved therein or incident thereto. *Bolling v. Belk-White Co., supra.* The question therefore narrows to whether Bartlett's accidental choking resulted from a risk involved in the act of eating.

While the risk of accidentally choking while eating is obviously not as great a risk as that of being injured in a traffic mishap while riding or walking to a restaurant in order to eat, it is nevertheless a risk. It is a fact of life that on infrequent occasions people do accidentally choke to death while eating. Defendants properly point out that this is a risk common to the community in general. However, the distinction is that in this case the act of eating, which subjected deceased to the risk involved, was also an act of his employment.

The only rational distinction we can see between the risk of being struck by a car and killed while on the way to eat *(Martin v. Georgia-Pacific Corp., supra)* and the risk of being accidentally injured while actually engaged in the act of eating, is that experience establishes that the former risk is substantially greater than the latter. The degree of risk, however, is not controlling. The causative danger need not have been foreseen or expected, but after the event it must appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a rational consequence. *Robbins v. Nicholson, supra.*

We have not overlooked the two North Carolina cases principally relied upon by defendants in contending that the injury and resulting death did not arise out of deceased's employment.

In *Cole v. Guilford County,* 259 N.C. 724, 131 S.E. 2d 308, the deceased's fall was caused *solely* by an idiopathic condition

unrelated to her employment. In the instant case, there was no showing that the employee choked because of any physical or mental anomaly or disease. The evidence does indicate that he may have been negligent in attempting to swallow a piece of meat that was too large. However, the negligence of an employee does not bar him from compensation for an injury by accident arising out of and in the course of his employment. *Stubblefield v. Construction Co.*, 277 N.C. 444, 177 S.E. 2d 882; *Allred v. Allred-Gardner, Inc.*, 253 N.C. 554, 117 S.E. 2d 476. In the recent case of *Robbins v. Nicholson, supra,* two employees of a grocery store were unexpectedly shot and killed by feme deceased's jealous husband while the employees were working on their employer's premises. The Supreme Court reversed and remanded a decision allowing compensation for the deaths. We simply note that being shot by a jealous husband did not arise from the risk of any service being performed by the employees for their employer. In this respect, that case is distinguishable from the instant case.

Affirmed.

Judge HEDRICK concurs.

Judge CAMPBELL dissenting:

If it be conceded that Bartlett had not deviated from his employment when he was eating with a friend on a purely personal and social occasion and at the time in no way conducting any business for his employer, which is going far, nevertheless, I find no causal relationship between the choking on a piece of steak and working for Duke University. The death in the instant case did not "arise out of the employment" as I understand that requirement in order to be compensable. Judge Graham has reviewed the authorities, and nothing would be gained by a repetition thereof. His opinion is full and complete. The Minnesota case at least presented a situation where the employee was entertaining a prospective customer in an effort to make a sale. This situation does not exist in the present case. I think *Robbins v. Nicholson,* 281 N.C. 234, 188 S.E. 2d 350 (1972), is controlling.

JANEY HARRIS v. DEWEY PARKER, GLENNON PARKER, AND CHARLIE PARKER

No. 7230SC538

(Filed 28 March 1973)

1. **Husband and Wife § 15— entirety property — effect of conveyance by one spouse on survivor's rights**

Since one of the incidents of an estate by the entireties is that neither the husband nor the wife can defeat the other's right of survivorship in the land by a conveyance or encumbrance to a third party, neither the 1955 conveyance of entireties property by plaintiff's husband to defendants, in which plaintiff did not join, nor defendants' possession of the property under that conveyance could serve to defeat plaintiff's right of survivorship so long as plaintiff's marriage to grantor husband remained undissolved by death or by absolute divorce.

2. **Husband and Wife § 17; Rules of Civil Procedure § 56— summary judgment based on finding of divorce by judge — judge as trier of facts — error**

In an action to recover possession of and establish title to real property plaintiff's motion for summary judgment did not make the trial judge the trier of facts, rather, the motion presented to the trial court only the question whether there was no genuine issue as to any material fact; therefore, entry of summary judgment for plaintiff was improper where it was based on the judge's finding that plaintiff and grantor of the deed in question never obtained any divorce.

3. **Husband and Wife § 17; Rules of Civil Procedure § 33— filing of interrogatories — investigation as to divorce — summary judgment improper**

In an action to recover possession of and establish title to real property where the determining factor was whether plaintiff was divorced from the grantor of the deed in question, the trial court erred in granting summary judgment for plaintiff without first affording defendants an adequate opportunity to complete their discovery proceedings which had been initiated by the filing of interrogatories.

4. **Husband and Wife § 17; Rules of Civil Procedure § 33— interrogatories — reasonableness of information sought**

Defendants' interrogatories containing questions as to plaintiff's residences, marriages, husbands and children sought information reasonably calculated to lead to the discovery of admissible evidence concerning the crucial fact of divorce or no divorce in this case, and entry of summary judgment improperly denied defendants an opportunity to produce evidence favorable to their cause.

APPEAL by defendants from summary judgment dated 12 April 1972 rendered by *Thornburg, Judge,* after hearing in Chambers in Superior Court in JACKSON County.

Civil action to recover possession of and establish title to real property. In her verified complaint plaintiff alleged: She is a resident of South Carolina and defendants are residents of Jackson County, North Carolina. In 1917 she was lawfully married to Ben H. Harris. On 3 November 1917 plaintiff and her said husband bought a tract of land in Jackson County, N. C., and received a warranty deed thereto executed to them as man and wife, which deed was duly recorded in the Jackson County Registry on 3 November 1919 in Deed Book 80 at page 459. (The copy of this deed attached to the complaint as Exhibit A shows it was dated 3 November 1919 and filed for registration 4 December 1919.) About 1925 Ben H. Harris, by cruel and inhuman treatment, forced plaintiff to leave home. Some time thereafter Ben H. Harris, without having first obtained any divorce from plaintiff, entered into a purported marriage and commenced living with a woman who was thereafter known as Lantis Harris. Plaintiff has never obtained a divorce from Ben H. Harris. On 2 July 1955 Ben H. Harris and his purported wife, Lantis Harris, executed a paper writing, a copy of which was attached to the complaint as Exhibit B, purporting to be a warranty deed to defendants describing the same lands as described in Exhibit A. By virtue of this purported deed, which was recorded in Book 210 at page 473, defendants hold possession of and claim an interest in the lands described therein. On 4 December 1970 Ben H. Harris died and plaintiff, his sole surviving legal spouse, became entitled to sole ownership and possession of the lands. Plaintiff prayed judgment that she recover possession of the lands, that defendants' purported deed in Book 210 at page 473 be stricken as a cloud on her title, and that she be declared owner of the lands in fee simple.

Defendants filed answer in which they admitted plaintiff's allegations concerning the deed which was attached to the complaint as Exhibit A, admitted that Ben H. Harris married Lantis Harris, admitted the execution and delivery of the deed to them from Ben H. Harris and Lantis Harris which was attached to the complaint as Exhibit B, and admitted that they hold possession and claim title pursuant thereto. Defendants also admitted the death of Ben H. Harris on 4 December 1970. They alleged they "are without sufficient information or belief to admit or deny" that plaintiff was lawfully married to Ben H. Harris in 1917, or that subsequently Ben married Lantis without having first obtained any divorce from plaintiff, or that plaintiff has never obtained a divorce from Ben. As affirmative de-

fenses defendants alleged that they have adversely possessed the property claimed for more than twenty years and under color of title for more than seven years next preceding the commencement of this action.

On the same date they filed answer, 2 March 1972, defendants filed written interrogatories pursuant to G.S. 1A-1, Rule 33, directed to the plaintiff and calling upon plaintiff to answer under oath some twenty-two questions. Included were questions as to the date of plaintiff's separation from B. H. Harris, her places of residence and dates of occupancy from the date of such separation until the present, the name of any man with whom plaintiff had lived in a state of marriage since her separation from B. H. Harris, the dates and locations of all marriage ceremonies in which plaintiff participated subsequent to her separation from B. H. Harris, the names, dates of birth, and current addresses of any children born to plaintiff, the name of the father of each such child, whether plaintiff had ever been known by the name of Janie Kinley, whether she had ever entered a marriage ceremony with a man named Kinley, and whether she had ever gone by or been known by any names other than Janey Harris or Janie Kinley.

By written notice dated 7 March 1972 plaintiff's counsel notified defendants that plaintiff objected to the interrogatories "for that the same are irrelevant to this cause," and that plaintiff would move before Judge Thornburg at 10 a.m. on 18 March 1972 "for a protective Order on the same, in accordance with the provisions of N. C. Rules of Civil Procedure." By written notice, also dated 7 March 1972, plaintiff notified defendants that plaintiff would also move before Judge Thornburg on 18 March 1972 for summary judgment "upon the pleadings and affidavits to be then submitted." No hearing was held on 18 March 1972 pursuant to these notices. Instead, on that date plaintiff filed affidavits in support of her motion for summary judgment and filed a notice of hearing to be held before Judge Thornburg on 1 April 1972 on plaintiff's motions for summary judgment and "for an Order suppressing defendants' Interrogatories."

In support of her motion for summary judgment, plaintiff filed two affidavits of her own, one by her brother, Wade Harris, and one by a Whitney Massingale. In her own affidavit plaintiff stated that she was lawfully married to Ben Harris on 25 February 1917 in Jackson County, N. C., and attached a certified

certificate of the marriage issued by the Register of Deeds as custodian of the marriage records; that she and Ben Harris separated about 1921 and that Ben never obtained a divorce from her and she never obtained a divorce from him; that in the latter part of 1930 Ben Harris commenced living with a woman named Lantie Broom, who subsequently took on the name of Lantie Harris; that Ben Harris and Lantie Broom were never lawfully married to each other; that plaintiff never joined in the paper writing of 2 July 1955 executed by Ben Harris and his purported wife, Lantie Harris; that plaintiff never conveyed the property to defendants or to any other person; and that she did not know the defendants and had never been notified by them that they were holding the land adversely to her. Wade Harris's affidavit states that his sister, the plaintiff, "never got a divorce from Ben Harris and to the best of my knowledge, Ben Harris never got a divorce from my sister." Massingale's affidavit states that in 1919 he was a neighbor of Ben and Janey Harris and frequently visited in their home; that about 1921 Ben Harris and Janey Harris separated, and that about 1930 "Ben Harris moved back in his house with a female person named Lantie Broom, and they continued to live there."

In opposition to plaintiff's motion for summary judgment, defendants presented copies of certain court records in an action instituted in the Superior Court of Jackson County in December 1935, entitled "John D. Broom v. B. H. Harris and Jane Harris Kinley," brought to foreclose a tax sale certificate issued for unpaid 1933 taxes covering a one-half undivided interest of Jane Harris Kinley in the lands in controversy in the present action. In this tax foreclosure proceeding judgment was entered by default in favor of the plaintiff, and a commissioner was appointed to sell the property covered by the tax sale certificate. A report of sale dated 11 April 1936 was signed by the commissioner and a final decree dated 24 July 1936 was signed by the clerk of superior court directing the commissioner to make and deliver a deed to John D. Broom, the last and highest bidder. No deed from the commissioner appears in the present record. In the 1935 tax foreclosure proceeding service was had upon Jane Harris Kinley by publication, based upon an affidavit dated 16 December 1935 sworn to on that date by the plaintiff, John D. Broom, in which it was stated that Jane Harris Kinley was a nonresident of North Carolina and was a citizen and resident of South Carolina.

Plaintiff's motion for summary judgment was heard by Judge Thornburg upon the verified pleadings, the affidavits presented by plaintiff, and the court records in the tax foreclosure proceeding. By judgment dated 12 April 1972 Judge Thornburg found that defendants failed to respond to plaintiff's motion for summary judgment "by affidavit or otherwise as provided by Rule 56, failing to set forth any specific facts showing that there is a genuine issue for trial, and that there is no genuine issue as to any material fact." Judge Thornburg concluded as a matter of law that upon the death of Ben Harris on 4 December 1970, the plaintiff, as his widow and surviving tenant by the entireties, became the sole owner of the lands in controversy. Summary judgment was entered adjudging that plaintiff is the owner and entitled to immediate possession of said lands. Defendants appealed.

Louis Wilson and Stedman Hines for plaintiff appellee.

Hall, Holt & Haire by Ben Oshel Bridgers for defendant appellants.

PARKER, Judge.

[1] Determinative of the rights of the parties is whether plaintiff's marriage to Ben H. Harris was dissolved by an absolute divorce. If it was not, then upon Harris's death in 1970 plaintiff became sole owner of the property as surviving tenant by the entireties, and neither the 1955 conveyance to defendants, in which plaintiff did not join, nor defendants' possession of the property under that conveyance, could serve to defeat plaintiff's right of survivorship.

The common-law estate by the entireties remains unchanged by statute in North Carolina. *Combs v. Combs,* 273 N.C. 462, 160 S.E. 2d 308. "One of the incidents of an estate by the entireties is that neither the husband nor the wife can defeat the other's right of survivorship in the land by a conveyance or encumbrance to a third party." *Council v. Pitt,* 272 N.C. 222, 158 S.E. 2d 34. However, "[d]uring the existence of the tenancy by the entirety, the husband has the absolute and exclusive right to the control, use, possession, rents, income and profits of the lands, and he does not have to account to his wife for the rents and income received from the property." *Board of Architecture v. Lee,* 264 N.C. 602, 142 S.E. 2d 643. Therefore, during the marriage the husband may convey or encumber the property

to the extent of his common-law interest therein, including his rights to the rents, profits, and usufruct of the property, *Bank v. Hall,* 201 N.C. 787, 161 S.E. 484; *Dorsey v. Kirkland,* 177 N.C. 520, 99 S.E. 407, and if he survive, his grantee under a warranty deed may even acquire title by way of estoppel. *Davis v. Bass,* 188 N.C. 200, 124 S.E. 566. Applying these well-established principles to the facts of this case, it is apparent that so long as plaintiff's marriage to Ben H. Harris remained undissolved by death or by absoute divorce, defendants' possession of the property under the 1955 deed could not be adverse to plaintiff's survivorship rights nor could that deed serve to defeat those rights.

[2, 3] In entering summary judgment for plaintiff, the trial court found that "Janey Harris never obtained any divorce from Ben Harris and said Ben Harris never obtained any divorce from Janey Harris." Had the trial court been the trier of the facts, this finding would have ended the matter, for the judgment entered correctly applies the law arising from such a factual determination. Plaintiff's motion for summary judgment, however, did not make the trial judge the trier of the facts. The motion presented to the trial court only the question whether there was no genuine issue as to any material fact. As we view this case, the crucial question presented to this Court by this appeal is whether the trial court was correct under the circumstances of this case in ruling on plaintiff's motion for summary judgment and in determining there was no genuine issue as to any material fact without first affording defendants an adequate opportunity for completing the discovery process which obtaining answers to their interrogatories would have permitted. In our opinion, and we so hold, the trial court committed error in granting summary judgment under the circumstances of this case without first affording defendants an adequate opportunity to complete their discovery proceedings which had been initiated by the filing of interrogatories.

[4] The trial court may have granted summary judgment without first requiring answers to the interrogatories on the theory that no answer to any of the questions therein could have been directly admissible and relevant to raise a genuine issue as to any material fact. The scope of discovery authorized by our Rules of Civil Procedure, however, is not so limited. G.S. 1A-1, Rule 33, provides (in part) that "[i]nterrogatories may relate to any matters which can be inquired into under Rule

26(b)," and Rule 26(b) provides that "[i]t is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence." We make no decision on this appeal as to whether defendants are entitled to an answer to each individual question contained in their interrogatories, since the trial court made no rulings in that regard, but we think it apparent that at least some of the information sought "appears reasonably calculated to lead to the discovery of admissible evidence" concerning the crucial fact of divorce or no divorce in this case.

Plaintiff's affidavit indicates that she and Ben Harris separated in 1921 and remained separate and apart until Ben's death in 1970, a period of almost half a century. During at least a part of that period plaintiff was a nonresident of North Carolina, though exactly where she has resided is not disclosed. Investigation as to whether a person has or has not obtained a divorce throughout such a long period of time is at best a formidable task. If it is not known where from time to time the person resided, any significant investigation becomes well-nigh impossible. Obtaining answers to their interrogatories would greatly facilitate defendants' search. Even though their search may produce no evidence favorable to their cause, they are nevertheless entitled to a fair opportunity to try. The entry of the summary judgment under the circumstances of this case denied them that opportunity.

While we rest our decision on the grounds above stated, we note that the presumption recognized in this State in favor of the validity of a second marriage, *Chalmers v. Womack*, 269 N.C. 433, 152 S.E. 2d 505; *Kearney v. Thomas*, 225 N.C. 156, 33 S.E. 2d 871; Annotation, 14 A.L.R. 2d 7, may have been alone sufficient to require submission of this case to the jury.

Reversed and remanded.

Judges VAUGHN and GRAHAM concur.

H. L. KING, ADMINISTRATOR OF THE ESTATE OF BYRON SHARPE, DECEASED v. RONALD K. GRINDSTAFF, SR., RONALD K. GRINDSTAFF, JR., INDIVIDUALLY AND TRADING AS RONALD K. GRINDSTAFF & SON; LEONARD ROSS LEWIS AND BRADLEY LUMBER COMPANY, INC.

H. L. KING, ADMINISTRATOR OF THE ESTATE OF BERLIN SHARPE, DECEASED v. RONALD K. GRINDSTAFF, SR., RONALD K. GRINDSTAFF, JR., INDIVIDUALLY AND TRADING AS RONALD K. GRINDSTAFF & SON; LEONARD ROSS LEWIS AND BRADLEY LUMBER COMPANY, INC.

No. 7321SC163

(Filed 28 March 1973)

1. **Judgments § 36— res judicata — identity of parties — personal injury actions in federal court — wrongful death actions in state court**

Where an automobile occupied by a husband, his wife and their two children collided with a truck, the husband and one child were killed and the wife and other child were injured, the wife and injured child recovered judgments for their personal injuries in federal court against the driver of the truck, its owner and the corporation for which the truck was hauling lumber at the time of the accident, wrongful death actions were instituted in a state court against the same defendants by the personal representatives of the deceased husband and child, and the wife and child who were plaintiffs in the federal personal injury actions would be the sole beneficiaries of any recovery in the wrongful death actions, there was a sufficient identity of parties in the two actions to support a plea of *res judicata* in the state wrongful death actions so that the only issue remaining for the jury in those actions is the issue of damages.

2. **Principal and Agent § 9— liability of principal for agent's negligence — action in scope of employment**

Although there was no specific finding in a federal court judgment that a truck driver was acting in the scope of his employment with the corporate defendant at the time he collided with an automobile, such finding was implicit in the court's determination that the corporate defendant was liable for the negligence of the truck driver.

APPEAL by defendant Bradley Lumber Company from *Collier, Judge,* 13 October 1972 Session, Superior Court, FORSYTH County.

These two wrongful death actions resulted from an automobile-truck collision which occurred in Davidson County on 25 November 1966. The truck was operated by defendant Lewis, was owned by defendant Grindstaff and Son, and was used to

haul lumber for defendant Bradley Lumber Company under an agreement between Grindstaff and Bradley. The automobile was occupied by Berlin Sharpe, his wife, Alice Sharpe, and their two minor children, Juanita Sharpe and Byron Sharpe. Alice Sharpe was the driver. All of the Sharpes were injured in the accident. As a result of injuries received in the accident, Berlin Sharpe died on 25 November in Davidson County, and Byron Sharpe died later the same day in Forsyth County.

Alice Sharpe and Juanita Sharpe, by her next friend, brought separate personal injury actions in United States District Court, Middle District of North Carolina, Winston-Salem Division, against the same defendants herein, *Sharpe v. Grindstaff,* 329 F. Supp. 405 (M.D.N.C. 1970). Both plaintiffs alleged that Lewis was negligent, that his negligence was the proximate cause of the injuries sustained, and that Lewis was driving the truck as the agent and servant of the Grindstaffs and Bradley and in furtherance of their business and within the scope of his authority from them. The material allegations were denied by defendants.

The causes were heard by Judge Gordon without a jury, who found Lewis negligent, and Mrs. Sharpe free of contributory negligence. He found that the Grindstaffs admitted that Lewis was their employee and was driving their truck within the course of his employment, and they were, under the doctrine of *respondeat superior,* liable, as well as Lewis, for whatever damages plaintiffs might be awarded. As to Bradley, however, he found that Bradley retained no control over Lewis or Grindstaff nor over their method of operation and, therefore, Bradley was not liable for Lewis' negligence at the time of the accident. He awarded damages against the Grindstaffs in favor of plaintiffs in the total amount of $115,000, and dismissed the actions as to Bradley.

On appeal, the Circuit Court of Appeals recited the facts and said: "We think these facts ineluctably establish that Lewis was no less an employee of the Bradley Lumber Company than of R. K. Grindstaff & Son and that his negligence which brought injuries to the Sharpes is imputable to both." *Sharpe v. Bradley Lumber Co.,* 446 F. 2d 152, 155 (4th Cir. 1971). That Court held that the plaintiffs were entitled to judgment against Bradley as well as the Grindstaffs and reversed and remanded for entry of judgment in favor of plainitffs against

Bradley. Bradley petitioned the Supreme Court for a writ of certiorari, which was denied. *Bradley Lumber Co. v. Sharpe,* 405 U.S. 919, 92 S.Ct. 946, 30 L.Ed. 2d 789 (1972).

Pleadings in these two actions *sub judice* contain the same allegations as in the Federal court actions. Plaintiffs in the State actions, after obtaining leave of court, amended the complaints and pleaded the doctrine of *res judicata* by virtue of the findings of fact, conclusions of law, and judgments in the companion cases in the Federal Court, alleging that the only issue remaining for the jury is the issue of damages. Defendant Bradley answered, moving to dismiss plaintiffs' plea of *res judicata.*

Plaintiffs then filed a motion for summary judgment. The court, by order entered, granted the motion and directed that the causes be placed on the jury calendar for trial on the sole issue of damages.

Defendant Bradley appealed.

Deal, Hutchins and Minor, by Fred S. Hutchins, Sr., and William Kearns Davis, for plaintiff appellees.

Womble, Carlyle, Sandridge and Rice, by W. F. Womble, and Smith, Moore, Smith, Schell and Hunter, by Richmond G. Bernhardt, Jr., for defendant appellant.

MORRIS, Judge.

The sole question presented on this appeal is whether the court erred in allowing plaintiff's motion for summary judgment, based on their plea of *res judicata,* leaving only the issue of damages for trial.

> " 'The doctrine of *res judicata* as stated in many cases is that an existing final judgment rendered upon the merits, without fraud or collusion, by a court of competent jurisdiction, is conclusive of rights, questions, and facts in issue, as to parties and their privies, in all other actions in the same or any other judicial tribunal of concurrent jurisdiction.' 30A Am. Jur., Judgments, § 324, p. 371. In order for a judgment to constitute *res judicata* in a subsequent action there must be identity of parties, subject matter, issues and relief demanded, and it is required further that the estoppel be mutual." (Citations omitted.) *Shaw v. Eaves,* 262 N.C. 656, 661, 138 S.E. 2d 520 (1964).

[1] Appellant first contends that the identity of parties requirement is not met. We do not agree.

It is conceded that plaintiffs in the Federal personal injury actions, Alice K. Sharpe and Juanita Sharpe, would be the sole beneficiaries of any recovery in the wrongful death actions now before us.

> "It is said that identity of parties is not a mere matter of form, but of substance; parties nominally the same may be, in legal effect, different; and parties nominally different may be, in legal effect, the same.
>
> For the purpose of the rule of res judicata, 'parties' has been defined to include all persons who have a direct interest in the subject matter of the action and have a right to control the proceedings, defend, examine the witnesses, and appeal if an appeal lies." 46 Am. Jur., 2d, Judgments § 529, p. 680.

It is true, as appellant suggests, that had Berlin Sharpe and Byron Sharpe survived and brought actions for personal injuries neither would be bound by the judgments in the Federal personal injury actions. Appellant argues that their personal representatives should not be bound. However, the cause of action given by statute to the personal representative for the wrongful death of the deceased is not a cause of action which belonged to the deceased person nor is it a cause of action in which he had any interest. The personal representative is the person designated by statute to bring the action, but he derives no right, title, or authority from his intestate. He occupies a position similar to a trustee in respect to the fund he may recover for the benefit of the persons who are entitled to receive it as beneficiaries under the statute of distribution. In an action for the recovery of damages for wrongful death, such as the actions before us, the real party in interest is the beneficiary under the statute for whom the recovery is sought—not the personal representative. *In re Estate of Ives,* 248 N.C. 176, 102 S.E. 2d 807 (1958); *Davenport v. Patrick,* 227 N.C. 686, 44 S.E. 2d 203 (1947).

In *Deaton v. Elon College,* 226 N.C. 433, 38 S.E. 2d 561 (1946), plaintiff administratrix's action was based on negligence and the appeal presented the question of whether the trial court erred in granting defendant's motion for nonsuit.

The Court noted that there had been a previous action brought by the plaintiff against the same defendant in which it had been determined that the status of deceased was that of an independent contractor in his relations with defendant. The Court said:

> "The widow and children of the deceased were the claimants in the former proceeding. *Hayes v. Elon College,* 224 N.C. 11. They are the ultimate beneficiaries in case of recovery in this action. Hence the former decision of this Court is *res judicata* as to the status of deceased as an independent contractor in his relations with defendant."

The Court went on to say that it did not, however, bar plaintiff's right to maintain the action then before the Court because the issues were not the same because the recovery in the first action depended upon a master-servant relationship and in the second action recovery depended upon a finding of negligence on the part of defendant. We think Justice Barnhill's language applicable to the case *sub judice.* The plaintiffs in the Federal cases are the ultimate beneficiaries in case of recovery in these actions. If the issues determinative of liability are the same and were determined in the Federal cases, the plea of *res judicata* was properly allowed. Bradley contends they were not.

The District Court found that Lewis, driver of the truck, was negligent; that his negligence was a proximate cause of plaintiffs' injuries; and that Alice Sharpe, driver of the Sharpe automobile, was not contributorily negligent. The Court on the question of agency said: "R. K. Grindstaff and Ronnie Grindstaff transacting business as 'R. K. Grindstaff and Son', a partnership, readily admit that at the time of the collision Leonard Ross Lewis was employed by them and that he was driving their truck within the course of his employment. Thus, under the doctrine of *respondeat superior* they, as well as Lewis, are liable for whatever damages plaintiffs might be awarded." *Sharpe v. Grindstaff, supra,* p. 409. The Court concluded from the facts found that "[s]ince Bradley Lumber Company, Inc., retained no control over Lewis or Grindstaff as individuals nor over their method of operation, the corporation cannot be considered their employer. Bradley Lumber Company, Inc., therefore, is not liable for the negligence of Lewis on November 25, 1966." *Id.* p. 410. The Court also concluded "that Alice K. Sharpe and Juanita Sharpe, as a proximate result

of the negligence of Leonard Ross Lewis, suffered severe and multiple injuries; that Leonard Ross Lewis, when the collision in question occurred, was acting within the scope of his employment for R. K. Grindstaff and Son; that there was no agency relationship either between Lewis and Bradley Lumber Company, Inc., or between the Grindstaffs and Bradley Lumber Company, Inc., and that Alice K. Sharpe was not contributorily negligent in the driving of her automobile." *Id.* p. 411. Plaintiffs appealed to the Circuit Court of Appeals. That Court, in reciting the facts, said: "R. K. Grindstaff & Son were engaged in the business of sawmilling and trucking, the latter activity under the direction and control of the junior partner, Ronnie Grindstaff. In November, 1966, the time of the accident, the partnership owned three tractor-trailer units, two of which were closely tied in with the operations of the Bradley Lumber Co. One was leased to the company on a permanent basis. The other, driven regularly by Lewis, was devoted largely, though not exclusively, to hauling lumber for the Bradley Lumber Co., and was garaged at Bradley's place of business in Marion, North Carolina. It was this vehicle that collided with the Sharpes' automobile shortly after Lewis had completed delivering a load of lumber in Lexington, North Carolina for the Bradley Lumber Company. Bradley's payments for the use of the leased vehicle and for the hauling performed by Lewis amounted to nearly half the annual gross income of the Grindstaff partnership." *Sharpe v. Bradley Lumber Co., supra,* p. 154. The Court, after setting out other facts relating to the relationship of the Grindstaffs, Lewis, and Bradley said, "We think that these facts ineluctably establish that Lewis was no less an employee of the Bradley Lumber Company than of R. K. Grindstaff & Son *and that his negligence which brought injuries to the Sharpes is imputable to both.*" *Id.* p. 155. (Emphasis supplied.) The Court concluded " . . . the appellants are entitled to judgment against Bradley Lumber Company as well as R. K. Grindstaff & Son." *Id.*

[2] Appellant argues forcefully that there was no finding that Lewis, though an employee of Bradley, was acting in the course and scope of his employment. The District Court noted in its memorandum opinion the principle that Federal courts, sitting in civil actions by virtue of diversity jurisdiction apply the substantive law of the forum state. In North Carolina, under the doctrine of *respondeat superior,* the employer can be held liable for the negligence of the employee only if the evidence introduced at

trial is sufficient to establish (1) that the employee was negligent, (2) that his negligence was a proximate cause of plaintiff's injuries, and (3) that the relationship of master and servant existed at the time of the injury and in respect to the very transaction out of which the injury arose. *Graham v. Gas Co.*, 231 N.C. 680, 58 S.E. 2d 757 (1950). The matter was heard in the Federal District Court before the judge without a jury, so the usual issues upon which liability could be predicated were not submitted and answered. Before the Federal District Court and the Circuit Court of Appeals could conclude that both Grindstaff and Bradley were liable for the negligence of Lewis, they were compelled to find and conclude that the relationship of master and servant existed at the time of the injury and in respect to the very transaction out of which the injury arose. Although the judgment does not set out in detail and with particularity the specific fact that Lewis was acting in the scope of his employment at the time of the collision, we are of the opinion that the issues determinative of Bradley's liability were answered by the court.

Judgments of the Federal courts are accorded full faith and credit in our courts when pleaded as *res judicata. Motor Lines v. Johnson,* 231 N.C. 367, 57 S.E. 2d 388 (1950); 5 Strong, N. C. Index 2d, Judgments, § 38, p. 80.

We conclude that the trial court did not err in granting plaintiffs' motion for summary judgment and directing that the causes be placed on the jury calendar for trial on the sole issue of damages.

Affirmed.

Chief Judge MALLARD and Judge HEDRICK concur.

J. T. TAYLOR, JR., AND WIFE, DORA W. TAYLOR, PETITIONERS v. JOE ASKEW AND WIFE, THELMA ASKEW, DAVID BOWEN AND WIFE, MAXINE BOWEN, B. B. BOWEN, C. G. RESPESS AND WIFE, MYRTLE RESPESS, H. L. RESPESS AND WIFE, ELOISE RESPESS, BEULAH RESPESS, WIDOW, DEMPSEY BOWEN AND WIFE, ALMA A. BOWEN, AND HERMAN BOWEN AND WIFE, GLADYS BOWEN, RESPONDENTS

No. 722SC526

(Filed 28 March 1973)

1. **Highways and Cartways § 12— condemnation of cartway — absence of reasonable access**

A petitioner is not entitled to condemn a cartway if he presently has reasonable access to a public road, even if such reasonable access is permissive.

2. **Highways and Cartways § 12— cartway proceeding — failure to show absence of reasonable access**

In this proceeding to condemn a cartway, the court's conclusion that petitioners had failed to show that they do not have an adequate means of ingress and egress to and from their property was supported by findings based on competent evidence that the commissioners of a drainage district had offered to allow petitioners to use a road over the spoil bank of a drainage canal to reach their property and that the spoil bank could be made suitable for roadway purposes by installation of tile at approximatealy 20 intersecting farm drainage ditches.

3. **Drainage § 4— drainage district commissioners — authority to permit road over spoil bank**

The commissioners of a drainage district had authority to grant petitioners permission to use a road over the spoil bank of a drainage canal as a means of ingress and egress to and from their property since the construction and maintenance of such a road would benefit the drainage district by facilitating the repair, maintenance and improvement of its drainage canal.

4. **Highways and Cartways § 12— right to cartway — reasonable way — relative costs of construction**

Petitioners are not entitled to condemn a cartway across respondents' land merely because such cartway might be less expensive than constructing a road over the existing spoil bank of a drainage canal pursuant to an offer of the commissioners of the drainage district.

APPEAL by petitioners from *Webb, Judge,* 14 February 1972 Civil Session of Superior Court held in BEAUFORT County.

Petitioners brought this special proceeding under G.S. 136-68 and 69 to condemn a cartway over lands of respondents to connect a tract of timberland owned by petitioners in Beau-

fort County with N. C. Highway 32. Petitioners alleged that they desire to cut and remove the timber from their tract and then to cultivate it; that they have no adequate means of ingress and egress; that Highway 32 lies approximately one mile west of their tract; and that an adequate and necessary cartway to said highway would cross lands of the respondents. Respondents admitted no public road leads to petitioners' land, but denied petitioners lacked other adequate way of ingress and egress. The case was once previously before this Court, and for the prior procedural history of this proceeding reference is made to the opinion of this Court rendered on the first appeal. *Taylor v. Askew,* 11 N.C. App. 386, 181 S.E. 2d 192.

Upon remand from the first appeal, the Superior Court heard evidence and rendered judgment making findings of fact, including the following: Albemarle Drainage District, Beaufort County #5, has been in existence for approximatly half a century and was reorganized and reactivated just prior to 1960. It is organized under G.S. Chap. 156 and is duly functioning with a Board of Commissioners and other appropriate officials. One of the canals of said Drainage District runs along the northern boundary of petitioners' land for approximately one mile and then continues in a straight line eastwardly for approximately 2.8 miles to a paved public road. Findings of Fact No. 6 (in part), Nos. 7 and 8 are as follows:

> "6. . . . The Albemarle Drainage District owns a right of way over the South spoil bank of the canal. It has at least enough right in this spoil bank to allow the petitioners to use a road over the spoil bank for means of ingress and egress.
>
> "7. The said right of way is suitable for use as a road subject to the necessity of placing tiles in approximately twenty farm drainage ditches which have been cut through the said spoil bank. Taking as true the petitioners' evidence that the expense of building a road along this route will be substantially more than along an alternate route, the Court cannot conclude that this is not 'an adequate means of ingress and egress' to the property of the petitioners.
>
> "8. The Court finds as a fact on the basis of the evidence introduced and before it for its consideration, that the Albemarle Drainage District has by resolution said that it would enter into an agreement or contract with the

petitioners to allow them the use of the said roadway along the South bank of the Intercepting Canal provided the farm ditches leading across the same from the lands of Malvin Respess were adequately tiled and that the petitioners would help maintain the said roadway."

Upon these findings of fact, the court concluded that petitioners had failed to carry the burden of showing that they do not have an adequate means of ingress and egress to and from their property and ordered this proceeding dismissed with prejudice. Petitioners appealed.

David S. Henderson for petitioner appellants.

Wilkinson, Vosburgh & Thompson by John A. Wilkinson for respondent appellees.

PARKER, Judge.

[1] The statute, G.S. 136-69, which authorizes in certain cases the condemnation of a cartway for the benefit of one land owner over the lands of his neighbor, is in derogation of the rights of the owner of the land over which the cartway is to be established and must be strictly construed. *Brown v. Glass,* 229 N.C. 657, 50 S.E. 2d 912; *Warlick v. Lowman,* 104 N.C. 403, 10 S.E. 474. Accordingly, it is well settled that a petitioner is not entitled to condemn a cartway if he presently has reasonable access to a public road, *Pritchard v. Scott,* 254 N.C. 277, 118 S.E. 2d 890, and this is true even if such reasonable access is permissive. *Garris v. Byrd,* 229 N.C. 343, 49 S.E. 2d 625. "[A] petitioner is not entitled to have a cartway laid out over another's land simply because it would give him a shorter and better outlet to the public road. If he already have a private way, or by parol license an unobstructed way, across the land of another, the petition should be denied, and evidence tending to show that the desired cartway would be shorter than the outlet in use should be excluded as immaterial." *Warlick v. Lowman, supra.*

[2] When the record in the present case is viewed in the light of these well-established principles, the judgment appealed from should be affirmed. The trial court concluded as a matter of law that petitioners had failed to show that they do not have an adequate means of ingress and egress to and from their property. This conclusion supports the judgment dismissing the

proceeding and in turn is supported by the court's factual findings made on competent evidence.

G.S. 156-93.6, enacted in 1961, provides that "[a]ll drainage districts theretofore created shall be deemed to own an easement or right of way in and to those lands upon which there are existing canals and spoil banks," and "[w]henever the proposed repairs, maintenance or other improvement make it necessary for the drainage district to acquire additional land for easements or right of way, the procedure to secure the same shall be in accordance with G.S. 156-70.1." This latter statute in turn provides in part that "[t]he district shall be deemed to have acquired title for the purpose of easements or rights-of-way to those areas of land identified in the final report of the board of viewers and as shown on the map accompanying said report, at the time said final report is confirmed by the clerk of the superior court." At the hearing, respondents introduced the final report of the board of viewers of the Albemarle Drainage District dated 5 December 1960 and the order confirming said report, and counsel for petitioners conceded that "rights of way were acquired pursuant to the authority of Chapter 156 of the General Statutes." Thus, the trial court's finding that "[t]he Albemarle Drainage District owns a right of way over the South spoil bank of the canal" is fully supported by the record and by applicable statutes. There was also competent evidence to support the trial court's finding that "said right of way is suitable for use as a road subject to the necessity of placing tiles in approximately twenty farm drainage ditches which have been cut through the said spoil bank." An adjoining landowner testified that there is an existing road "suitable for the passage of heavy equipment, such as combines and tractors," running on top of the spoil bank for approximately one mile, and there was competent evidence that the remaining 1.8 miles of the spoil bank could be made suitable for roadway purposes by installation of tile at the intersecting farm drainage ditches.

[3] We do not agree with petitioners' contention that the powers of the Commissioners of the Drainage District were so limited that they lacked authority to grant petitioners permission to use a road over the spoil bank as a means of ingress and egress to and from petitioners' property. The construction and maintenance of such a road would be of obvious benefit to the Drainage District in carrying out its primary functions, by facilitating the repair, maintenance and improvement of its

draining canal. Without attempting to delimit the exact extent of the Commissioners' authority to grant permission to others to utilize the right of way in question as a roadway, we hold that the trial court was correct in concluding that they did have lawful authority to grant petitioners such a right under the circumstances of this case.

[4] Evidence introduced by the parties was in sharp conflict as to the relative costs of constructing a road over the existing spoil bank as compared with the costs of constructing a new cartway to be condemned across respondents' lands. Again, we agree with the trial court that, even if petitioners' evidence in this regard be accepted as true, the conclusion is not thereby compelled that the more expensive road along the spoil bank is not "an adequate means of ingress and egress." Petitioners are not entitled to condemn a cartway across respondents' lands merely because this might prove the least expensive means for obtaining access to their property.

Affirmed.

Judges VAUGHN and GRAHAM concur.

HUMBLE OIL & REFINING COMPANY, PETITIONER v. BOARD OF ALDERMEN OF THE TOWN OF CHAPEL HILL, JOSEPH L. NASSIF, ALICE WELSH, REGINALD D. SMITH, ROSS F. SCROGGS, GEORGE L. COXHEAD, AND JAMES C. WALLACE, RESPONDENTS

No. 7315SC227

(Filed 28 March 1973)

1. **Municipal Corporations § 30— denial of special use permit — challenge by optionee**

An optionee of land has no standing to challenge the denial of a special use permit to allow construction of a service station on the land.

2. **Municipal Corporations § 30— special use permit — standards of ordinance**

The standards set forth in a municipal ordinance for determining whether a special use permit would be issued by the board of aldermen were not too vague to be susceptible to definition.

3. **Municipal Corporations § 30— denial of special use permit — review of application by planning board**

A municipal board of aldermen did not act improperly in denying an application for a special use permit before it was reviewed by the

planning board since the municipal zoning ordinance required a review by the planning board only before the issuance of such permit.

4. Municipal Corporations § 30— denial of special use permit for service station — increase in traffic hazard

There was sufficient evidence to support a municipal board of aldermen's denial of a special use permit to allow construction of a service station on the ground that the service station would substantially increase the traffic hazard at an intersection and thus would endanger the public safety at the intersection.

APPEAL by petitioner from judgment of *McKinnon, Judge,* filed 3 November 1972 in ORANGE Superior Court.

Petitioner appeals from judgment sustaining action of the Board of Aldermen of the Town of Chapel Hill (Board of Aldermen) denying petitioner a special use permit. The parties appear to agree on the following:

On 27 July 1971 application was made by petitioner to Board of Aldermen for a special use permit to allow construction of an automobile service station at the corner of West Franklin Street and Merritt Mill Road in the Town of Chapel Hill. Said location is in the central business district of Chapel Hill and petitioner is the owner of options to purchase or lease the property at said location.

Following duly published notice, the Board of Aldermen and the Chapel Hill Planning Board held a public hearing on 27 September 1971. A representative of petitioner appeared at the hearing and presented arguments and evidence in support of the application; other evidence was also presented. At the conclusion of the hearing, the Board of Aldermen denied the request for the special use permit for the reason that "at this time the proposed use would materially increase the traffic hazard at this intersection and increase the danger of public safety at this intersection."

Petitioner's petition to superior court for certiorari to review the action of the Board of Aldermen was allowed and the cause was heard by Judge McKinnon at the 27 March 1972 Session of Orange Superior Court. The parties agreed that judgment might be entered "out of term and out of the district."

On 3 November 1972 judgment entered by Judge McKinnon on 31 October 1972 was filed. The judgment included numerous findings of fact and conclusions of law and adjudged that the

action of the Board of Aldermen be sustained. Petitioner appealed to the Court of Appeals.

Newsom, Graham, Strayhorn, Hedrick & Murray by K. Byron McCoy and Malvern F. King, Jr., for petitioner appellant.

Haywood, Denny & Miller by Emery B. Denny, Jr., for respondent appellees.

BRITT, Judge.

[1] While respondents do not raise the point on appeal, we think we are confronted at the outset with the question of whether petitioner, as an optionee of the land on which it proposes to construct a service station, has standing to challenge the denial of its application for a special use permit. We hold that petitioner does not have that standing.

In this case the Board of Aldermen was performing a function sometimes performed by a municipal board of adjustment pursuant to former G.S. 160-178. In 5 Strong, N. C. Index 2d, Municipal Corporations, § 31, p. 692, we find:

> "While any owner whose property is affected has the right to apply to the courts for review of an order of a municipal board of adjustment, the decision of the board of adjustment is reviewable solely for errors of law on the evidence presented by the record itself. But the right to appeal to the courts is limited to persons owning an interest in the property, *and such right does not extend to an optionee.*" (Emphasis ours.)

See also Annot., 89 A.L.R. 2d 663, 680 (1963).

Since *Lee v. Board of Adjustment,* 226 N.C. 107, 37 S.E. 2d 128, 168 A.L.R. 1 (1946), is cited in support of the emphasized statement from *Strong,* a close study of *Lee* is appropriate. In that case an optionee applied to the city building inspector (of Rocky Mount, N. C.) for a permit to construct on the land under option buildings suitable for and to be used as a grocery store-service station. The building inspector declined to issue the permit for the reason that the proposed buildings were designed to be used for a nonconforming purpose (business in a district zoned for residences only). Optionee appealed to the board of adjustment who, following a hearing in which

adjoining property owners opposed the application, concluded "that to reject this permit would work a great hardship on the applicant, and that no damage would be sustained by adjoining property owners if the permit were granted." The board of adjustment ordered the building inspector to issue the permit and certain adjoining property owners obtained certiorari. The superior court affirmed the decision of the board of adjustment and the property owners appealed to the Supreme Court. In an opinion by Barnhill, Justice, (later Chief Justice), the Supreme Court reversed; on page 110 of the opinion we find:

> "Acting upon its interpretation of the statute authorizing its creation, G.S. 160-172, the Board of Adjustment, upon the appeal of the respondent, 'concluded that to reject this permit would work a great hardship on the applicant,' and ordered that a permit issue. In this there was error.
>
> An option in relation to land grants the right to elect, within a stipulated period, to buy or not to buy. The applicant optionee merely has the right of choice granted by his option. He possesses no present right to erect a building on the lot described in his contract. To withhold from him a permit to do what he has no present right to do cannot, in law, impose an 'undue and unnecessary hardship' upon him."

At all times pertinent to *Lee,* G.S. 160-178 provided that an appeal could be taken to the board of adjustment "by any person aggrieved or by an officer, department, board or bureau of the municipality." We construe *Lee* to hold that an optionee was not sufficiently aggrieved by the denial of a permit by the city building inspector to enable the optionee to obtain relief from the board of adjustment. We think it follows that in the instant case petitioner, an optionee, was not sufficiently aggrieved by the denial of its application for a special use permit by the Board of Aldermen for petitioner to seek relief in the courts.

Although we are holding that petitioner does not have standing to challenge the denial of its application for a special use permit, we have, nevertheless, reviewed the record to the end that we might render a decision on the merits of this case. We think that Judge McKinnon's judgment should be affirmed and will discuss briefly the principal questions raised in petitioner's brief.

[2] 1. Petitioner contends "that the standards set out in Section 4-C-1(f)(1), (2), (3) and (4), for determining whether an application for a special use permit shall be issued by the Board of Aldermen is too vague to be susceptible to definition," therefore, said section is invalid. It appears that the standards imposed by Section 4-C of the Chapel Hill Zoning Ordinance on the Board of Aldermen for special use permits issued by it are identical to those imposed by Section 4-B on the board of adjustment for special use permits issued by it. In *Kenan v. Board of Adjustment,* 13 N.C. App. 688, 187 S.E. 2d 496 (1972), cert. den. 281 N.C. 314 (1972), and in *Carter v. Town of Chapel Hill,* 14 N.C. App. 93, 187 S.E. 2d 588 (1972), cert. den. 281 N.C. 314 (1972), this court upheld the validity of Section 4-B. We think there is even more reason to uphold the validity of Section 4-C as it applies to the municipal legislative body rather than an administrative board. The contention is without merit.

[3] 2. Petitioner contends that the action of the Board of Aldermen was arbitrary and capricious, in violation of lawful procedure, and unsupported by competent, material and substantial evidence; and that the superior court erred in holding that the Chapel Hill Zoning Ordinance did not require referral of petitioner's application to the planning board for review and recommendations.

Section 4-C, 1-a of said ordinance provides as follows: "Special Use Permits *may be issued by* the Board of Aldermen for the uses so indicated in Section 4-D, Regulations for Special Use Permits, after joint hearing with the Town Planning Board and after Planning Board review and recommendations." (Emphasis added.) Section 4-C, 1-f provides that "[o]n receiving the recommendation of the Planning Board, the Board of Aldermen shall consider the application and said recommendation and either grant or deny the Special Use Permit requested."

Petitioner argues that the Board of Aldermen acted improperly in denying petitioner's application before it was reviewed by the planning board. We reject this argument. It would appear that before the Board of Aldermen could *issue* a special use permit, the application would have to go to the planning board for review and recommendations, but not where, as here, the Board of Aldermen *denies* the permit.

Petitioner further argues that the Board of Aldermen did not comply with G.S. 143-318 in conducting the meeting on

27 September 1971 and particularly in receiving evidence at said meeting. This argument is rejected for the reasons stated in *Carter v. Chapel Hill, supra.*

[4] 3. Finally, petitioner contends that the court erred in its finding of fact "to the effect that the board's finding that the traffic accident hazard at the intersection would be increased substantially by location" of a new service station on the subject property was supported by competent evidence. This contention is without merit.

At the public hearing the evidence (which was not governed by G.S. 143-318) tended to show, among other things, that the daily vehicle count at the intersection in question was 10,900, that five streets intersected at said point and that there were no electric traffic control signals at the intersection. Section 4-C, 1-f provides, among other things, that in granting a special use permit the Board of Aldermen shall find "that the use will not materially endanger the public health or safety if located where proposed and developed according to the plan as submitted and approved." We hold that the evidence fully supported the finding of the Board of Aldermen that the service station proposed by petitioner would materially increase the traffic hazard at the intersection.

For the reasons stated, the judgment appealed from is

Affirmed.

Judges MORRIS and VAUGHN concur.

STATE OF NORTH CAROLINA v. JOHN DAVID McLEAN, JR., AND JAMES WILLIE McALLISTER

No. 7310SC199

(Filed 28 March 1973)

1. **Criminal Law § 114— expression of opinion in stating contentions of the State**

In this prosecution of three defendants for crime against nature, the trial judge expressed an opinion in violation of G.S. 1-180 when he charged the jury (1) that the State contended that the prosecuting witness, a prisoner, was a young man whose punishment "was never intended to include a gang rape, and that this prisoner is entitled to

the same protection against this kind of degrading and vicious crime as any other citizen," and (2) that the State contended that the testimony of the victim "was corroborated and strengthened by the testimony of another prisoner, James Gaddy, an eyewitness, and by the testimony of the staff nurse, who certainly has no interest at all in the outcome of this case."

2. **Criminal Law §§ 113, 168— misstatement of evidence — prejudicial error**

In this prosecution of three defendants for crime against nature wherein a witness testified that he saw two of the defendants sexually assault the victim, the trial judge committed prejudicial error in recapitulating the testimony of the witness when he stated that the witness testified that he saw the third defendant sexually assault the victim.

APPEAL by defendants from *Clark, Judge,* 9 October 1972 Criminal Session of WAKE County Superior Court.

Defendants were tried on valid bills of indictment charging each with having committed a crime against nature, prohibited by G.S. 14-177. The defendants tendered a plea of not guilty but were found guilty by jury verdict, and each was sentenced to a term of imprisonment of not less than eight years nor more than ten years, to begin at the expiration of any sentence theretofore imposed and unserved.

The evidence for the State tended to show that at about 2:00 p.m. on 28 April 1972 the two appealing defendants and one James Snyder (who was acquitted) entered the cell of Raymond Terry Davis, all of them being prisoners at the Central Prison in Raleigh. Davis testified that all three individuals beat him physically, removed his clothing, forced him at knifepoint to a bunk in his cell, and that each of them had anal intercourse with him.

James Gaddy, another prisoner, testified that he saw all three defendants (including Snyder) in Davis's cell and that he saw McLean and Snyder sexually assault Davis. He did not testify that he saw McAllister sexually assault Davis.

James R. Taylor testified that he was a health officer employed by the Department of Correction at Central Prison on 28 April 1972, and that he examined Davis on that day at about 8:00 p.m. Taylor observed that Davis's rectum was red, the anus slightly dilated, and that Davis appeared to be emotionally upset. He gave Davis an anesthetic ointment commonly used for rectal ailments.

Although he refused to identify his assailants until he was separated from other prisoners, Davis identified the three men some five or six days after the crime by picking their pictures out from among seven or ten photographs.

Attorney General Robert Morgan by Assistant Attorney General Charles M. Hensey for the State.

Gulley & Green by Charles P. Green, Jr. for defendant appellant McLean.

Joyner & Howison by G. Clark Crampton for defendant appellant McAllister.

CAMPBELL, Judge.

[1] Several of the defendants' assignments of error challenge the propriety of statements made by the trial judge while charging the jury.

The trial judge stated the contentions of the State in the following manner:

> "The State says and contends that you should find each defendant guilty as charged; State says and contends that in this case the victim of this assault was a young man who had been sentenced to prison for a law violation and that his punishment for this offense was a term in confinement, but that the court's punishment certainly was never intended to include a gang rape, and that this prisoner is entitled to the same protection against this kind of degrading and vicious crime as any other citizen.
>
> "That the testimony of this victim was not unsupported, but it was corroborated and strengthened by the testimony of another prisoner, James Gaddy, an eyewitness, and by the testimony of the staff nurse, who certainly has no interest at all in the outcome of this case, so the State says and contends, and fully supports the testimony of the witness Davis with physical evidence as to his condition, both physical, emotional and mental."

In recapitulating the testimony of James Gaddy the court charged:

> "That McAllister pulled Davis's pants down and defendant McLean went on with his sex act and then Snyder got in on the bunk with Davis and then McAllister."

G.S. 1-180, while it cannot insure the impartiality of the trial judge, does require that he not express any opinion to the jury as to the merit of the case being tried. Even if the trial judge undertakes to state the contentions of the parties in a criminal case, which he is not required to do, the expression of an opinion therein must be held to be prejudicial error. *State v. Stroud* and *State v. Mason* and *State v. Willis,* 10 N.C. App. 30, 177 S.E. 2d 912 (1970). In stating the contentions the trial judge must be extremely careful, for arguments proper on the part of counsel may be highly improper if repeated by the bench.

It has long been held in this State that even the slightest intimation from a judge as to the strength of the evidence, or as to the credibility of a witness, will always have great weight with a jury; and, therefore, the court must be careful to see that neither party is unduly prejudiced by any expression from the bench which is likely to prevent a fair and impartial trial. *State v. Ownby,* 146 N.C. 677, 61 S.E. 630 (1908).

Accordingly, it is error for the trial judge to intimate that controverted facts have or have not been established, *State v. Hall,* 11 N.C. App. 410, 181 S.E. 2d 240 (1971); *State v. Mitchell,* 260 N.C. 235, 132 S.E. 2d 481 (1963); or to place before the jury in a statement of contentions matter which they should not take into consideration in arriving at a verdict, *State v. Pillow,* 234 N.C. 146, 66 S.E. 2d 657 (1951). It is error to intimate an opinion as to the relative strength or weakness of a party's case, or the credibility of his witnesses, *State v. Rhinehart,* 209 N.C. 150, 183 S.E. 388 (1936); *State v. Stroud* and *State v. Mason* and *State v. Willis, supra;* or to make any statement such as to invoke sympathy for the prosecuting witness, thereby bolstering that testimony, *State v. Woolard,* 227 N.C. 645, 44 S.E. 2d 29 (1947).

To tell the jury, even in the form of a contention, that the prosecuting witness was a young man whose punishment for law violation "was never intended to include a gang rape, and that this prisoner is entitled to the same protection against this kind of degrading and vicious crime as any other citizen," is no less an invocation of sympathy than the statement made in *State v. Woolard, supra,* in which the trial judge stated in the presence of the jury that "you people cannot laugh at the predicament of this poor little girl; the only difference between you and she is that you haven't been caught."

The error in the instant case is similar in nature to the statement made by the trial judge in *State v. Kline,* 190 N.C. 177, 129 S.E. 417 (1925), in which the judge said to the jury, " 'If the evidence is believed it was a terrible wrong which was done this young man, and a cold-blooded, cruel assault was committed upon him. . . . ' " The *Kline* opinion ordered a new trial due to the prejudicial nature of the above statement.

Further, it is error to speak of the impartiality of a witness in such a manner as to emphasize the credibility of his testimony, or to emphasize to the jury that the testimony of the prosecuting witness was corroborated by other testimony. Either conduct of the trial judge constitutes the expression of an opinion, which is prohibited.

It was held in *State v. Ownby, supra,* a prosecution for embezzlement, that the court's charge that the prosecuting witnesses were " ' "not interested one cent in the result of this suit. It makes no difference how it may go with them" ' " was prejudicial error, constituting a statement of opinion as to the weight and credibility of the evidence.

A statement by the trial court, in *State v. Benton,* 226 N.C. 745, 40 S.E. 2d 617 (1946), that the police were disinterested and worthy of belief, that the physician testifying for the State was an expert and corroborated the prosecutrix's testimony, together with a later statement that the evidence was "rather clear," was prejudicial error.

In *State v. Maready,* 269 N.C. 750, 153 S.E. 2d 483 (1967), the trial judge repeated a contention of the State to the effect that a police witness had no interest in the case, and therefore was worthy of belief. That statement was held to be prejudicial error. To the same effect is the case of *State v. Byrd,* 10 N.C. App. 56, 177 S.E. 2d 738 (1970), in which the court's charge included the statement that an officer's testimony was substantially the same as another witness. Such charge was error; it told the jury that the State's evidence was corroborated, the question of corroboration being, on the contrary, a jury question.

[2] Further, we feel that the misstatement by the trial court of the testimony of the witness Gaddy to the effect that Gaddy saw defendant McAllister sexually assault Davis was highly prejudicial; the court effectively told the jury that not only was there evidence that McAllister committed the crime, but there

was also an "eyewitness" to his commission of the crime who corroborated the statement of the prosecuting witness. The evidence in the record does not support any such charge, and actually contains testimony contrary.

Because of the inadvertent but prejudicial statements made by the trial judge, we feel that both defendants are entitled to a new trial. A new trial being required, it is unnecessary to discuss any other assignment of error as they may not arise again.

New trial.

Judges MORRIS and PARKER concur.

STATE OF NORTH CAROLINA v. CHARLES HUGH McEACHIN

No. 7316SC105

(Filed 28 March 1973)

Criminal Law § 95— codefendant's confession — admission against defendant — subsequent limiting instructions

In this joint trial of two defendants for distributing heroin, error in overruling defendant's objection to the admission of his codefendant's confession which implicated defendant was not cured by the court's instruction, given at the close of all the evidence, that such evidence could be used only against the declarant where there was no reference in the charge to the prior erroneous ruling and where there was no instruction that the jury should disabuse their minds of any and all prejudicial impressions lodged by the incompetent evidence.

APPEAL by defendant from *McKinnon, Judge,* 14 August 1972 Session of SCOTLAND County Superior Court.

Defendant McEachin and Anthony Wingate were both convicted of distributing heroin in violation of G.S. 90-95(a)(1) which offense was alleged to have taken place on 14 February 1972 at Laurinburg Institute, Laurinburg, North Carolina.

The State offered testimony of several witnesses to the effect that an undercover police agent purchased two packages of white powder from the two defendants; that the powder was placed in the custody of the police at Lumberton, North Caro-

lina; that the substance was some time thereafter transmitted to the chemical laboratory of the State Bureau of Investigation in Raleigh, North Carolina, and that chemical analysis of one of the packages showed the white powder to be heroin.

Defendant McEachin testified that he did not possess or distribute any drugs on the night of 14 February 1972, and that he was not present when the undercover agent and defendant Wingate were talking together.

Defendant Wingate denied having sold the agent any drugs and testified that defendant McEachin was not present at the agent's automobile when he and the agent talked.

The defendants rested their cases, and the State offered rebuttal testimony of Wade Anders, an agent of the State Bureau of Investigation, who testified that after his arrest Wingate told Anders that he (Wingate) received drugs from New York, used McEachin and others to help sell the drugs, and that on 14 February 1972 both he and McEachin talked with the undercover agent about making a sale.

McEachin objected to the admission of this testimony against him, and requested that the trial court instruct the jury to consider the evidence only as to defendant Wingate. The objection and requested instruction were denied by the trial judge.

However, at the close of all the evidence, and before presentation of counsels' arguments to the jury, the trial judge did instruct as follows:

> "In the testimony of the last witness, Mr. Anders, there was evidence of statements made to him by Wingate after his arrest, in which names and some references were made to McEachin. Wingate denies these statements were made to the Officer by him at any time. If you find statements or any parts of them were made, you would consider as against Wingate, for, if made out of the presence of McEachin, you would not consider against McEachin, but only as against the defendant Wingate."

Attorney General Robert Morgan by Associate Attorney John M. Silverstein for the State.

Jennings G. King for defendant appellant McEachin.

CAMPBELL, Judge.

Rules concerning the use and exclusion of hearsay evidence and the confrontation clause of the Sixth Amendment are generally designed to protect similar values. However, that is not to say that the confrontation clause is nothing more or less than a codification of the rules of hearsay. There may be a violation of the confrontation values even though the statements in issue were admitted under a hearsay exception, just as there may not be a violation of confrontation values in another case just because evidence has been admitted in violation of the hearsay evidence rules. *Dutton v. Evans,* 400 U.S. 74, 27 L.Ed. 2d 213, 91 S.Ct. 210 (1970).

However, since the Sixth Amendment's right of an accused to confront the witness against him is a fundamental right made obligatory on the states by the Fourteenth Amendment, *Pointer v. Texas,* 380 U.S. 400, 13 L.Ed. 2d 923, 85 S.Ct. 1065 (1965), there is some point at which the admission of hearsay evidence is a denial of that constitutional right.

In *Bruton v. United States,* 391 U.S. 123, 20 L.Ed. 2d 476, 88 S.Ct. 1620 (1968), there was a joint trial of two defendants in Federal District Court. During the course of the trial a postal inspector testified as to the extrajudicial confession of one of the defendants; that defendant did not testify. The court instructed the jury that the confession testimony could not be used against both defendants, but only against the defendant whom it was alleged had made the statement. Both were convicted, and the United States Supreme Court reversed.

The confession added substantial weight to the government's case in a form not subject to cross-examination, thereby violating the other defendant's Sixth Amendment right of cross-examination. This encroachment on Bruton's constitutional right could not be avoided by a jury instruction to disregard the confession as to him.

> " '. . . The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction. . . .' "

> " '. . . The government should not have the windfall of having the jury be influenced by evidence against a defendant which, as a matter of law, they should not consider

but which they cannot put out of their minds.' . . ." *Bruton v. United States, supra.*

In *Roberts v. Russell,* 392 U.S. 293, 20 L.Ed. 2d 1100, 88 S.Ct. 1921 (1968), the Supreme Court held that the *Bruton* ruling was applicable to state trials, since the rule corrected a serious flaw in the fact-finding process at trial.

> " '[T]here are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored. . . . Such a context is presented here, where the powerfully incriminating extrajudicial statements of a codefendant . . . are deliberately spread before the jury in a joint trial.' " *Roberts v. Russell, supra.*

However, in *Nelson v. O'Neil,* 402 U.S. 622, 29 L.Ed. 2d 222, 91 S.Ct. 1723 (1971), the Supreme Court held that the *Bruton* rule did not apply to that particular joint trial.

O'Neil involved a joint trial of two defendants; a police officer was allowed to testify to the extrajudicial confession of one of the defendants, and the trial court gave a limiting instruction to the jury. The defendant who allegedly made the confession testified, and denied having made the statement, asserted that the substance of the statement was false and gave testimony favorable to the other codefendant. The Supreme Court held that although the counsel for the nontestifying defendant chose not to cross-examine, he had the opportunity to do so and therefore that defendant was not denied rights protected by the Sixth and Fourteenth Amendments.

> "It was clear in Bruton that the 'confrontation' guaranteed by the Sixth and Fourteenth Amendments is confrontation *at trial*—that is, that the absence of the defendant at the time the codefendant allegedly made the out-of-court statement is immaterial, so long as the declarant can be cross-examined on the witness stand at trial. . . . The Constitution as construed in Bruton, in other words, is violated *only* where the out-of-court hearsay statement is that of a declarant who is unavailable at the trial for 'full and effective' cross-examination." *Nelson v. O'Neil, supra.*

From this review of federal cases it is clear that the out-of-court confession of Wingate is admissible in evidence *against*

him in the joint trial where Wingate is available for cross-examination; that is, where Wingate takes the stand to testify, not having exercised his right to remain silent. However, the reception of such hearsay evidence still requires an instruction from the court that it can only be considered against the defendant who allegedly made the confession.

In view of the suspected value of such limiting instructions, and in view of the decision in *State v. Franklin,* 248 N.C. 695, 104 S.E. 2d 837 (1958), we hold that the trial court's limiting instruction in the instant case was insufficient to protect McEachin's right to a fair trial.

Error in overruling McEachin's objection to the hearsay confession as against him was not cured by a later instruction that such evidence could only be used against Wingate where there was no reference in the charge to the prior erroneous ruling noting its correction, and where there was no instruction that the jury should disabuse their minds of any and all prejudicial impressions lodged by the incompetent evidence. *State v. Franklin, supra.*

Since the circumstances upon which appellant's other assignments of error are based may not occur in a second trial, we refrain from discussing them.

New trial.

Judges HEDRICK and GRAHAM concur.

JUANITA J. CHANCE v. A. K. JACKSON

No. 728DC535

(Filed 28 March 1973)

1. Evidence §§ 15, 29— checks drawn by defendant — explanation of checks — admissibility

Where plaintiff brought an action to recover profits from a one-third interest in a farm and defendant counterclaimed for loans made to plaintiff, contending that her share of the profits had, by agreement, been applied to repayment of the loans, checks drawn by defendant and made payable to plaintiff's husband, a bank and "The Garden Center" (a business owned by plaintiff and her husband) and defendant's explanation of the checks were admissible in evidence

since the checks were competent to show that defendant advanced the amount of money which he contended he had advanced and the explanation allowed the jury to determine whether defendant had made the loans to plaintiff's husband, as plaintiff contended or to plaintiff herself, as defendant contended.

2. **Frauds, Statute of § 5; Rules of Civil Procedure § 8— failure to plead statute of frauds — original promise to pay — inapplicability of statute**

The statute of frauds was not applicable in this case where plaintiff did not plead that issue as an affirmative defense to defendant's counterclaim and where defendant alleged in his counterclaim only that he had made loans to the plaintiff, and his evidence, if considered in the light most favorable to him, would support a jury finding that plaintiff's obligation was based on original promises to repay loans made to her, though the proceeds of the loans were, at her request, furnished to her husband.

3. **Trial § 33— jury instruction — failure to explain law — new trial**

Plaintiff is entitled to a new trial where the trial court failed adequately to declare and explain the law arising on the evidence at trial of defendant's counterclaim for sums of money loaned plaintiff.

ON *certiorari* to review judgment of *Nowell, Chief District Judge,* 10 January 1972 Session of District Court held in WAYNE County.

Plaintiff and defendant, sister and brother, each own a one-third interest in a family farm which defendant has managed since the death of their mother on 12 September 1962. Plaintiff filed this suit on 13 January 1970 asking for an accounting and payment to her of her part of the rents and profits from the farm accruing since 12 September 1962. Defendant counterclaimed, alleging that since 10 May 1962 he had "made several loans to the Plaintiff and that the Paintiff agreed that her share of the profits from the W. F. Jackson Farms be applied to the amount due the Defendant." Defendant attached as an exhibit to his counterclaim a statement purporting to show various amounts, which totaled $12,400.00, as "Loaned to Plaintiff" on various dates in 1962 and 1963, annual credits against the account of one-third of the farm income for each of the years 1962 through 1969, interest on the yearly balances, and a balance due on 31 December 1969 in the amount of $14,214.92, for which amount, with interest from 31 December 1969, defendant prayed judgment. Plaintiff filed a reply, denying all allegations of the counterclaim.

At the trial the parties stipulated that plaintiff's one-third share of the rents and profits from the farm for the years 1962

through 1969 inclusive was $2,987.24, which amount was the sum of the annual credits as set forth on the exhibit attached to defendant's counterclaim.

Defendant testified:

"I had an agreement with Mrs. Chance during the time when she asked me to loan her money. I visited in their home quite frequently, just the two of us actually. She is my sister and I am her only brother so I visited her home quite frequently and she and her husband were talking about going into a business known as the Garden Center, so he talked with me some and suggested that if they went into the business that they would need some money, so I then discussed this with my sister and asked her if this was her desire. She said that if I loaned her the money that she would see that I was paid back. This was my sister, Juanita Chance.

"As a result of that conversation, I in fact loaned her money. I started out with $1,500.00 and then a little bit later I had another request for money, as I remember that was $900.00 and a little bit later another request for money and that was $2,000.00. A little bit later another request and that was $8,000.00. As I recall, this totaled $12,400.00 that I loaned my sister."

Defendant also testified in effect that in 1964, after the business had gone into bankruptcy, plaintiff had agreed to his applying her part of the proceeds from the farm to the debt, and that he had so applied the amount stipulated to, $2,987.24.

In rebuttal, plaintiff and her husband, John B. Chance, each testified that the sums loaned by defendant had been loaned solely to plaintiff's husband and not to plaintiff, and that the husband was the sole owner of the business for which the loans had been made, the paintiff having no interest therein.

The jury answered issues as follows:

"1) What amount, if any, is the Defendant indebted to the Plaintiff for rents and profit received from the Jackson farm as alleged in the Complaint?

"ANSWER: None

"2) What amount, if any, is the Plaintiff indebted to the Defendant as alleged in the Counterclaim?

"ANSWER: $9,412.76"

From judgment that defendant recover of plaintiff $9,412.76, plaintiff in apt time gave notice of appeal. Subsequently this Court granted plaintiff's petition for writ of certiorari in order to permit her to perfect her appeal.

Smith & Everett by James N. Smith for plaintiff appellant.

C. Horton Poe, Jr. for defendant appellee.

PARKER, Judge.

[1] Over plaintiff's objection the court permitted defendant to introduce in evidence four checks which had been drawn by defendant, two in 1962 and two in 1963, and which together totaled $12,400.00. Two of these checks were payable to plaintiff's husband, one was payable to a bank and was marked for deposit to the account of plaintiff's husband, and the fourth was payable to "The Garden Center." On the face of two of these checks was the notation, "For Loan." One of the two checks which was payable to plaintiff's husband, being also one of the two which bore on its face the notation, "For Loan," was endorsed by the payee "For Deposit to account Mr. or Mrs. John B. Chance."

In explanation of why he had made a check payable to paintiff's husband, defendant was permitted, over plaintiff's objection, to testify as follows:

> "I made it out with no real significance as to whether it was to Mr. and Mrs. Johnnie B. Chance or Mr. Johnnie B. Chance, because I was loaning the money to my sister for her benefit and I just made the check out as I was instructed to make it out. I couldn't say absolutely as to who instructed me to make the check out in that manner. Each individual time, I asked her or got, it was just the agreement and I didn't get a new agreement for each transaction."

In response to his counsel's question as to why he had made out one of the checks to the bank, defendant testified: "That's what I was told to do at that time." Referring to all of the checks, defendant testified without objection that they "repre-

sent the amount of money that I have paid for the loan to Mrs. Chance."

The admission of these checks in evidence and the overruling of her objections to questions directed to defendant by his counsel as to why he had made the checks payable in the manner in which they had been made payable are the subjects of plaintiff's first three exceptions and assignments of error. In these we find no merit. The checks were competent to show that defendant had advanced the amount of money which he contends he had advanced. While the form in which the checks were made payable made them more consistent with plaintiff's contention that defendant had loaned money solely to her husband than with defendant's contention he had made loans to her, this presented a matter for the jury to evaluate in the light of defendant's explanations and all other relevant circumstances, including the relationship between the parties. The checks and defendant's testimony explaining them were admissible in evidence.

[2] Consistent with her theory that the loans made by defendant were made to her husband and not to her, plaintiff contends that defendant's evidence at the most tends to show only a collateral oral promise on her part to pay the debt of her husband, thus bringing this case squarely within the provisions of the statute of frauds, G.S. 22-1. However, no issue as to the statute of frauds was presented by the pleadings in this case. Under the Rules of Civil Procedure the statute of frauds is now an affirmative defense, G.S. 1A-1, Rule 8(c), and plaintiff failed to plead it as a defense to defendant's counterclaim. Moreover, defendant alleged in his counterclaim only that he had made loans to the plaintiff, and his evidence, if considered in the light most favorable to him, would support a jury finding that plaintiff's obligation was based on original promises to repay loans made to her, though the proceeds of the loans were, at her request, furnished to her husband. Such original promises, if found to have been made, would not fall within the statute of frauds. *Piedmont Aviation v. Motor Lines,* 262 N.C. 135, 136 S.E. 2d 658; *Pegram-West v. Insurance Co.,* 231 N.C. 277, 56 S.E. 2d 607; *Farmers Federation, Inc. v. Morris,* 223 N.C. 467, 27 S.E. 2d 80; see also Annotation, 20 A.L.R. 2d 246.

[3] In its charge to the jury the trial court, after recapitulating the evidence and stating the contentions of the parties, gave

certain general instructions as to what, in law, constitutes a contract. In the mandate portion of the charge with respect to the second issue, the court then instructed the jury as follows:

> "The burden of proof on this issue is upon the defendant, Mr. Jackson, to satisfy you from the evidence and by its greater weight that some time in 1962 and 1963 he made her a loan of $12,400.00; that she has not repaid him this money; that she still owes him this money; that as of December of 1969, she still owed him $14,214.92; that he has properly applied these proceeds off against this amount, then it would be your duty to answer this issue in favor of the defendant, anywhere from $14,214.92, down to nothing."

Appellant's assignment of error to this portion of the charge must be sustained. Defendant's evidence did not show any original understanding between him and his sister that he would lend to her, upon her credit and promise to repay, $12,400.00 or any other specific amount. Rather, defendant's evidence indicated, as he had alleged in his counterclaim, a series of loans made over a period of approximately ten months. There was no dispute but that these loans were made in the form of advances of funds, not to plaintiff, but to her husband. At no point in the charge did the trial court instruct the jury that it could answer the second issue in favor of the defendant only if it should find that one or more of these loans were made upon the express agreement, existing at the time the funds were advanced, that the loan was being made by defendant to plaintiff upon her promise to repay and upon the understanding that the funds were to be advanced to plaintiff's husband rather than directly to her. Neither did the court instruct the jury that it could answer the second issue in favor of defendant only in such amount as it should find had been so loaned by defendant to plaintiff. Under the evidence in this case the jury might well have found that some of the loans were made to plaintiff upon her original promise to pay, while other loans were made solely to her husband. For failure of the trial court adequately to declare and explain the law arising on the evidence in this case as required by G.S. 1A-1, Rule 51(a), appellant is entitled to a

New trial.

Judges VAUGHN and GRAHAM concur.

STATE OF NORTH CAROLINA v. RICARDO O'NEAL AND FRANK O'NEAL

No. 7318SC110

(Filed 28 March 1973)

1. **Larceny § 7— felonious larceny of clothing — sufficiency of evidence**

Defendants' motion for nonsuit in a felonious larceny case was properly denied where there was substantial evidence that defendants, acting with two women, took and carried away clothing of the value of more than $200 from each of Sears, Roebuck and Company and Paul H. Rose, Incorporated, without the consent of either owner and with the intent permanently to deprive the owners thereof.

2. **Criminal Law § 84; Searches and Seizures § 2— consent to search — valid search warrant — admissibility of evidence**

The trial court did not err in failing to grant defendants' motion to suppress evidence with respect to items found in the trunk of defendant Frank O'Neal's automobile where the evidence on *voir dire* supported the judge's findings of fact and conclusions that the search was made by and with the consent of the owner and that a valid search warrant was obtained and served on defendant before the search was made.

APPEAL by defendants from *Rouse, Judge,* 17 July 1972 Session of Superior Court held in GUILFORD County.

Defendant Ricardo O'Neal was tried upon two separate bills of indictment, proper in form, charging him with the felonious larceny of goods of the value of more than $200 belonging to Sears, Roebuck and Company, a corporation (case number 71CR77713), and with the felonious larceny of goods of the value of more than $200 belonging to Paul H. Rose, Incorporated, a corporation (case number 71CR77714). Defendant Frank O'Neal was tried upon two separate bills of indictment, proper in form, charging him with the felonious larceny of goods of the value of more than $200 belonging to Sears, Roebuck and Company, a corporation (case number 71CR77715), and with the felonious larceny of goods of the value of more than $200 belonging to Paul H. Rose, Incorporated, a corporation (case number 71CR77716). The defendants pleaded not guilty, and the cases were consolidated for trial without objection.

The evidence for the State tended to show the following: Witness Wanda Atwater testified that "[b]ack in November and October, 1971, I had a drug habit." On 28 November 1971, she and Bernice Miller, Ricardo O'Neal and Frank O'Neal got

together in Winston-Salem, North Carolina, and drove to Greensboro, North Carolina, for the purpose of shoplifting goods, for which she was to receive from Frank O'Neal one-third of the retail value of the goods stolen. The two defendants and Mrs. Miller and Miss Atwater drove to the downtown Sears, Roebuck and Company store in Greensboro. Miss Atwater and defendant Ricardo O'Neal entered the store and picked out a man's suit, placed it under Miss Atwater's dress, and removed the suit from the store without paying for it. Thereafter, Miss Atwater placed a man's suede coat under her dress, and she and Ricardo O'Neal removed the suede coat from the store without paying for it.

Bernice Malloy Miller testified for the State that "[i]n October and November, 1971, I had a drug habit." On 28 November 1971, Bernice Miller, Wanda Atwater, and Ricardo O'Neal traveled with Frank O'Neal in his car to Greensboro for the purpose of shoplifting. At the Sears, Roebuck and Company store, Mrs. Miller and Frank O'Neal looked at men's suits, and while there they removed two suits and a pair of pants from hangers and placed them in Mrs. Miller's pocketbook without paying for them. Mrs. Miller carried the first suit out to the car and placed it in a pillowcase on the front seat of the car, and then returned to the store and removed the pants and second suit to the car, placing them in the same pillowcase. Both couples then drove to the Paul Rose Store in Greensboro. Sometime after 1:30 p.m. on 28 November 1971, Mr. Joe Decker, the general manager of the Paul Rose Store, located in the Friendly Shopping Center, observed the defendants, accompanied by the two women, Bernice Miller and Wanda Atwater, enter the Paul Rose Store. Upon entering the store, Bernice Miller and Frank O'Neal went in one direction and Wanda Atwater and Ricardo O'Neal went in another direction. The defendants and their companions remained in the Paul Rose Store approximately 35 to 45 minutes. Bernice Miller testified that while she was in the store, she and Frank O'Neal picked out two men's suits and a woman's three piece suit, which Mrs. Miller identified as State's Exhibit Number 1, placed the suits in her pocketbook without paying for them, and took them out of the Paul Rose Store to Frank O'Neal's car. While at the car, Mrs. Miller observed a man standing at the door of Paul Rose Store looking at her, whereupon she threw the woman's suit, State's Exhibit Number 1, underneath an adjoining car. Mr. Joe Decker testified that after he observed Bernice Miller

throw State's Exhibit Number 1 underneath a nearby car, he saw the defendants and their female companions climb into a Ford "LTD" automobile and drive away. Decker noted the license number of their car and telephoned the Greensboro Police Department for assistance. Decker further testified that State's exhibits numbered 1 through 5, consisting of various pieces of clothing, were the property of Paul H. Rose, Incorporated, and had a retail value of between $800 and $900. On cross-examination, Decker testified that for the purpose of keeping records of their inventory, the Paul Rose Store attached labels to all their garments, and that it was customary at the time of sale for part of the tag to be torn off and kept by store personnel. However, Decker admitted that " . . . it is human error sometimes for my cashiers not to tear the ticket off when it's sold. . . . I never at any time saw these two defendants with those suits in their personal possession in and around the store. . . . I have no way of knowing how these garments got out of the Paul Rose Store. . . . "

Mr. Barry Marshall, the manager of the men's suit department at the Sears, Roebuck and Company store in Greensboro testified that he was familiar with the inventory and accounting method used by the Sears store in November, 1971, and that State's exhibits numbered 6 through 12 were various articles of clothing offered for sale by Sears, Roebuck and Company, having an aggregate retail value of some $380. On cross-examination, however, Mr. Marshall testified that he could not identify State's exhibits numbered 6 through 12 as having come from the men's department of the Sears, Roebuck and Company store in Greensboro.

The State's evidence further tended to show that Sergeant R. D. Pegram of the Greensboro Police Department was following Frank O'Neal's Ford automobile in a police car when Sergeant Pegram received a radio transmission describing the O'Neal vehicle; that Sergeant Pegram stopped the O'Neal vehicle, and that shortly thereafter Detective J. D. Zimmerman arrived at the scene; that Zimmerman informed Frank O'Neal of his constitutional rights, but that O'Neal made no statement at that time; that while Zimmerman was talking with O'Neal, Bernice Miller came up to Zimmerman and said "that she took the item," that "it was in a pillowcase up in the car," and that "she went up and pulled out a pink pillowcase full of various garments and brought them to me"; that the defendants and

the two women were asked to go to the police station with the officers; that a search warrant was procured to search Frank O'Neal's vehicle; that as a result of that search, State's exhibits numbered 6 through 12 were recovered from the trunk of Frank O'Neal's Ford car; and that State's exhibits numbered 1 through 5 were the same articles of clothing as were found in the pink pillowcase voluntarily given to Detective Zimmerman by Bernice Miller after the O'Neal car had been stopped.

Defendants offered no evidence. After the close of the State's evidence, the defendants moved for judgments as of nonsuit. The motion was denied. The jury returned verdicts of guilty of felonious larceny on both indictments against each defendant. Cases numbered 71CR77713 and 71CR77714 were consolidated for judgment and defendant Ricardo O'Neal was sentenced to three years in the custody of the Commissioner of Correction as a "committed youthful offender," G.S. 148-49.1, et seq. In case number 71CR77715, judgment was rendered that defendant Frank O'Neal be imprisoned for two to three years in the State Department of Correction, and in case number 71CR77716 judgment was rendered that defendant Frank O'Neal be imprisoned for two to three years in the State Department of Correction, this sentence to run consecutively with the sentence in case number 71CR77715. Defendants appealed, assigning error.

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

Lee, High, Taylor and Dansby, by Herman L. Taylor, and Samuel S. Mitchell, for defendant appellants.

MORRIS, Judge.

[1] Defendants assign as error the failure of the trial court to grant their motion for judgment of nonsuit. This assignment of error presents the question whether there is substantial evidence, when viewed in the light most favorable to the State, of each essential element of the crime charged, and whether there is substantial evidence that the defendants are the perpetrators of the crime charged. *State v. Hoffman,* 281 N.C. 727, 190 S.E. 2d 842 (1972); *State v. Vestal,* 278 N.C. 561, 180 S.E. 2d 755 (1971).

The record in this case contains substantial evidence that defendants, acting with Bernice Miller and Wanda Atwater,

took and carried away clothing of the value of more than $200 from each of Sears, Roebuck and Company and Paul H. Rose, Incorporated, without the consent of either owner and with the intent permanently to deprive the owners thereof. This assignment of error is overruled.

[2] By defendants' only other assignment they contend that the court erred in failing to grant their motion to suppress evidence with respect to items found in the trunk of the automobile owned by Frank O'Neal. Upon defendants' objection, the court conducted a voir dire hearing. Two witnesses for the State and defendant Frank O'Neal testified on voir dire. The court made the following findings of fact:

> "1. After being stopped by officers, the defendants were directed to go to the police station in Greensboro.
>
> 2. The defendant, Frank O'Neal, advised the officers that the Ltd Ford automobile in question was his.
>
> 3. Mr. Frank O'Neal stated to Officer Zimmerman, of the Greensboro Police Department, that he had no objection to a search of his automobile, but further advised him that he didn't have a key.
>
> 4. This conversation took place at the police station and constituted a consent by the defendant, Frank O'Neal, that his automobile should be searched.
>
> 5. A search warrant was obtained and served upon the defendant prior to the time that the Ltd automobile was searched.
>
> 6. The search warrant appears in the record, together with the affidavit supporting the search warrant, as State's Exhibits 16 and 17.
>
> 7. Said search warrant and affidavit were valid and sufficient in law to authorize a search of the automobile, that is the 1970 Ltd Ford owned by the defendant, Frank O'Neal.
>
> 8. That pursuant to said search warrant, a search was made of the trunk of the 1970 Ltd Ford automobile, and the items identified as State's Exhibits through 12, inclusive, by the State were found in the trunk, as well as other items which have been testified by the State."

And the following conclusions of law:

"1. The search of the trunk of the Ltd Ford automobile owned by Frank O'Neal was by and with the consent of the owner and was, therefore, for that reason lawful.

2. That it is further lawful for the reason that a valid search warrant had been obtained and served on the defendant, Frank O'Neal, prior to the time that a search was made of the trunk of the Ltd Ford Automobile owned by the defendant, Frank O'Neal.

3. The items found in the trunk of the automobile pursuant to the search are admissible in evidence in this case."

The court heard the evidence on voir dire of both the State and defendants. In the light of the evidence and its observation of the demeanor of the witnesses, the court resolved the question in favor of the State. The findings of fact, if supported by competent evidence in the record, are conclusive and no reviewing court may set them aside or modify them. *State v. Pike*, 273 N.C. 102, 159 S.E. 2d 334 (1968). Here the facts found were supported by competent evidence in the record and supported the conclusions of law. The evidence was properly admitted.

No error.

Judges HEDRICK and VAUGHN concur.

NANCY VARNER HUBBARD v. BARBARA GANTT LUMLEY AND DONALD HOWARD HUBBARD

No. 7321SC154

(Filed 28 March 1973)

1. **Rules of Civil Procedure § 55— setting aside entry of default — good cause — no error**

The trial court did not err in setting aside entry of default against defendant where defendant's failure to file his answer on time was due to uncertainty as to whether defendant's insurer was responsible for his defense in the suit, where there was a mistake between defendant and the insurer as to when the answer was due and where an answer was filed promptly upon learning of the mistake two days after the final date on which to file.

2. **Rules of Civil Procedure §§ 55, 60— setting aside entry of default — governing rule**

Any reference to or discussion of Rule 60 by defendant in his motion to set aside and vacate entry of default was unnecessary and surplusage because defendant's motion was governed by Rule 55(d), not Rule 60 governing the setting aside of judgment by default.

3. **Rules of Civil Procedure § 6— entry of default set aside — necessity of motion for enlargement of time to file answer**

Where the trial judge concluded that defendant's failure to answer was a result of "excusable neglect," set aside entry of default and ordered that defendant's answer be filed and remain of record, it was not necessary that defendant file a Rule 6(b) motion for enlargement of time to file answer, though that would have been the better practice.

APPEAL by plaintiff from *Wood, Judge,* in chambers, 6 July 1972, in FORSYTH County Superior Court.

Plaintiff instituted this civil action against defendants in which she sought to recover damages for injuries received in a collision between the automobile in which she was riding, driven by her husband, defendant Donald Howard Hubbard, and an automobile driven by defendant Barbara Gantt Lumley. A summons and complaint were served on defendant Hubbard on 11 May 1972 and after defendant Hubbard failed to file an answer within 30 days as required by Rule 12(a)(1) of the North Carolina Rules of Civil Procedure, plaintiff's counsel petitioned the Clerk of Superior Court of Forsyth County for entry of default on 14 June 1972. On 14 June 1972 at 8:21 a.m., default was entered against defendant Hubbard and at 11:47 a.m. that same day an answer on behalf of defendant Hubbard was filed. Also on 14 June 1972, defendant Hubbard filed a motion (amended 26 June 1972) to set aside entry of default and asking the court not to enter judgment by default against him.

The matter was heard by Judge Wood and from his order of 6 July 1972 that the entry of default against defendant be set aside and vacated, that defendant's answer be permitted to be filed, and that plaintiff's motion for judgment by default be denied, plaintiff appealed.

Defendant Lumley filed a timely answer denying any negligence and is not involved in this appeal.

Hudson, Petree, Stockton, Stockton and Robinson, by Norwood Robinson, for plaintiff appellant.

Deal, Hutchins and Minor, by John M. Minor and William K. Davis, for defendant appellee.

MORRIS, Judge.

Plaintiff asserts that the trial judge abused his discretion in setting aside and vacating entry of default against defendant Hubbard.

When an entry of default has been made by the Clerk of Superior Court, a motion to set aside and vacate that entry is governed by the provisions of Rule 55(d) of the North Carolina Rules of Civil Procedure which provide as follows:

> "(d) *Setting aside default.*—For *good cause* shown the court may set aside an entry of default, and, if a judgment by default has been entered, the judge may set it aside in accordance with Rule 60(b)." (Emphasis added.)

The determination of whether good cause exists under Rule 55(d) rests in the sound discretion of the trial judge and his ruling will not be disturbed unless a clear abuse of discretion is shown. *Whaley v. Rhodes,* 10 N.C. App. 109, 177 S.E. 2d 735 (1970).

In support of his motion to set aside and vacate entry of default, defendant Hubbard asserted by way of affidavit that on 30 March 1972, he and his wife, the plaintiff, had a conference with attorney Norwood Robinson regarding the accident and the injuries plaintiff wife had received, and the potential lawsuit for recovery of her damages. Mr. Robinson then informed defendant Hubbard that the facts indicated that he, Hubbard, might be a defendant in any action brought by Mrs. Hubbard. Hubbard then wrote a letter to Mr. Robinson stating that he did not consider that the attorney-client relationship existed between them and released Mr. Robinson from any obligation Mr. Robinson might have owed him by virtue of defendant's having talked with him. About a week after the complaint and summons had been served on defendant Hubbard, he took them to Mr. R. D. Jackson of Aetna Life and Casualty Company, who advised him that his insurance policy excluded coverage as between persons related by marriage and that Aetna was not responsible for any coverage nor defense against suit by plaintiff wife. Defendant Hubbard later read his policy

carefully and found it had an SP-23 endorsement which, in his opinion, did make Aetna responsible for providing him with a defense. Realizing that time within which answer should be filed was about to expire, he called Jackson on the 5th or 6th of June 1972 and informed him of the SP-23 endorsement. Jackson then checked with the St. Louis office of Aetna and informed defendant Hubbard on 12 June 1972 that the St. Louis office had directed him to furnish defendant with a defense. Later that day Jackson directed defendant Hubbard to go see attorney Grady Barnhill in regards to the matter at 9:30 a.m., 14 June 1972. At the meeting with Mr. Barnhill, defendant was informed that since Mr. Barnhill's firm was representing Mrs. Lumley and Allstate in the suit, arrangements had been made with Deal, Hutchins and Minor to represent him in the matter.

Defendant Hubbard further asserted by way of affidavit facts that tended to show that defendant Lumley was solely responsible for causing the accident and that he had a meritorious defense.

The affidavit of R. D. Jackson was also introduced at the hearing which tended to show that defendant Hubbard brought him the complaint and summons on 17 May, and since defendant had called him earlier that day informing him of the lawsuit, he assumed that defendant had been served on 17 May 1972 and noted that date in his file. Jackson stated that he was further informed that after defendant Hubbard had been taken to the office of attorney John Minor by Mr. Barnhill, Mr. Minor found that the summons and complaint had been served on Mr. Hubbard on 11 May instead of 17 May, and that immediately upon ascertaining the date of service, an answer was drafted and filed by Mr. Minor at about 11:30 a.m., 14 June 1972, at which time it was found that entry of default had been placed on record by Mr. Norwood Robinson, counsel for plaintiff wife.

The trial judge made findings of fact which in substance conform with those set forth in the affidavits and then made the following conclusions of law:

> "1. That defendant Hubbard's failure to answer the Complaint prior to June 14, 1972, was the result of excusable neglect, within the provisions of Rule 60, North Carolina Rules of Civil Procedure; and

2. That, in its discretion, the Court concludes that good cause has been shown, in accord with Rule 55, North Carolina Rules of Civil Procedure, to set aside and vacate the entry of default against the defendant Hubbard as appears of record, and to permit said defendant's Answer to remain filed; and

3. That defendant Hubbard has a meritorious defense to the cause of action alleged in the Complaint; and

4. That there have been no intervening equities that would prejudice plaintiff by allowing defendant Hubbard's Answer to remain filed."

[1] We feel that the facts in this case are sufficient to warrant the conclusion of the trial judge that defendant had shown good cause for his failure to file his answer on time. There was some uncertainty as to whether defendant Hubbard's insurer was responsible for his defense in the suit, and there was a mistake between defendant and the insurer as to when the answer was due. Upon learning of the mistake an answer was promptly filed on 14 June 1972, only two days late, since the final date on which to file fell on a Saturday, 10 June 1972.

[2] In moving to set aside and vacate entry of default, defendant Hubbard referred to Rule 60 as well as Rule 55 and the trial judge concluded that defendant Hubbard's failure to file his answer on time "was the result of excusable neglect, within the provisions of Rule 60." Any reference to or discussion of Rule 60 in this case was unnecessary and surplusage, because defendant's motion was to set aside and vacate entry of default which is governed by Rule 55(d). The case in no way dealt with a motion to set aside judgment by default which would be governed by the provisions of Rule 60, "excusable neglect" being one of the grounds listed under Section (b) which would justify the granting of such a motion. See *Whaley v. Rhodes, supra.*

> "An entry of default is to be distinguished from a judgment by default. An entry is only an interlocutory act looking toward the subsequent entry of a final judgment by default and is more in the nature of a formal matter; (citation omitted); and a court might feel justified in setting aside an entry of default on a showing that would not move it to set aside a default judgment. (citation omitted.) *Whaley v. Rhodes, supra,* p. 111.

[3] Plaintiff also contends that the trial judge erred in permiting defendant to file his answer, arguing in her brief that to date no request for an enlargement of time to file an answer has been made under Rule 6(b). In *Crotts v. Pawn Shop,* 16 N.C. App. 392, 192 S.E. 2d 55 (1972), cert. denied, 282 N.C. 425, 192 S.E. 2d 835 (1972), this Court upheld an order vacating entry of default but stated through Judge Brock the following at page 394:

> "Before depositing its answer with the clerk defendant did not move under Rule 6(b) for enlargement of time to file answer, therefore, its tardily deposited answer did not constitute a bar to the entry of default. Under the circumstances, the answer was merely proffered for filing. Defendant has not yet made a motion under Rule 6(b) for enlargement of time to file answer, and, therefore, no answer has been filed."

However, in Crotts, the trial judge only set aside and vacated entry of default and made no order permitting the movant to file his answer as was done in the case before us.

Under Rule 6(b) a judge may permit an enlargement of time to file an answer after the expiration of the specified period "where the failure to act was the result of *excusable neglect.*" (Emphasis added.) The trial judge did conclude that defendant's failure to answer was a result of "excusable neglect" [although he did so under Rule 60(b)]. This, with the fact that he ordered the answer to be filed and remain of record, makes the filing of a 6(b) motion unnecessary in this instance. It would have been preferable, however, for defendant Hubbard to have coupled his motion to set aside and vacate entry of default under Rule 55(d) with a motion to enlarge the time in which to file answer under Rule 6(b).

The order of the trial judge is

Affirmed.

Chief Judge MALLARD and Judge HEDRICK concur.

STATE OF NORTH CAROLINA v. STEPHEN F. BALSOM, JAMES E. GOVE, JOSEPH H. KAUSNER, AND JOHN A. SIRACUSE

No. 7312SC131

(Filed 28 March 1973)

1. **Narcotics § 4— felonious possession of LSD — sufficiency of evidence against one defendant only**

Evidence was sufficient to withstand nonsuit in a prosecution against defendant Gove for felonious possession of LSD where such evidence tended to show that LSD was found in premises under the control of Gove, that LSD was found in a drawer with a wallet containing Gove's identification and that LSD was found in a closet containing his clothing; however, nonsuit should have been allowed against defendants Balsom, Kausner and Siracuse where the evidence tended to show that the premises in question were not under their control, that they had no actual or constructive possession of LSD and that they were mere transient visitors of defendant Gove.

2. **Criminal Law § 84— valid search warrant — admissibility of LSD seized**

LSD found on defendant Gove's premises was properly admitted into evidence where the premises were searched and the drug was seized pursuant to a validly issued and executed search warrant.

3. **Criminal Law § 43— photographs of defendants — admissibility for illustration**

The trial court did not err in allowing into evidence photographs taken of defendants at the time of their arrests where the photographs were used to illustrate the testimony of a witness.

APPEAL by defendants from *Clark, Judge,* 28 August 1972 Session of Superior Court held in CUMBERLAND County.

Defendants, Stephen F. Balsom (alias Richard J. Paulino), James E. Gove, Joseph H. Kausner and John A. Siracuse, were charged in separate bills of indictment, proper in form, with felonious possession of the controlled substance Lysergic Acid Diethylamide (LSD). Upon their pleas of not guilty, the State offered evidence tending to show that at about 8:40 a.m., 2 May 1972, Deputy Sheriff William H. Nichols of Cumberland County and other officers, armed with a search warrant, went to a residence at 102 Fleishman Street in Fayetteville. After knocking on the door and receiving no response, Deputy Sheriff Nichols looked through the window to the right of the front door and saw "two subjects sleeping on the floor." He again knocked on the door and received no response. Deputy Nichols opened the door, which was unlocked, and went into the front bedroom and awoke defendants Siracuse and Balsom, then went

to a back bedroom and awoke defendant Kausner and a female companion. Nichols testified: "I identified myself as a Deputy Sheriff, told them that I had a search warrant, and told them to get dressed and go into the living room." After reading the search warrant, the officers began searching the premises. In a dresser drawer in the front bedroom was found a wallet containing identification with the name of James E. Gove. In the same drawer was found "a plastic bag . . . containing 20 yellow and green capsules of white powder" (State's exhibit 2). Another bag containing 21 yellow and green capsules of white powder (State's exhibit 3) was found on the top shelf of a closet in the front bedroom. In a pocket of a brown shirt (State's exhibit 12) hanging in the same closet was found a plastic bag containing 11 green and white capsules of white powder (State's exhibit 4) and another plastic bag containing white powder (State's exhibit 5). Military clothing bearing the name of Gove was found in the closet. After advising the subjects of their rights and placing them under arrest "for possession of narcotics," the officers began searching the area outside the premises. Deputy Sheriff Nichols discovered an indentation in the tall grass approximately 20 to 25 feet directly behind the house, then continued to search the area behind the house. Nichols testified:

> "I found a brown paper bag containing a plastic bag with several small plastic bags of white powder and a silver spoon. State's Exhibit 6, a manila envelope, is the manila envelope which I placed the plastic bag from the brown paper bag which I found in the back yard. I also found three small plastic bags with white powder which I placed into the manila envelope marked State's Exhibit 7. The three plastic bags and the larger plastic bags are the ones which I referred to.
>
> * * *
>
> In the paper bag, I found five more plastic bags of white powder which I placed in the envelope marked State's Exhibit 8. They have my initials and date on each.
>
> * * *
>
> I also found a silver spoon with white powder residue in it which was placed in a manila envelope marked as State's Exhibit 9. It has my initials on the plastic bag it was sealed in and sent to the lab."

Nichols reentered the residence and had resumed searching the interior of the premises when defendant Gove arrived. Nichols testified:

> "I met Mr. Gove in the living room. He wanted to know who we were and what we were doing there and said that he lived there. At that time I stated that I was a Deputy Sheriff of Cumberland and placed him under arrest and advised him of his rights."

On 3 May 1972, defendant Kausner informed Nichols "that he wanted to give me some information with reference to the narcotics traffic." Kausner then stated that he had been paid $300.00 by an individual in Buffalo "to bring two bags of white powder from New York to Fayetteville to be delivered. The individual in Buffalo told him the white powder was pure mescaline; that it would be cut; and that it would end up as approximately 3 pounds of cut mescaline." Kausner said he delivered the two bags to a service station and informed Nichols "that he did not know whether any of the narcotics that were found in the house was part of the narcotics that he brought in."

In a red plaid suitcase in the dining room of the residence at 102 Fleishman Street was found an airline ticket dated 29 April 1972, bearing the names of "J. Siracuse and J. Kausner." The city of departure was Buffalo and the destination was Washington, D. C. Also in the plaid bag were found two airline tickets dated 29 April 1972 from "DCA" (Washington, D. C.) to Fayetteville and bearing the names of defendants Siracuse and Kausner. Nichols testified: "I asked who the red plaid bag belonged to and Siracuse stated that the dirty clothes were his and the items in it were his."

Exhibits 2 through 9 were taken to the laboratory of the State Bureau of Investigation for analysis. Defendants, through counsel, stipulated that were the chemist present, he would testify that the substance analyzed was LSD.

Defendants offered no evidence and were found guilty as charged. From judgments imposing prison sentences of from four to five years (Balsom), a maximum of four years as a committed youthful offender (Gove), two to four years (Siracuse), and three to five years (Kausner), defendants appealed.

Attorney General Robert Morgan and Assistant Attorney General Howard P. Satisky for the State.

Sol G. Cherry, Public Defender, for defendant appellants Balsom and Gove.

Butler, High & Baer by Sneed High for defendant appellants Siracuse and Kausner.

HEDRICK, Judge.

[1] Defendants, Balsom, Gove, Kausner and Siracuse, assign as error the denial of their motions for judgments as of nonsuit.

> "An accused's possession of narcotics may be actual or constructive. . . . Where such materials are found on the premises under the control of an accused, this fact, in and of itself, gives rise to an inference of knowledge and possession which may be sufficient to carry the case to the jury on a charge of unlawful possession." *State v. Harvey,* 281 N.C. 1, 12, 187 S.E. 2d 706, 714 (1972)

When the evidence in the present case is considered in the light most favorable to the State, it is sufficient to show that LSD was found in the premises under the control of defendant Gove. Defendant Gove told the officers that "he lived there." LSD was found in a drawer with a wallet containing Gove's identification. LSD was found in a closet containing Gove's clothing. Such evidence, in our opinion, is sufficient to raise an inference that Gove was a permanent resident of the premises and that he was in control of the premises and had knowledge of the narcotic drug LSD found therein. Gove's exception to the denial of his motion for judgment as of nonsuit is not sustained.

With repect to defendants Balsom, Kausner and Siracuse, there is no evidence that the premises at 102 Fleishman Street were under their control, or that they knew of the LSD located therein. There is no evidence that these defendants had actual or constructive possession of the LSD. The evidence tends to show that these defendants were mere transient visitors. There is no evidence that any of these defendants were under the influence of or users of narcotics. Evidence tending to show that on 29 April 1972, defendant Kausner, accompanied by defendant Siracuse, brought a quantity of the narcotic drug mescaline to Fayetteville from Buffalo, New York, by way of Washington, D. C., raises no inference that Kausner or Siracuse either ac-

tually or constructively possessed the narcotic drug LSD found on or about the premises at 102 Fleishman Street. It is recognized that "mere proximity to persons or locations with drugs about them is usually insufficient, in the absence of other incriminating circumstances, to convict for possession." Annot., 91 A.L.R. 2d 810, 811 (1963).

It is our opinion, and we so hold, the court erred in not allowing the motions of defendants Balsom, Kausner and Siracuse for judgments as of nonsuit. *State v. King,* 264 N.C. 578, 142 S.E. 2d 130 (1965); *Haley v. State,* 7 Md. App. 18, 253 A. 2d 424 (1969).

[2] Defendant Gove contends the court erred in admitting into evidence the LSD found in the premises. The record discloses Gove's premises were searched and the LSD seized pursuant to a validly issued and executed search warrant. This assignment of error is overruled.

[3] Defendant Gove contends the court erred in admitting into evidence a photograph taken at the time of his arrest. This assignment of error has no merit.

It is well settled that photographs may be introduced into evidence for the purpose of illustrating the testimony of a witness. Here the officer testified, without objection, describing the appearance of defendants at the time of their arrest. It was not error for the court to allow photographs taken of defendants at the time of their arrest to illustrate the testimony of the witness.

Defendant Gove has additional assignments of error which we have carefully considered and find to be without merit. Defendant Gove had a fair trial free from prejudicial error.

The judgment against defendant Gove contains the erroneous recital that defendant was charged and convicted of "possession of LSD with intent to distribute." The record reveals the defendant Gove was charged and convicted of felonious possession of the narcotic drug LSD. The erroneous recital is hereby stricken and the judgment modified to conform to the record. As modified, the judgment as to defendant Gove is affirmed. As to defendants Balsom, Kausner and Siracuse, the judgments are reversed.

Judges CAMPBELL and GRAHAM concur.

TIMOTHY SHELDON WINTERS, BY HIS GUARDIAN AD LITEM, L. G. GORDON, JR., AND HARRY C. WINTERS v. PATRICIA PATTERSON BURCH

No. 7321SC123

(Filed 28 March 1973)

Automobiles § 63— striking child on tricycle — directed verdict for defendant driver — no error

In an action to recover for personal injuries caused by defendant's allegedly negligent operation of her car, the trial court properly directed verdict for defendant where plaintiff's evidence showed that she was driving through a residential district at 15-20 mph on a sunny afternoon when the roads were dry, that she saw the minor plaintiff on his tricycle but did not think that he would come out in front of her, that she did not sound her horn when he did so but that she did apply her brakes.

Judge MORRIS dissenting.

APPEAL by plaintiffs from *Gambill, Judge,* 3 August 1972 Session of Superior Court held in FORSYTH County.

This is a civil action wherein the minor plaintiff, Timothy Sheldon Winters, and his father, Harry C. Winters, seek to recover damages for personal injuries and loss of services of the minor plaintiff allegedly resulting from a collision between an automobile negligently operated by defendant and a tricycle (Big Wheelie) being ridden by the minor plaintiff.

The material evidence offered by the plaintiffs tended to show the following:

At about 4:22 p.m., 27 April 1971, an automobile operated by defendant struck and seriously injured the minor plaintiff, age 7, on Pleasant Street in a residential area of Winston-Salem. In the vicinity of the accident, Pleasant Street runs north and south and is intersected on the west by Bretton Street. Pleasant Street is 26 feet wide from curb to curb, divided by a center line, and is straight for a distance of about 176 yards north of Bretton Street. The weather was clear and sunny and the streets were dry.

R. C. Lambert, the investigating officer, received a call at 4:27 p.m. and when he arrived at the scene the minor plaintiff was being put in an ambulance. At the scene, defendant told Officer Lambert that she was driving her automobile south on

Pleasant Street at a speed of 15 to 20 miles per hour when "this child rode out into the street from her right." At the hospital, defendant told the mother of the minor plaintiff, "I saw him, but I didn't think he was going to come out in front of me" and "I saw him and that's just where I stopped." With respect to the location of the defendant's automobile after the accident, Officer Lambert testified:

> "I found the defendant's automobile positioned at the scene of the accident or near there with a big wheelie and this was near where they were putting Timmy in the ambulance. It was near the east curb of Pleasant Street. As to whether it was opposite the mouth of Bretton Street or back of the corner, it was back of the corner."

Officer Lambert further testified:

> "I looked for what we normally refer to as debris, like mud or glass in the road to determine the point of impact. I found a small amount of mud in the roadway.
>
> The mud was 18 feet north from the north cub [*sic*] line of Bretton Street and 10 feet east of the west curb line of Pleasant Street."
>
> "The mud was 3 feet west of the center line."

Plaintiff, Harry C. Winters, testified:

> "When I found this black piece of plastic, I say that that was out in the road, eight feet from the west curb of Pleasant Street. Yes, about eight feet, considering the mud or debris of the road that the officer mentioned, he said he found it further. I didn't particularly notice any mud, not in large amounts, let's put it that way.
>
> Just a little bit of black plastic, very small, caught my attention. I can only surmise that it looked to me like the same plastic on the wheel. Yes, sir, it did look to me to be about the same material. It was eight feet from the western curb line. Yes, I noticed some skid marks extending to the left. Yes, sir, they were in a swerved direction."

With respect to the "skid marks," plaintiff further testified:

> "Yes, sir, I saw skid marks at the scene of the accident. Yes, sir, I measured them. From the start of the tread marks

between the two driveways to the car, it's the front of the car that was 54 feet. Yes, sir, the northernmost tread mark to the front of her car was 54 feet. That includes, of course, allowance for the curvature of the roadway. They began where I found the plastic."

With respect to the "skid marks," Officer Lambert testified:

"There were skid marks approximately . . . 20 feet of skid marks from her left rear tire roughly 3 to 4 feet from the right rear tire.

The skid marks were leading up to where the debris was . . . . The easternmost skid mark was 3-5 feet. There were no marks between the point where I found the mud and the resting place of the automobile."

"The debris I found on the road, the skid marks of the left rear wheel approximately 20 feet of skid mards (sic) came out at an angle like this going toward the east curb line at the right rear tire, left two smaller skid marks approximately 3 or 4 feet in length. Mrs. Burch said she was going to the east side of the road when she applied her brakes. The skid marks that I saw were in a swerved direction to her left. That was in a direction she had been traveling."

Plaintiff found Timmy and the Big Wheelie pinned between the right front wheel and fender of defendant's automobile.

Millie Holt, who lived on the corner of Bretton and Pleasant Streets testified that she heard no unusual noise until she heard "the squeal of tires and the thud" and that she did not hear a horn blow. The minor plaintiff's mother testified that she was in the kitchen of her home (which is located on the east side of Pleasant Street directly across from the Holt residence) when she heard the squeal of brakes, looked out the window and saw her son lying in the street. Mrs. Winters also did not hear a horn blow. There was evidence tending to show that one or two of the tires on defendant's automobile were slick, with very little tread.

At the close of plaintiff's evidence, pursuant to G.S. 1A-1, Rule 50 of the North Carolina Rules of Civil Procedure, defendant moved for directed verdict on the ground that plaintiffs' evidence failed to show actionable negligence on the part of defendant. The trial judge allowed the motion and from a judgment directing a verdict in favor of defendant, plaintiffs appealed.

Hatfield and Allman by James W. Armentrout and R. Bradford Leggett, Jr., for plaintiff appellants.

Womble, Carlyle, Sandridge & Rice by Allan R. Gitter for defendant appellee.

HEDRICK, Judge.

By their two assignments of error, plaintiffs contend the court erred in allowing defendant's motion for directed verdict and in the entry of judgment directing a verdict for the defendant.

When the evidence in this case is considered in the light most favorable to the plaintiffs, it is insufficient, in our opinion, to raise an inference that the injuries to the minor plaintiff were proximately caused by the actionable negligence of the defendant in the operation of her automobile. *Brewer v. Green,* 254 N.C. 615, 119 S.E. 2d 610 (1961).

The judgment is

Affirmed.

Chief Judge MALLARD concurs and Judge MORRIS dissents.

Judge MORRIS dissenting.

Plaintiff's evidence showed that on a sunny dry April afternoon at approximately 4:22, defendant was proceeding in a southerly direction on Pleasant Street in a residential area of the City of Winston-Salem. Pleasant Street is straight for some 176 yards in this area. There were no obstructions to visibility. Defendant's car had at least one slick tire on it. Defendant saw the minor plaintiff, but she didn't think he was going to come out in front of her. She did not sound her horn. The minor plaintiff came from her right and defendant struck the minor plaintiff and his Big Wheelie at a point almost in the center of the road. The skid marks from defendant's car were 54 feet in length. The skid marks were in a swerved direction to her left. The minor plaintiff and his Big Wheelie were found pinned between the right front wheel and fender of defendant's automobile. Defendant was on her way to work, a distance of over two and one-half miles away, and she was supposed to be there at 4:30.

While all the circumstances are not clear, nevertheless, considering the entire evidence under the rule that plaintiff is entitled, on the defendant's motion, to every reasonable intendment and every reasonable inference therefrom, I reach the conclusion that there is here sufficient evidence to withstand defendant's motion.

I am of the opinion that the principles enunciated in *Pope v. Patterson*, 243 N.C. 425, 90 S.E. 2d 706 (1956), and *Sparks v. Willis*, 228 N.C. 25, 44 S.E. 2d 343 (1947), when applied to the facts in this case, require the submission of this case to the jury.

STATE OF NORTH CAROLINA v. CLARENCE MOLES

No. 729SC799

(Filed 28 March 1973)

1. **Crime Against Nature § 2— motion to quash indictment — constitutionality of statute**

G.S. 14-177 providing that the crime against nature is a felony punishable by fine or imprisonment in the discretion of the court is constitutional, and defendant is not entitled to quashal of the bill of indictment against him on grounds that the statute is unconstitutional because of its vagueness and overbreadth.

2. **Criminal Law § 89— testimony of witness corroborated by another witness — no error**

Where one Alston, the person with whom defendant allegedly committed the crime against nature, testified for the State and was subjected to cross-examination by defendant, testimony by a sheriff as to a statement made to him by Alston was admissible for purposes of corroboration.

3. **Criminal Law § 85— evidence of defendant's reputation — admissibility**

The trial court did not err in admitting into evidence testimony of a social worker as to defendant's reputation in the community in which he lived after defendant had already testified in his own behalf.

4. **Criminal Law § 89— prior inconsistent statement — admissibility for impeachment**

The trial court properly admitted rebuttal testimony of a State's witness as to a prior statement made by a defense witness in conflict with the witness's testimony since such testimony was competent for the purpose of contradiction or impeachment.

5. **Criminal Law § 6— drunkenness as defense — sufficiency of evidence**

The trial court was not required to instruct on defendant's intoxication and on drunkenness as a defense where the evidence did not

tend to show that defendant's mental processes were so overcome by the excessive use of intoxicants that he had lost the capacity to think and to plan.

6. **Crime Against Nature § 2; Criminal Law § 106— accomplice testimony alone — sufficiency of evidence**

The sole testimony of an accomplice will support a conviction in a prosecution for crime against nature.

APPEAL by defendant from *Godwin, Judge,* at the 1 May 1972 Criminal Session of Superior Court held in FRANKLIN County.

Defendant was tried under a bill of indictment charging in pertinent part as follows: "That Clarence Moles late of the County of Franklin on the 18th day of September 1971 with force and arms, at and in the county aforesaid, unlawfully, wilfully and feloniously did commit the abominable and detestable crime against nature with Shelton Alston . . ."

A jury found defendant "guilty as charged" and from judgment imposing prison sentence of ten years, defendant appealed.

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

Thomas F. East for defendant appellant.

PARKER, Judge.

[1] Before pleading to the bill of indictment, defendant moved to quash the bill. He now assigns as error the failure of the court to allow his motion. Defendant challenges the validity of the bill for the reason that it was drawn pursuant to G.S. 14-177 and that said statute because of vagueness and overbreadth does not meet Federal and State constitutional standards. The assignment of error is without merit.

G.S. 14-177 provides: "If any person shall commit the crime against nature, with mankind or beast, he shall be guilty of a felony, and shall be fined or imprisoned in the discretion of the court." Prior to the effective date of Chapter 621 of the 1965 Session Laws, G.S. 14-177 provided as follows: "If any person shall commit the abominable and detestable crime against nature, with mankind or beast, he shall be imprisoned in the State's prison not less than five nor more than sixty years."

We have been cited to no case in which the Supreme Court of North Carolina has specifically upheld the constitutionality of G.S. 14-177, but the Court has upheld the validity of bills of indictment substantially embodying the words of the statute. *State v. O'Keefe,* 263 N.C. 53, 138 S.E. 2d 767, and cases cited therein. See also *State v. Stokes,* 274 N.C. 409, 163 S.E. 2d 770. We think the reasoning given in *O'Keefe* and *Stokes* for upholding the validity of bills of indictment substantially embodying the words of the statute is also applicable for upholding the validity of the statute. We hold that the statute is constitutional.

[2] Defendant assigns as error testimony of Sheriff Dement, a State's witness, relating a statement made to him by Shelton Alston, the person with whom defendant committed the alleged crime. Defendant contends the challenged statement was an extrajudicial confession by an accomplice and as such was inadmissible. This contention has no merit.

Conceding, *arguendo,* that Alston was an accomplice, the fact remains that he took the stand as a witness for the State, gave testimony against defendant, and was subjected to cross-examination by defendant. The testimony of Sheriff Dement with respect to the statement made to him by Alston was admitted for the limited purpose of corroborating the witness Alston and the jury was instructed to receive the testimony for that purpose only. Had Alston not taken the witness stand a different question would be presented, but we hold that the testimony was admissible in this case under the well-established rule followed in *State v. Paige,* 272 N.C. 417, 158 S.E. 2d 522, and cases cited therein.

[3] Defendant assigns as error certain testimony given by State's witness Nancy Beasley, identified as a social worker with the Franklin County Department of Social Services. The witness testified that she had interviewed people in the community where defendant lived and pursuant to those interviews she knew "the general character and reputation for the character of Clarence Moles in the community" in which he lived and that it was "not good." This testimony was presented after defendant testified on his own behalf. We hold that the court did not err in admitting the testimony. Stansbury, N. C. Evidence 2d, § 110, pp. 249-251.

[4] Defendant also challenges the competency of certain rebuttal testimony of Nancy Beasley in which she related state-

ments made to her by Irene Strickland who had testified as a defense witness. On direct examination, Irene Strickland testified that she had known defendant approximately eight years, had been his girl friend for several years, had engaged in normal sexual relations with him, and during the entire time she had known defendant, had not observed any unnatural sexual tendencies in his behavior. On cross-examination she testified that she had never made a complaint to anyone about defendant molesting children in the neighborhood.

As a rebuttal witness for the State, Nancy Beasley testified that subsequent to September of 1971 she talked with Irene Strickland who told her that she and her son Ronnie had beaten defendant because of his treatment of Ronnie; that by "treatment" she meant defendant's physical abuse of Ronnie; that defendant had been involved with Ronnie "in an illegal manner involving his privates." We hold that the challenged evidence was competent under the well-established rule that "[t]estimony of a prior statement made by a witness in conflict with the witness' testimony is competent for the purpose of contradiction or impeachment." 2 Strong, N. C. Index 2d, Criminal Law, § 89, pp. 615-616; Stansbury, N. C. Evidence 2d, § 46.

[5] Defendant assigns as error the failure of the trial court to instruct the jury with respect to defendant's intoxication and with respect to drunkenness as a defense. In *State v. Cureton,* 218 N.C. 491, 495, 11 S.E. 2d 469, 471, we find:

> "While intoxication is an affirmative defense no special plea is required. However, to avail the defendant and require the court to explain and apply the law in respect thereto, there must be some evidence tending to show that the defendant's mental processes were so overcome by the excessive use of liquor or other intoxicants that he had temporarily, at least, lost the capacity to think and plan. As to this, he is not relegated to his own testimony. It is sufficient if the testimony of any witness tends to establish the fact. But it must be made to appear affirmatively in some manner that this defense is relied upon to rebut the presumption of sanity before the doctrine becomes a part of the law of the case which the judge must explain and apply to the evidence."

While there was evidence in the instant case that defendant was drinking intoxicants on the day of the alleged offense,

we do not think the evidence tended to show that defendant's mental processes were so overcome by the excessive use of intoxicants that he had lost the capacity to think and plan. We note that defendant did not request instructions on that point. The assignment of error is overruled.

[6] Finally, defendant assigns as error the failure of the court to grant his motions for dismissal because of insufficient evidence of the crime charged. This assignment of error is without merit.

Defendant's argument that there was insufficient evidence of penetration is negatived by the testimony of Alston who testified to the effect that defendant engaged in sexual relations with him *per os* and *per anus*. Defendant appears to argue that the sole testimony of an accomplice will not support a conviction of the offense prescribed by G.S. 14-177. In Stansbury, N. C. Evidence 2d, § 21, pp. 40-41, we find: "The general rule is that the testimony of a single witness will legally suffice as evidence upon which the jury may found a verdict; . . . In some jurisdictions an *accomplice* must be corroborated, but in North Carolina the unsupported testimony of an accomplice is sufficient to convict if the jury believe him." See also *State v. McNair*, 272 N.C. 130, 157 S.E. 2d 660. In the cited section Professor Stansbury enumerates some four offenses that require corroborating testimony to convict, but crime against nature is not one of them.

We have carefully considered all contentions argued in defendant's brief but find them to be without merit. We hold that defendant received a fair trial, free from prejudicial error, and the sentence imposed is within the limits provided by statute.

No error.

Judges BRITT and VAUGHN concur.

ALICE JEANNIE HAWLEY CLOUSE v. CHAIRTOWN MOTORS, INC.

No. 7322SC140

(Filed 28 March 1973)

1. **Damages § 15; Fraud § 12— fraud in sale of automobile — sufficiency of evidence — punitive damages**

In this action to recover damages for fraud in the sale of an automobile, plaintiff's evidence was sufficient for submission to the jury of an issue of compensatory damages, but was insufficient for submission of an issue of punitive damages, where it tended to show that defendant's agents represented to plaintiff that the automobile came straight from the factory, that it had never been "titled" to another person, that it was a "new factory demonstrator car," and that it had not been wrecked, that the automobile in fact had previously been owned by a rent-a-car company, and that subsequent to the purchase one of defendant's agents admitted that the automobile had been wrecked.

2. **Appeal and Error § 68— law of the case — sufficiency of complaint — insufficiency of evidence**

Decision on former appeal that plaintiff's complaint stated a claim for relief for punitive damages does not constitute the law of the case on the question of whether plaintiff's evidence is sufficient to support the submission of an issue of punitive damages to the jury.

APPEAL by plaintiff and defendant from *Gambill, Judge,* 10 July 1972 Session of Superior Court held in DAVIDSON County.

Plaintiff commenced this civil action against the defendant corporation seeking compensatory and punitive damages for fraud. The defendant filed a counterclaim seeking damages on a cause of action unrelated to the plaintiff's claim for fraud. The issues raised by the counterclaim were answered by the jury in favor of the plaintiff and the appeal taken as to those issues has lapsed.

At trial before a jury plaintiff testified in her own behalf to the following facts: On 18 November 1969, plaintiff entered into a contract with the defendant corporation to purchase a 1969 Mercury automobile. At the time the contract was entered into, the defendant corporation's agents, C. C. Alexander and J. E. Sink, represented to plaintiff that the Mercury automobile "came straight from the factory"; that it had never been "titled" to another person; that "it was a new factory demonstrator car"; and that the Mercury automobile had not been "wrecked." Plaintiff further testified that she relied upon these

representations in deciding to purchase the Mercury automobile, but that, subsequent to the purchase, C. C. Alexander "admitted the car had been wrecked." On 15 December 1969, plaintiff discovered from a notice mailed to her by the North Carolina Department of Motor Vehicles that the Mercury automobile she had purchased had previously been owned by a "rent-a-car" company. Plaintiff also testified that the purchase price of the Mercury car was $3,295.00, but that in her opinion the fair market value of the car on the date of purchase was only $2,500.00.

The defendant offered evidence showing, in substance, that the defendant's agents and employees had not knowingly made any false representations to the plaintiff; that the title to the Mercury automobile in question was originally held by a "rent-a-car" corporation, but that neither C. C. Alexander nor J. E. Sink were aware of that fact when dealing with Mrs. Clouse; that neither Alexander nor Sink made any statement with regard to whether or not the Mercury car had been previously owned by a "rent-a-car" company, but that Sink had represented to Mrs. Clouse that the Mercury was a "factory car." Defendant also offered in evidence testimony to the effect that the purchase contract between plaintiff and defendant showed the Mercury car as being a "used factory" car and that cars used by "rent-a-car" companies were sold as "used factory" cars by the defendant.

At the close of the plaintiff's evidence the defendant moved for a directed verdict. The motion was denied as to the claim for fraud, but allowed as to the issue of punitive damages. At the close of all the evidence, the motion for a directed verdict was renewed and denied by the trial court. The jury answered the issues tendered in favor of the plaintiff and returned a verdict that the plaintiff shall recover of the defendant the sum of $795.00. Judgment was entered on the verdict and the defendant's motion for judgment notwithstanding the verdict was denied. Both plaintiff and defendant appealed, assigning error.

John Randolph Ingram for plaintiff appellee and plaintiff appellant.

Charles F. Lambeth, Jr., for defendant appellant and defendant appellee.

MORRIS, Judge.

PLAINTIFF'S APPEAL

[1] Plaintiff assigns error to the action of the trial judge, allowing the defendant's motion for a directed verdict on the issue of punitive damages, G.S. 1A-1, Rule 50(a). Plaintiff contends that, under the facts of this case, the issue of punitive damages should have been submitted to the jury.

In North Carolina, whether a party may recover punitive damages in an action for fraud depends on the character of the acts alleged to constitute fraud in each case. *Swinton v. Realty Co.*, 236 N.C. 723, 73 S.E. 2d 785 (1953).

> "In ordinary cases a recovery of exemplary, punitive, or vindictive damages will not be allowed in an action of deceit, but in certain cases such damages may be allowed, as . . . where the fraud is gross or the case presents other extraordinary or exceptional circumstances clearly indicating malice and willfulness, as where it appears that defendant acted with a deliberate intent to injure plaintiff. . . . " 37 C.J.S., Fraud, § 144.

See also, *Nunn v. Smith*, 270 N.C. 374, 154 S.E. 2d 497 (1967); *Van Leuven v. Motor Lines*, 261 N.C. 539, 135 S.E. 2d 640 (1964); *Binder v. Acceptance Corp.*, 222 N.C. 512, 23 S.E. 2d 894 (1943); *Mills v. Koscot Interplanetary*, 13 N.C. App. 681, 187 S.E. 2d 372 (1972); *Poplin v. Ledbetter*, 6 N.C. App. 170, 169 S.E. 2d 527 (1969).

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

We hold that, taking all of the plaintiff's evidence as true, the record is void of evidence of insult, indignity, malice, oppression, or bad motive, and that the facts upon which the plaintiff seeks to recover punitive damages are the same facts on which he bases his cause of action for fraud. See *Nunn v. Smith, supra.* This assignment of error is overruled.

[2] Although not referred to by the plaintiff in her brief, we note that this case has been before us on a previous appeal

[*Clouse v. Motors, Inc.*, 14 N.C. App. 117, 187 S.E. 2d 398 (1972)]. On that appeal, Judge Vaughn, writing for the Court, held that the trial court had erred in allowing the defendant's motion to dismiss the complaint as to the issue of punitive damages and that the facts alleged in the complaint of the plaintiff stated a claim for punitive damages upon which relief could be granted, G.S. 1A-1, Rule 12(b)(6). At the trial below the defendant's motion for a directed verdict on the issue of punitive damages was allowed, and we have sustained that ruling on this appeal. Plaintiff has not raised or discussed the issue whether the decision on plaintiff's former appeal is the "law of the case," binding on the question of the adequacy of the facts to state a claim for relief for the jury to decide. Even had the plaintiff so contended, she could not prevail. In the former appeal the sufficiency of pleadings was before the court. Here we are concerned with sufficiency of the evidence.

> "It is contended that the 'law of the case' was written when this case was before us at the fall term of 1940, 218 N.C., 680, 12 S.E. (2d), 217. At that term we held that the demurrer to the complaint should not have been sustained. We are now holding that the demurrer to the evidence in this case should be sustained. There is no inconsistency in such holdings. . . . " *Montgomery v. Blades*, 222 N.C. 463, 23 S.E. 2d 844 (1943), reh. denied, 223 N.C. 331, 26 S.E. 2d 567; *Smith v. Sink*, 211 N.C. 725, 192 S.E. 108 (1937). See also, *Lewis v. Shaver*, 236 N.C. 510, 73 S.E. 2d 320 (1952).

Plaintiff further assigns error to the admission in evidence of certain testimony and the exclusion from evidence of other testimony. We have considered the questions raised, but are of the opinion that no prejudicial error was committed therein by the trial judge. These assignments of error are overruled.

DEFENDANT'S APPEAL

[1] Defendant assigns as error the failure of the trial judge to grant its motions for a directed verdict and for judgment notwithstanding the verdict. G.S. 1A-1, Rule 50(b). However, we are of the opinion that viewed in the light most favorable to the plaintiff, the evidence was sufficient to be submitted to the jury and amply supported the verdict and that defendant's motions were properly denied. *Garland v. Penegar*, 235 N.C. 517, 70 S.E. 2d 486 (1952); *cf. Bennett v. Whippett-Knight Co.*,

198 N.C. 98, 150 S.E. 676 (1929). This assignment of error is overruled.

Defendant assigns as error the failure of the trial judge to declare and explain the law arising on the evidence, G.S. 1A-1, Rule 51(a). We have examined the challenged portion in connection with the charge as a whole in the light of the evidence offered. We do not perceive any substantial ground upon which to predicate harmful error.

Plaintiff's appeal—Affirmed.

Defendant's appeal—Affirmed.

Judges BROCK and HEDRICK concur.

JIMMY R. LOVE v. LLOYD FRANKLIN HUNT

No. 7321SC159

(Filed 28 March 1973)

1. **Damages §§ 3, 13— personal injury — loss of earning capacity — loss of business profit**

While evidence of a loss of business or the net income of a business may be competent and admissible in certain personal injury cases as an aid in determining the pecuniary value of the loss of time or the loss or impairment of earning capacity, under the circumstances of the present case where plaintiff had been in business for himself for only two months prior to the injury in question and had no record of profit or loss before the accident, evidence tending to show that his business lost $1500 and that six automobiles he had purchased to repair and resell had depreciated $1500 in value during plaintiff's disability would not have been of any aid to the jury in determining the pecuniary value of loss of time or loss or impairment of earning capacity, and exclusion of such evidence was not prejudicial.

2. **Damages § 16; Trial § 33— review of evidence — instruction on damages — failure to repeat evidence — no error**

The trial court in a personal injury and property damage suit properly declared and explained the law arising on the evidence where he reviewed the evidence in detail as to plaintiff's injuries, then instructed on the measure of damages, and his failure to repeat all the evidence of injury in enunciating the rule for the admeasurement of damages for personal injury was not error.

APPEAL by plaintiff from *Gambill, Judge,* 18 September 1972 Session of Superior Court held in FORSYTH County.

This is a civil action wherein plaintiff, Jimmy R. Love, seeks to recover damages for injury to person and property allegedly resulting from an automobile-truck collision. Plaintiff offered evidence tending to show that on 3 October 1970 he was riding as a passenger in an automobile owned and operated by Richard Wayne Kiger when it collided with a pickup truck owned and operated by defendant, Lloyd Franklin Hunt. When the two motor vehicles collided, plaintiff was thrown through the windshield and received multiple lacerations to the face, three fractured ribs and abrasions to his legs. After the lacerations in plaintiff's face were sutured in the emergency room of a hospital in Thomasville, plaintiff was transferred by ambulance to Baptist Hospital in Winston-Salem where he was examined and "released from the hospital the day after the accident." These sutures were removed by plaintiff's family doctor on 9 October 1970 who on 23 October 1970 placed plaintiff in a "rib binder." After the accident, plaintiff was "not bedridden." "He could walk around," but his physician advised him not to operate an automobile from six to eight weeks. In the opinion of the physician, plaintiff was able to return to work after 4 February 1971.

Plaintiff testified that prior to the accident he had one small scar under his chin and that:

> "In the accident, I received scarring on my right eye and scarring on each side of my cheek and also scarring on my forehead. I have pain in these scars and feel it when you touch them.
>
> I also have scars in my eyelid and have pain and discomfort there. When you touch the scar on my eye, it pulls on my eye and the muscles of my eye.
>
> I also have scarring on the inside of my mouth. The upper and lower lips were stitched up. There are knots in my mouth where it was sewed up. I no longer have feeling in my lower lip. I have not been able to wear my false teeth since receiving these injuries."

All expenses incurred by plaintiff for transportation, diagnosis and treatment of injuries received in the accident totaled $282.27.

At the time of the accident, plaintiff was 37 years of age and had been self-employed for two months "in the used car business." Plaintiff testified:

> "I would buy cars locally and in West Virginia, do body work and mechanical work on them and sell the cars at the auto auctions in High Point, North Carolina, and Darlington, South Carolina.
>
> At the time of the accident, I had six cars prepared for sale. Because of the injuries I sustained in the accident, I was unable to sell these cars until February and March of 1971."

Before going into business for himself, plaintiff was employed as sales manager of J. C. Parker Motors in Winston-Salem at a weekly salary of $100.00 plus commissions. Plaintiff was unemployed for the first six months of 1969 because of an eye operation and had a gross income of $3,806.00 for that year. Plaintiff's gross income for 1970 was $3,171.00. Plaintiff's 1970 income tax return did not indicate that he earned any income from his own business because he "wound up with a loss. That was during the period of time that this wreck happened and I was incapacitated."

Plaintiff testified that his false teeth valued at $100.00, "eyeglasses" valued at $160.00, and watch valued at $75.00 were destroyed in the accident.

The jury found that plaintiff was injured and damaged by the negligence of defendant and awarded plaintiff $335.00 for damage to personal property and $1,257.27 for personal injuries.

From judgment on the verdict, plaintiff appealed.

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

Hudson, Petree, Stockton, Stockton & Robinson by R. M. Stockton and James H. Kelly, Jr., for defendant appellee.

HEDRICK, Judge.

All of the assignments of error brought forward and argued in plaintiff's brief relate to the issue of damages for personal injury.

Based on exceptions 2 through 8, plaintiff contends the court erred in excluding testimony that:

(1) Six used cars which plaintiff purchased to repair and resell depreciated $1,500.00 in value from 3 October 1970 until February, 1971;

(2) While plaintiff was employed as sales manager of J. C. Parker Motors in Winston-Salem two months before he became self-employed, he earned commissions of $10.00 or $15.00 on each automobile sold, depending upon its selling price; and

(3) Plaintiff lost $1,500.00 from his "own business" from the date of the accident to the end of the calendar year.

In his brief, plaintiff asserts:

> "[E]vidence of lost profits and depreciation of assets of the personal, one-man, business of the plaintiff-appellant . . . should have been admitted to furnish as a safeguard for the jury to help it in determining the pecuniary value of loss of time or impairment of the plaintiff-appellant's earning capacity."

[1] While evidence of a loss of business or the net income of a business may be competent and admissible in certain personal injury cases as an aid in determining the pecuniary value of the loss of time or the loss or impairment of earning capacity, *Smith v. Corsat,* 260 N.C. 92, 131 S.E. 2d 894 (1963); *Jernigan v. R. R. Co.,* 12 N.C. App. 241, 182 S.E. 2d 847 (1971), under the circumstances of the present case, where plaintiff had been in business for only two months prior to this injury and had no record of profit or loss before the accident, we cannot perceive that evidence tending to show that his business lost $1,500.00 and that the six automobiles he had purchased to repair and resell had depreciated $1,500.00 in value during plaintiff's disability, would be of any aid in determining the pecuniary value of loss of time or loss or impairment of earning capacity. Moreover, plaintiff was allowed to testify, without objection, that he had no income from his own business during his incapacity, and that his business "wound up with a loss" for the year 1970.

Plaintiff was allowed to testify as to his gross income for the years 1969 and 1970. The exclusion of testimony as to the type commission plaintiff received on each car sold while em-

ployed by J. C. Parker Motors cannot, therefore, be considered prejudicial.

[2] Based on assignments of error 5, 6, 7 and 8 (exceptions 9 and 10), plaintiff contends the court failed to declare and explain the law arising on the evidence as to damages for personal injuries as required by G.S. 1A-1, Rule 51(a) of the North Carolina Rules of Civil Procedure.

It is apparent that Judge Gambill based his charge on the issue of damages for personal injury upon the charge approved in *Hunter v. Fisher,* 247 N.C. 226, 100 S.E. 2d 321 (1957). After reviewing the evidence in detail as to plaintiff's injuries, including evidence as to scars on plaintiff's face, Judge Gambill instructed the jury substantially in accordance with the charge approved in the *Hunter* case. Where the court reviews in detail evidence of plaintiff's injuries, the failure of the court to repeat such evidence in enunciating the rule for the admeasurement of damages for personal injury is not error. 3 Strong, N. C. Index 2d, Damages, § 16.

We hold that plaintiff had a fair trial free from prejudicial error.

No error.

Chief Judge MALLARD and Judge MORRIS concur.

MICHAEL REAGAN HINSON v. CHARLES THOMAS PARKER

No. 7314DC17

(Filed 28 March 1973)

Automobiles § 58— left turn at intersection — negligence of plaintiff — directed verdict for plaintiff improper

Even if defendant was negligent in some manner, he was entitled to a directed verdict in an action to recover for damage to personal property where the evidence tended to show that plaintiff was concentrating on a car behind him as he entered an intersection to make a left turn, that his attention was not directed in front of him until he was five or six feet from defendant and that he collided with defendant's vehicle while executing the left turn.

APPEAL by defendant from *Read, District Judge,* 8 May 1972 Civil Session of District Court held in DURHAM County.

Plaintiff instituted this action on 7 September 1971 seeking to recover $750.00 for damage to his automobile sustained in a collision with defendant's vehicle. Defendant answered, denied any negligence on his part, and alleged that negligence on the part of the plaintiff was the sole cause, or one of the contributing causes of the collision and resulting damage. In a counterclaim, defendant asked for recovery of $400.00 for property damage to his vehicle.

The jury answered issues of negligence and contributory negligence in plaintiff's favor and awarded damages in the amount of $700.00. Defendant appeals from entry of judgment on the verdict.

Winders, Williams, Darsie and Clayton by Charles Darsie for plaintiff appellee.

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

GRAHAM, Judge.

Defendant assigns as error the denial of his motion for a directed verdict made at the conclusion of plaintiff's evidence and renewed at the end of all the evidence. The assignment of error is well taken.

The collision occurred at a Durham intersection where Guess Road is intersected from the north by Hillcrest Drive and from the south by Clarendon Street. The intersecting streets are offset only slightly and traffic moving along said streets and through the intersection moves in a direct line without having to first turn onto Guess Road. In other words, the three streets form a single intersection. Guess Road is the dominant street and stop signs on both Hillcrest Drive and Clarendon Street control the movement of traffic onto or across Guess Road.

Plaintiff alleged in his original complaint that while he was driving his Datsun automobile in a westerly direction along Guess Road, defendant entered the intersection from Hillcrest Drive without stopping at the stop sign and caused the collision. However, plaintiff's evidence, which consisted of his testimony only, tended to show that the collision occurred when plaintiff made a left turn onto Guess Road from Clarendon Street and drove into the left front quarter panel of defendant's car at a time when both vehicles were in the intersection.

Plaintiff testified that he approached the intersection proceeding in a northerly direction along Clarendon Street and stopped at the stop sign. He looked in both directions along Guess Road and saw no approaching traffic. He also looked across the intersection and saw no traffic approaching along Hillcrest Drive or stopped at the stop sign on Hillcrest Drive. Plaintiff then proceeded into the intersection and into his turn. He stated that he caught a glimpse of defendant's car out of the corner of his eye when it was five to six feet away. Plaintiff was already making his turn and was unable to stop before striking the front quarter panel of defendant's car with the front of his own. Plaintiff expressed no opinion as to the speed of defendant's car or as to whether it stopped before entering the intersection. He was unable to state where it came from or how it got within five or six feet of him before he saw it. There was nothing to obstruct his vision. A motorist is charged with having seen what he could have seen had he looked. *Dawson v. Jennette,* 278 N.C. 438, 180 S.E. 2d 121.

An explanation as to why plaintiff never saw defendant's automobile until the collision was imminent may be found in his statement that after he left the stop sign he never looked north directly in front of him. He also admitted that two boys had been driving a car right behind him since he pulled out of his driveway a short distance away. He stated that " . . . I do remember that car blowing its horn at me. This was once coming up Clarendon Street and as I had made my turn right about there with my automobile, he also blew the horn." The record reflects the following:

"Q. Your attention was directed back to where that horn came from?

A. That's right.

Q. And then as you then refocused your attention where you were headed you saw the car being driven by Mr. Parker?

A. That's right.

Q. Is that correct?

A. That's correct."

Considering the evidence in the light most favorable to plaintiff, as we must do, we are of the opinion that it fails to

show any negligent act or omission on the part of defendant as a proximate cause of the collision and resulting damages.

At the conclusion of all the evidence plaintiff was permitted to amend his complaint to allege that defendant was " . . . careless and negligent in that he failed to first see before starting, stopping or turning from a direct line upon a highway that such movement could be made in safety. . . . " Plaintiff argues that in considering defendant's evidence along with his own, a permissible inference arises that defendant entered the intersection without seeing that the movement could be made in safety. Evidence of defendant which is favorable to plaintiff must be considered in determining whether defendant was entitled to a directed verdict. *See Rosser v. Smith,* 260 N.C. 647, 133 S.E. 2d 499. In addition to his own testimony, defendant presented the testimony of the investigating police officer and of an eyewitness. We fail to find any inferences favorable to plaintiff that could be drawn from any of their testimony.

Even if it be conceded that defendant was negligent in some manner, plaintiff was also negligent as a matter of law in failing to keep a proper lookout and in making a left turn without first ascertaining that he could do so in safety.

Reversed.

Judges CAMPBELL and HEDRICK concur.

MILTON GADDY, EMPLOYEE v. C. J. KERN, CONTRACTOR, EMPLOYER AETNA CASUALTY AND SURETY COMPANY, CARRIER

No. 7314IC18

(Filed 28 March 1973)

Master and Servant § 96— appeal of Industrial Commission decision — review of findings of fact

In an action to recover for injury arising out of and in the course of employment where there was no evidence that plaintiff's headaches resulted from an accidental injury to his left arm, except a statement by the plaintiff himself that prior to his injury he had never had habitual headaches, the Industrial Commission's finding of fact that the headaches were unrelated to the injury is not disturbed on appeal, and there is no error in the Commission's award for plaintiff's injury to his left arm only.

Gaddy v. Kern

APPEAL by plaintiff from opinion and award of the North Carolina Industrial Commission filed 17 July 1972.

On 2 September 1970 plaintiff sustained an injury by accident arising out of and in the course of his employment. All jurisdictional facts were stipulated, and plaintiff's employer and its insurance carrier admitted liability under the North Carolina Workmen's Compensation Act. Pursuant to an agreement approved by the Industrial Commission plaintiff was paid compensation for temporary total disability at the rate of $50.00 per week from the date of his injury to 16 August 1971. During October 1971 plaintiff was advanced the sum of $400.00 toward the permanent disability award anticipated in this case.

A hearing was conducted before a Commissioner on 25 January 1972 at which the following pertinent evidence was presented:

Dr. F. W. Clippinger testified that he treated plaintiff beginning on 22 September 1970 after Gaddy had been treated at the emergency room at North Carolina Memorial Hospital in Chapel Hill. Dr. Clippinger observed a cut on the lower front part of the forearm which was in the process of healing. Gaddy could not use the long and ring fingers of his left hand, and complained of pain and loss of sensation in those fingers.

The two tendons to the long and ring fingers had been severed, and the median nerve extending into the palm of the hand was compressed. On 3 November 1970 Dr. Clippinger performed surgery on the left hand at Duke Hospital.

On 13 March 1971 Gaddy was readmitted to Duke Hospital, and the following day Dr. Clippinger removed scar tissue from the repaired muscle and tendons and decompressed the nerve again, this surgery having been necessary to relieve pain in the left arm and hand.

By 15 April 1971 Dr. Clippinger felt that Gaddy had recovered sufficiently from the last surgery to return to light work. By 29 April 1971 Gaddy had a good grasp with his left hand, and could bring his fingertips well into his palm; however, he lacked ten degrees of extension of the first joint of his long and ring fingers.

It was Dr. Clippinger's opinion that Gaddy had reached the stage of maximum improvement on 11 August 1971, and

that he had a partial permanent disability of 15% of his left hand.

Dr. Clippinger's testimony also recited that Gaddy had been examined by another physician in Raleigh, North Carolina, whose report dated 21 September 1971 stated that Gaddy had a partial permanent disability of 25%.

Beginning in April 1971 Gaddy complained of severe headaches. Dr. Clippinger did not know what caused the headaches, and sent Gaddy to see a Dr. Escueta, whose report stated that the headaches were histamine headaches, caused by an allergy. Dr. Escueta reported that he did not know of any relationship between the headaches and the hand injury.

Based upon this evidence the Commission found that the headaches were unrelated to plaintiff's accident. Gaddy did not object or take exception to this finding of fact. The Commission awarded plaintiff compensation. The award was pursuant to G.S. 97-31(12) at the rate of $50.00 per week for thirty-four weeks, beginning 11 August 1971, based upon a finding of 20% disability in his left hand.

Pearson, Malone, Johnson & DeJarmon by W. G. Pearson II for plaintiff appellant.

Spears, Spears, Barnes, Baker, Boles & Pinna by Alexander H. Barnes for defendant appellee.

CAMPBELL, Judge.

Plaintiff has argued that the Industrial Commission erred in not considering his evidence concerning severe headaches which he began to experience some three months after the injury occurred. It is his contention that the headaches are evidence of a general disability for which he is entitled to compensation under G.S. 97-30, and that the headache evidence necessitates a finding of a greater disability than that of 20% in his left hand.

Where the claimant has suffered injury as a result of accident arising out of and in the course of his employment *of a specific nature* included in G.S. 97-31, compensation provided by 97-31 for such specific injury is granted in lieu of all other compensation, except that he may also be entitled to compensation under G.S. 97-29 for total temporary disability

during the course of the healing of that injury. *Watkins v. Motor Lines,* 279 N.C. 132, 181 S.E. 2d 588 (1971); *Rice v. Panel Co.,* 199 N.C. 154, 154 S.E. 69 (1930).

Here the plaintiff received compensation during the healing period of the hand injury under G.S. 97-29, and after the healing period from the point of maximum recovery, for partial loss of use of his hand under G.S. 97-31(12).

But plaintiff also contends that the headaches entitled him to compensation under G.S. 97-30, which authorizes compensation for partial incapacity for work resulting from injury, not otherwise covered by G.S. 97-31.

In order to secure an award under G.S. 97-30, the claimant has the burden of proving (1) that the injury resulted from accident arising out of and in the course of his employment; (2) that there resulted from that injury a loss of earning capacity (disability); and (3) that he must prove the extent of that disability. *Hall v. Chevrolet Co.,* 263 N.C. 569, 139 S.E. 2d 857 (1965); *Henry v. Leather Co.,* 231 N.C. 477, 57 S.E. 2d 760 (1950). Without such proof there is no authority upon which to make an award even though permanent physical injury may have been suffered. *Branham v. Panel Co.,* 223 N.C. 233, 25 S.E. 2d 865 (1943).

In the instant case there is no evidence that plaintiff's headaches resulted from the accidental injury to his left arm, except a statement by the plaintiff himself that prior to his injury he had never had habitual headaches. The Industrial Commission is the sole judge of the credibilty of the evidence. It may accept or reject the testimony of a witness, either in whole or in part. It is not required to accept even the uncontradicted testimony of a witness. *Morgan v. Furniture Industries, Inc.,* 2 N.C. App. 126, 162 S.E. 2d 619 (1968).

Since there was no evidence that the plaintiff's headaches did result from the injury, and since plaintiff did not take exception to the Commission's finding of fact that the headaches were unrelated to the injury, there is no error in the Commission's award.

No error.

Judges HEDRICK and GRAHAM concur.

STATE OF NORTH CAROLINA v. JAMES DENTON

No. 7312SC93

(Filed 28 March 1973)

1. **Arrest and Bail § 3— warrantless arrest — commission of felony and probability of escape as prerequisites**

In order to justify a warrantless arrest under G.S. 15-41(2), the State must show that the officer had probable cause to believe the person arrested had committed a felony and that the officer had probable cause to believe the person arrested would escape if not immediately taken into custody.

2. **Arrest and Bail § 3— warrantless arrest — commission of felony**

Because of his knowledge of outstanding bills of indictment against the defendant charging felonies and his knowledge of the existence of a capias for the arrest of the defendant, the arresting officer did have probable cause to believe that defendant had committed a felony.

3. **Arrest and Bail § 3— warrantless arrest — probability of escape — arrest lawful**

Where the evidence in a prosecution for possession of heroin tended to show that the arresting officer knew that bills of indictment had been returned against defendant, that he had known defendant for eight or nine months and had an opinion where he could find him, that he found defendant where he expected to find him, but that defendant had to be removed forcibly from the vehicle in which he was sitting and his arms handcuffed behind his back, and that the officer had reason to believe that defendant would leave the county, the officer had probable cause to believe that defendant would evade arrest if not immediately taken into custody; therefore, the warrantless arrest of defendant was lawful.

APPEAL by defendant from *Clark, Judge,* 28 August 1972 Criminal Session of CUMBERLAND County Superior Court.

Defendant was charged in a bill of indictment with possession of heroin on 27 June 1972, pleaded not guilty, but was found to be guilty by a jury. Defendant was sentenced to imprisonment for not less than three nor more than five years in the State Prison.

In a voir dire hearing the State put on evidence tending to show that prior to 27 June 1972 a Grand Jury had returned two bills of indictment against the defendant for possession and sale of heroin on a date prior thereto. These were felony indictments. Pursuant thereto a capias had been issued ordering that defendant be arrested. William H. Nichols, a Deputy Sheriff, saw defendant sitting in an automobile in Fayetteville at about

10:00 p.m. on 27 June. Although Nichols did not have the capias in his possession, he arrested defendant under its authority. The defendant was searched as an incident to that arrest, taken to the police station, and a glassine bag was found when he emptied his pockets. That glassine bag contained a white powder which was tested by chemical analysis, and found to be heroin. It was for possession of that heroin found by search of his person incident to the arrest on 27 June 1972 that defendant was tried and convicted in this case.

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

Assistant Public Defender Kenneth Glusman for defendant appellant.

CAMPBELL, Judge.

Defendant contends that the arrest was unlawful, that the evidence discovered as an incident to that arrest was unlawfully seized, and therefore that that evidence was not admissible in the prosecution against him.

By the term "arrest without warrant" is obviously meant the situation where no warrant for arrest has been issued. But in addition, that phrase also includes the situation where a warrant for arrest is in existence, but not in the possession of the arresting officer, or someone acting in conjunction with him, at the time and place of arrest. It is the general rule that when the arresting officer does not have the warrant in his possession at the time of arrest, the arrest is unlawful, unless it is one which could be validly and legally made without a warrant. *Alexander v. Lindsey,* 230 N.C. 663, 55 S.E. 2d 470 (1949).

[1] An arrest without warrant, except as authorized by statute, is illegal. *State v. Mobley,* 240 N.C. 476, 83 S.E. 2d 100 (1954). Since the officer did not arrest with warrant in the instant case, the validity of the arrest must be determined by G.S. 15-41, which states the conditions upon which a law officer may arrest persons without warrant.

Subsection (2) of G.S. 15-41 provides that a peace officer may arrest a person without warrant "[w]hen 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." (Emphasis added.)

In order to justify a warrantless arrest under this subsection the State must show two things: (1) that the officer had probable cause to believe the person arrested had committed a felony, and (2) that the officer had probable cause to believe the person arrested would escape if not immediately taken into custody.

[2] Probable cause to believe that the person had committed a felony exists without question where the officer has personal knowledge that a warrant has been issued for the arrest of such person, which warrant charges a felony. *Bartlett v. United States,* 232 F. 2d 135 (5th Cir. 1956); *Cash v. State,* 222 Ga. 55, 148 S.E. 2d 420 (1966). Because of his knowledge of outstanding bills of indictment against this defendant charging felonies, and his knowledge of the existence of a capias for the arrest of this defendant, Deputy Nichols did have probable cause to believe that defendant Denton had committed a felony.

[3] However, for this arrest to have been valid, it must appear from the evidence that Deputy Nichols had probable cause to believe that Denton would evade arrest if not immediately taken into custody.

Nichols testified that a Grand Jury had returned true bills against several individuals for violations of the narcotics laws, including Denton. At about 6:30 p.m. on 27 June several officers gathered at the Cumberland County Courthouse to organize the arrest of all those individuals named in the indictments. Nichols testified that he had known Denton for about eight or nine months, and had an opinion where he could find him. At about 10:00 p.m. on the 27th of June, Nichols saw Denton sitting in an automobile where he expected him to be, and arrested him without having the capias in his possession at the time of the arrest. The arrest took place about one mile from the courthouse.

Nichols testified:

> "I did not have time to go to get the capias because I did not know how long he would be there. At that time the defendant was living in Spring Lake somewhere to the best of my knowledge. If he had left the area at that time

I would have followed him. In my mind, I had reason to believe he would leave Cumberland County."

The defendant had to be forcibly removed from the automobile where he was sitting, and his arms handcuffed behind his back.

The authority to arrest without warrant is limited to situations of emergency only. We believe the facts in the instant case do show such an emergency situation, and that the facts in this case are similar to the facts in *State v. Roberts*, 6 N.C. App. 312, 170 S.E. 2d 193 (1969), *aff'd*, 276 N.C. 98, 171 S.E. 2d 440 (1970), and the cases cited therein.

The arrest having been lawful, the evidence obtained as an incident thereto was admitted properly.

No error.

Judges BRITT and GRAHAM concur.

IN THE MATTER OF: THE CUSTODY OF MELVIN LEE COX, JR., SUSAN DIANNE COX AND JAMES EARL COX

No. 7319DC176

(Filed 28 March 1973)

1. **Infants § 9— child custody proceeding — review of court's decision**

Decision of the trial court awarding custody of minor children to the Department of Social Services rather than to the mother is not disturbed on appeal, absent a clear showing of abuse of discretion.

2. **Costs § 1; Infants § 9— child custody proceeding — costs and counsel fees**

Respondent in a child custody proceeding was not entitled to an award of counsel fees or to have court costs taxed against petitioner father where respondent introduced no evidence with respect to her dependent status or inability to defray the expenses of the suit and where she was not the party for whom judgment had been given. G.S. 50-13.6; G.S. 6-1.

3. **Appeal and Error § 21— denial of request for information — no review on appeal**

Challenge by respondent in a child custody proceeding to the trial court's denial of her request that the Department of Social Services turn over to her the entire record relating to its investigation of her children was not before the court on appeal.

In re Cox

APPEAL by respondent from *Sapp, Judge,* 25 September 1972 Session of RANDOLPH County District Court.

Respondent appealed from an order of the trial court entered 28 September 1972 in which the court refused to revoke and rescind an order of 31 August 1972 awarding the custody and tuition of her two minor children, James Earl Cox and Susan Dianne Cox, to the Department of Social Services and in which the trial court refused to restore custody of the children to respondent. A third child of respondent, Melvin Lee Cox, is not involved in this appeal. The order appealed from is the last in a series arising out of custody proceedings begun in 1961 by petitioner father, now divorced from respondent mother.

This cause was heard upon motion of respondent mother filed 19 September 1972, alleging that fraud had been perpetrated upon the trial court in that the two minor children, at the coercion of representatives of the Department of Social Services and the petitioner father's family, had perjured themselves at hearings held on 17 July 1972 and 31 August 1972. At the hearing upon respondent's motion, the two minors involved testified that they had lied to the court at the prior hearings in testifying that respondent mother had cruelly beaten them and that she had failed to provide them with adequate medical attention. Also, respondent introduced into evidence five letters allegedly written by James Earl Cox, four of which were addressed to respondent and a fifth to a "Lawyer or Judge," all allegedly written from the Junior Order Children's Home in which James Earl Cox and Susan Dianne Cox had been placed pursuant to the trial court's order of 31 August 1972. In the letters, James Earl Cox expressed his love for respondent, his desire to live with her, his regret that he lied to the court as to respondent's treatment of him, and that an employee of the Department of Social Services had forced him to lie to the court.

No evidence was offered on behalf of the Department of Social Services or the petitioner father. At the close of the hearing the trial court made findings of fact and concluded that there was no competent evidence to support a change in the 31 August 1972 order and entered the order from which respondent appealed.

Bell, Ogburn and Redding, by Deane F. Bell, for petitioner appellee.

Ottway Burton for respondent appellant.

MORRIS, Judge.

G.S. 50-13.2(a) provides as follows:

> "An order for custody of a minor child entered pursuant to this section shall award the custody of such child to such person, agency, organization or institution as will, in the opinion of the judge, best promote the interest and welfare of the child."

This provision became effective in 1967 and codified the rule enunciated many times by the North Carolina Supreme Court that in custody cases the welfare of the child is the "polar star" by which the court's decision must be guided. *In Re Custody of Pitts,* 2 N.C. App. 211, 162 S.E. 2d 524 (1968).

Also, "[w]hile this guiding principle is clear, decision in particular cases is often difficult and necessarily a wide discretion is vested in the trial judge. He has the opportunity to see the parties in person and to hear the witnesses, and his decision ought not to be upset on appeal absent a clear showing of abuse of discretion." *Pitts, supra,* p. 212.

With these principles in mind we examine respondent's contention on appeal that the trial judge erred in refusing to return custody of her two minor children in light of the evidence presented at the hearing of 28 September 1972.

[1] In the findings of fact in the order appealed from, the trial judge referred to the order of 31 August 1972 and stated that the court had found as a fact that it was to the best interest and welfare of the children that custody be awarded to the Department of Social Services and that the basis of that finding was grounded upon competent evidence at the hearings. It is clear from the record that the judge hearing the matter on 28 September 1972 was also the judge who heard the matter on 31 August 1972. It is also clear, therefore, that after considering the evidence presented at the hearing of 28 September 1972, the trial judge concluded that no competent evidence had been presented sufficient to warrant the entry of an order changing custody of the children. The court had the opportunity to see the parties in person and to observe their demeanor. His decision ought not to be upset absent a clear showing of abuse of discretion. None has been shown.

[2] Respondent next contends that the trial court erred in refusing to award her counsel fees for the prosecution of this custody action and in refusing to tax the court costs against petitioner father. G.S. 50-13.6 provides the following:

> *"Counsel fees in actions for custody and support of minor children.*—In an action or proceeding for the custody or support, or both, of a minor child the court may in its discretion allow reasonable attorney's fees to a dependent spouse, as defined in G.S. 50-16.1, who has insufficient means to defray the expenses of the suit."

"Dependent spouse" as defined in G.S. 50-16.1(3) "means a spouse, whether husband or wife, who is actually substantially dependent upon the other spouse for his or her maintenance and support or is substantially in need of maintenance and support from the other spouse."

In her motion of 19 September 1972, respondent alleged that she was a dependent spouse. However, she introduced no evidence as to her status or inability to defray the expenses of the suit. We find no merit in her contention.

As to the taxing of court costs, G.S. 6-1 provides that the "party for whom judgment is given" shall be allowed to recover his costs. Respondent certainly does not qualify as the "party for whom judgment is given." This assignment of error is overruled.

[3] Respondent also assigns as error the trial court's refusal to permit respondent's counsel to inspect the files of the Department of Social Services relating to the minors involved in this case. The record indicates that at a "hearing started on July 17, 1972," respondent requested the court to order the Department of Social Services to turn over to her "the entire record relating to the investigation of the Department of Social Services of these children." The request was denied. Entered in the record at that point is the following: "This is Respondent's exception No. 2." No order appears in the record as a result of a hearing started on 17 July 1972. If this hearing was continued and the order entered 31 August 1972 was the order entered, no exception to that order appears, nor did respondent appeal therefrom.

> "[P]roceedings on appeal are ordinarily strictly limited to review of matters directly affecting the judgment, order,

or decree appealed from, and other decisions, whether rendered before or after that directly appealed from, are not before the court." 5 Am. Jur. 2d, Appeal and Error, § 725, pp. 168-169.

The question respondent attempts to raise is not before the Court. This assignment of error is also overruled.

The order of the trial court is

Affirmed.

Judges CAMPBELL and HEDRICK concur.

STATE OF NORTH CAROLINA v. ROBERT E. CARROLL

No. 7315SC170

(Filed 28 March 1973)

1. **Escape § 1— testimony that defendant was "inmate" and was "captured"**

In this prosecution for escape, the trial court did not err in permitting a witness to testify that defendant was an "inmate" of the Department of Correction on the date of the escape and that he was thereafter "captured" where the witness had personally observed such facts.

2. **Escape § 1— admissibility of commitment**

Judgment and order of commitment upon conviction of a felony was competent evidence of the lawfulness of the custody from which defendant escaped.

3. **Constitutional Law § 31; Escape § 1— refusal to subpoena witnesses for defendant — no error**

In this prosecution for escape, defendant's constitutional rights were not denied by the trial court's refusal to subpoena as defense witnesses several fellow inmates who would have testified that prison officials had punished defendant for the escape by restricting his confinement and denying certain privileges to him, since the witnesses could offer no testimony relevant and material in defense of the crime of escape.

4. **Constitutional Law § 36; Convicts and Prisoners § 2— solitary confinement — cruel and unusual punishment**

Segregated confinement of a prison inmate in solitary or maximum security is not *per se* banned by the Eighth Amendment as cruel and unusual punishment, but is a question of internal administration

and discipline of prisoners normally within the discretion of prison officials.

5. **Criminal Law § 26— escape from prison — administrative discipline — criminal trial — double jeopardy**

Trial of defendant for escape following administrative discipline of defendant for the escape did not constitute double jeopardy.

APPEAL by defendant from *Cooper, Judge,* August 1972 Criminal Session of ALAMANCE Superior Court.

Defendant was convicted of escape occurring on 8 December 1970 from the North Carolina Prison System. The indictment charged a first offense felony escape in violation of G.S. 148-45, and upon conviction, defendant was sentenced to two years' imprisonment to begin at the expiration of any sentences currently being served.

Defendant's request that the State subpoena as witnesses on his behalf several fellow prison inmates was refused. The State stipulated that these witnesses would have testified that defendant was punished by prison officials after his return to prison and before trial for the escape, which punishment consisted of restrictive confinement and the denial of several privileges which the general population of the prison enjoyed.

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

John D. Xanthos for defendant appellant.

CAMPBELL, Judge.

[1, 2] Defendant has argued that it was error for the trial court to allow the witness to testify that defendant was an "inmate" of the North Carolina Department of Correction on 8 December 1970, and that he was "captured." The fact that a person is a prison inmate is a status based on observable facts, as is the fact of his apprehension in some place other than the designated place of confinement. The witness having personally observed these facts may testify to them. Likewise, the judgment and order of commitment upon conviction of a felony on 5 December 1969 in Alamance County Superior Court, placed into evidence, was competent evidence of the lawfulness of the custody from which he escaped. *State v. Walters,* 17 N.C. App. 94, 193 S.E. 2d 316 (1972); *State v. Ledford,* 9 N.C. App. 245, 175 S.E. 2d 605 (1970).

[3] The defendant also argued that his fundamental constitutional rights were denied him when the trial court refused to subpoena witnesses to appear and testify in his behalf. The right of an accused to have compulsory process for obtaining witnesses in his favor guaranteed by the Sixth Amendment to the United States Constitution, is applicable to state trials. However, it applies only to secure testimony for the defendant by persons who are physically and mentally capable of testifying to events that they had personally observed and which testimony would be revelant and material in defense of the crime charged. *Washington v. Texas,* 388 U.S. 14, 18 L.Ed. 2d 1019, 87 S.Ct. 1920 (1967).

Here the witnesses offered by defendant had no knowledge of the facts of his escape for which he was being tried, and could offer no testimony relevant and material in defense of that crime. "The right to compulsory process is not abolute, and a state may require that a defendant requesting such process at state expense establish some colorable need for the person to be summoned, lest the right be abused by those who would make frivolous requests." *Hoskins v. Wainwright,* 440 F. 2d 69, 71 (5th Cir. 1971).

[4] Carroll was sentenced to a period of imprisonment within that allowed by the statute, G.S. 148-45, which punishment, therefore, is not unconstitutionally cruel or unusual. *State v. Powell,* 6 N.C. App. 8, 169 S.E. 2d 210 (1969). Further, segregated confinement of a prison inmate in solitary or maximum security is not *per se* banned by the Eighth Amendment as cruel and unusual punishment. Rather, it is a question of internal administration and discipline of prisoners normally within the discretion of prison officials. *Burns v. Swenson,* 430 F. 2d 771 (8th Cir. 1970), *cert. denied,* 404 U.S. 1062, 30 L.Ed. 2d 751, 92 S.Ct. 743 (1972).

[5] Defendant's Double Jeopardy claim is also untenable. The Double Jeopardy Clause of the Fifth Amendment now applies to the states. *Benton v. Maryland,* 395 U.S. 784, 23 L.Ed. 2d 707, 89 S.Ct. 2056 (1969). In claiming this right defendant asserts that since he was punished in prison for his escape, he cannot now be tried and convicted for the same offense.

The United States Supreme Court has held that the Fifth Amendment guarantees the right to be free from a second punishment attempted to be inflicted for the same offense *by a*

judicial sentence. Ex Parte Lange, 18 Wall. 163, 21 L.Ed. 872 (1874). More recently, however, that court has held that the prohibition is not against being twice punished, but against being twice *put* in jeopardy. It insures freedom from the risk and hazard that an accused for a second time will be convicted of the same offense for which he was initially tried. The Double Jeopardy Clause is cast in terms of the risk or hazard of trial and conviction. *Price v. Georgia,* 398 U.S. 323, 26 L.Ed. 2d 300, 90 S.Ct. 1757 (1970).

Regardless of any inconsistency in *Lange* and *Price,* each case contemplates consequences flowing from multiple action by a court of law.

Administrative discipline of an inmate does not constitute multiple punishment within the meaning and intent of the Fifth Amendment because such punishment is not imposed by judicial sentence upon trial and conviction in a court of law.

No error.

Judges HEDRICK and GRAHAM concur.

STATE OF NORTH CAROLINA v. ERNEST DALE SMITH AND JOHN WAYNE SHELTON

No. 7217SC791

(Filed 28 March 1973)

1. **Criminal Law § 158— statement of solicitor not in record — assignment of error overruled**

   Where the record did not include the remarks of the solicitor upon which defendant based his motion for mistrial, the court on appeal could not sustain defendant's assignment of error relying solely on a statement by defendant's counsel as to what the solicitor said.

2. **Criminal Law § 87— leading questions — no abuse of discretion**

   The trial court in a safecracking case did not abuse its discretion in allowing the solicitor to ask leading questions of a witness.

3. **Criminal Law § 34— evidence of defendant's guilt of other offenses — admissibility**

   Though the State generally cannot offer evidence tending to show that the accused has committed another distinct, independent or separate offense, the trial court in a safecracking case did not err in allow-

ing into evidence testimony by a witness that defendant was involved with him in some or all of 40 or 50 other crimes for which he was under indictment since evidence of these other crimes tended to establish a common plan or scheme connecting defendant with the crime charged.

APPEAL by defendant from *Crissman, Judge,* 8 May 1972 Session of Superior Court held in SURRY County.

Defendant was tried on an indictment charging him with safecracking in violation of G.S. 14-89.1. Without objection he was tried jointly with one Ernest Dale Smith, who was charged with the same offense. The principal evidence against defendant and Smith was provided by the testimony of Eddie Ray Spivey, an accomplice. Defendant and Smith offered no evidence. Defendant was found guilty as charged, and from judgment imposing prison sentence, he appealed.

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

H. Glenn Pettyjohn for defendant appellant.

PARKER, Judge.

[1] Defendant's first assignment of error is directed to the denial of his motion for mistrial. The reason stated by defendant's counsel for making motion for mistrial was that the solicitor, in his opening statement made during the process of selecting the jury, stated that Spivey had come into court and pleaded guilty to the same offense for which defendant was being tried. Insofar as the record before us discloses, however, the only statement which the solicitor made in the presence of the jury panel was to the effect that the State contended that Spivey was a reliable witness, and then the solicitor inquired if any member of the jury panel "would not under any circumstances take the testimony of an accomplice?" The record does not contain the statement attributed to the solicitor as the reason given by defendant for his motion for mistrial, but contains only a statement by defendant's counsel as to what the solicitor said. We cannot accept the statement of counsel as sole support for the remarks challenged. 3 Strong, N. C. Index 2d, Criminal Law, § 158. Moreover, even if the remarks attributed to the solicitor were made in the presence of the jury panel, in our opinion no prejudicial error resulted under the circumstances of his case. Spivey was presented as a witness

for the State, testified in detail concerning his own and defendant's participation in the offense for which defendant was tried, and was subjected to full cross-examination by defendant's counsel. Defendant's first assignment of error is overruled.

[2] In his second assignment of error defendant contends the court erred in permitting the solicitor to "lead" the witness Spivey in his testimony. The contention is without merit. It is well settled that the allowance of leading questions is a matter entirely within the discretion of the trial judge and his rulings will not be reviewed on appeal, at least in the absence of a showing of abuse of discretion. Stansbury, N. C. Evidence 2d, § 31, p. 59. No abuse of discretion is shown.

[3] In his third assignment of error defendant contends the court erred in permitting the witness Spivey to testify to other crimes allegedly committed by him together with defendant and Smith. Spivey's testimony tended to show a conspiracy between Spivey, Smith and defendant to break and enter the Harris Home Center, Inc., in whose place of business the alleged safecracking occurred. In cross-examining Spivey, defendant's attorney elicited testimony tending to attack Spivey's credibility, including testimony that Spivey had been involved in some 45 or 50 crimes to which he had confessed and in which he had implicated others. On redirect examination, Spivey testified that he was under indictment in 40 or 50 cases and, over objection, testfied that defendant and Smith were involved with him in some or all of the other cases.

The general rule is that in a prosecution for a particular crime the State cannot offer evidence tending to show that the accused has committed another distinct, independent or separate offense. *State v. Fowler,* 230 N.C. 470, 53 S.E. 2d 853; *State v. Choate,* 228 N.C. 491, 46 S.E. 2d 476. This is true even though the other offense is of the same nature as the crime charged. *State v. Jeffries,* 117 N.C. 727, 23 S.E. 163. However, the rule stated is subject to certain well recognized exceptions set forth by Ervin, J., in *State v. McClain,* 240 N.C. 171, 81 S.E. 2d 364. We think the testimony challenged here falls within the sixth exception set forth in *McClain,* as follows:

> "Evidence of other crimes is admissible when it tends to establish a common plan or scheme embracing the commission of a series of crimes so related to each other that proof of one or more tends to prove the crime charged and

to connect the accused with its commission. (Citations omitted.) Evidence of other crimes receivable under this exception is ordinarily admissible under the other exceptions which sanction the use of such evidence to show criminal intent, guilty knowledge, or identity."

This assignment of error is overruled.

Defendant's fourth assignment of error relates to what we view as a "slip of the tongue." S.B.I. Agent Batten, as a witness for the State, was asked by the solicitor if *defendant* made a statement to him relative to "this particular breaking and entering." Defense counsel objected and the court instructed the jury to consider the answer "for the purpose of corroborating the testimony of the witness Spivey if you find that it does corroborate his testimony and for that purpose only." Thereafter, the witness testified that *Mr. Spivey* made a statement and the witness proceeded to relate the statement. We think the instruction of the court and the testimony of the witness made it completely clear that the statement which the witness related was made by Spivey and not by defendant. This assignment of error is overruled.

We have carefully considered the other assignments of error brought forward and argued in defendant's brief but finding them also without merit, they too are overruled.

No error.

Judges BRITT and VAUGHN concur.

JOSEPH C. BOWLING, JR., DOING BUSINESS AS ALLIED PERSONNEL OF RALEIGH v. CHRISTINE HINES AND ETHEL B. JONES

No. 7310DC9

(Filed 28 March 1973)

Contracts § 4; Frauds, Statute of § 5; Guaranty— promise to pay fee contracted by another — written contract — liability of promisor

Where the contract in question between plaintiff and defendant Jones was in writing, the consideration for the contract was plaintiff's obtaining employment for defendant Hines, the amount defendant Jones agreed to pay was the amount of the fee earned by plaintiff in securing employment for defendant Hines, and the parties stipulated

that plaintiff had obtained employment for defendant Hines and the fee was $169.00, the trial court erred in dismissing plaintiff's claim against defendant Jones.

Judge BROCK dissenting.

APPEAL by plaintiff from *Preston, Judge,* 8 May 1972 Session of District Court held in WAKE County.

Plaintiff, Joseph C. Bowling, Jr., doing business as Allied Personnel of Raleigh, instituted this action against defendants, Christine Hines and Ethel B. Jones, to recover a job placement fee of $169.00. In his complaint, plaintiff alleged that defendant Jones entered into a contract with plaintiff guaranteeing "the payment of the One Hundred Sixty-Nine Dollars ($169.00) due by Christine Hines." The contract between plaintiff and defendant Jones, dated 20 June 1969, which the parties stipulated was genuine, in pertinent part provides:

> Ethel B. Jones
> "I, Christine Hines will be responsible for the job fee for Christine Hines in the event he/she is placed through Allied Personnel. My telephone number is 833-3411.
>
> A. I understand this fee is to be paid in cash upon acceptance and before reporting to said job and will pay cash for Christine Hines for job placement. My bank is Wachovia Bank.
>
> B. I have good credit and will finance the fee for job placement, ... I understand this will be in said agency before ..... reports on the job he/she has been accepted on. Two credit references are (1) Kimbrell's Furniture (2) Hudson Belk."

Defendant Jones filed answer denying the material allegations of the complaint.

At a final pretrial conference, plaintiff and defendant Jones entered into the following pertinent stipulations:

> "a. On or about June 19, 1969 plaintiff and defendant Christine Hines entered into a contract whereby plaintiff would endeavor to secure employment for Christine Hines, who would in turn pay to the plaintiff the amount set out in said written contract for the services rendered.

b. That the defendant Ethel B. Jones entered into a written agreement on June 20, 1969 whereby she guaranteed the payment of the fee to be paid by Christine Hines.

c. That the plaintiff did secure employment for Christine Hines and that the fee incurred thereby was the amount of $169.00."

Additionally, it was stipulated that the contract of 19 June 1969 between plaintiff and defendant Hines and the contract of 20 June 1969 between plaintiff and defendant Jones were "genuine, and, if relevant and material, may be received in evidence without further identification or proof." Plaintiff and defendant Jones also stipulated that the issues were as follows:

"a. Did the defendant, Ethel B. Jones, breach her agreement with the plaintiff?

b. If so, what amount is the plaintiff entitled to recover of the defendant?"

The record reveals that:

"It was further stipulated by the attorneys for the plaintiff and Ethel B. Jones that judgment would be rendered by the Court based upon the stipulations herein and that the sole question involved was whether or not the agreement signed by Ethel B. Jones and designated as plaintiff's Exhibit #2, along with the other exhibits and stipulations was sufficient as a matter of law to bind the defendant, Ethel B. Jones."

The judgment entered by the court in pertinent part recites:

"[T]hat the document signed by the Defendant Ethel B. Jones and attached to the Complaint herein is a written agreement unsupported by consideration moving to Ethel B. Jones but instead is for the obligation of another, namely, Christine Hines; and

[T]hat under the terms of said written agreement there is no way that liability can be ascertained and that it is necessary to go beyond said instrument to prove the case; and

[T]hat the parol evidence rule under the statute of frauds forbids going beyond the limits of said document, and no

specific liability can be fixed under the terms of this agreement;

NOW, THEREFORE, it is ORDERED, ADJUDGED, and DECREED that as to the Defendant Ethel B. Jones, this action be dismissed; but as to the Defendant Christine Hines, the matter is retained for further order of the Court."

From the signing and entry of this judgment, plaintiff appealed.

Robert T. Hedrick for plaintiff appellant.

Robert L. McMillan for defendant appellee.

HEDRICK, Judge.

Plaintiff's claim against defendant Jones on her contract to guarantee payment of the fee incurred by defendant Hines is established when the pleadings and the stipulations are considered together.

The consideration for the contract between plaintiff and defendant Jones was plaintiff's obtaining employment for defendant Hines. Since the contract between plaintiff and defendant Jones was in writing, the statute of frauds has no application. G.S. 22-1. The amount defendant Jones agreed to pay was the amount of the fee earned by plaintiff in securing employment for defendant Hines. The parties stipulated that plaintiff had obtained employment for defendant Hines and that the fee was $169.00.

Based upon the stipulations, plaintiff is entitled to judgment against defendant Jones in the amount of $169.00. The judgment dismissing plaintiff's claim against defendant Jones is reversed and the case is remanded to the district court for the entry of judgment in accordance with the stipulations.

Reversed and remanded.

Judge VAUGHN concurs.

Judge BROCK dissents.

Judge BROCK dissenting.

The opinion of the majority reverses and remands for entry of judgment against the defendant Jones in the amount

of $169.00. This allows plaintiff to recover against defendant Jones upon a note given by defendant Hines to plaintiff to which defendant Jones was not a party. The majority treats the note as the same thing as the contract between defendant Hines and plaintiff, the performance of which was guaranteed by defendant Jones. However, there is no allegation, stipulation, or other evidence that the note sued on by plaintiff was given in payment of the obligation of defendant Hines to plaintiff under the contract. Of course, if the note were given in payment of defendant Hines' obligation under her contract with plaintiff, the question would arise as to whether such *payment* discharged defendant Jones from her guarantee of performance of the contract.

I concur in the majority view that the reasons given by the trial judge for dismissing the action against defendant Jones are not valid. However, the judgment of the trial court, in my opinion, reaches the correct result. Therefore, I vote to affirm the dismissal of the action as to defendant Jones.

NORTH CAROLINA ASSOCIATION OF LICENSED DETECTIVES AND DETECTIVE SERVICE OF NORTH CAROLINA, INC. v. ROBERT MORGAN, ATTORNEY GENERAL OF THE STATE OF NORTH CAROLINA, AND CHARLES DUNN, DIRECTOR, NORTH CAROLINA STATE BUREAU OF INVESTIGATION

No. 7310SC64

(Filed 28 March 1973)

1. **Constitutional Law § 12— regulation of profession — exercise of police power — benefit to public**

When the State's exercise of its police power works to deny a person, association or corporation the right to engage in a business otherwise lawful, such deprivation of liberty requires a substantially greater likelihood of benefit to the public in order to enable it to survive an attack based on Article I, § 19 of the Constitution of North Carolina.

2. **Constitutional Law § 20— state statute — equal protection — reasonable classification**

To withstand an equal protection claim a statute's classification must be reasonable, not arbitrary, and must rest on some ground of difference having a fair and substantial relation to the object of the legislation so that all persons similarly circumstanced shall be treated alike.

3. **Constitutional Law § 20— private detectives — special police officers — prohibition against individual serving as both — no denial of equal protection**

It is the purpose of G.S. 66-49.7(f) to prevent individuals from acting in the dual capacity of private detective and public, although limited, police officer, there being a real and fundamental difference between private detectives and special police, which distinction is that while the former are private persons no different from ordinary citizens, the latter are public officers, and this distinction between the two is a valid factual status reasonably related to the purpose of the Act upon which to base discrimination not constitutionally forbidden by the equal protection clause of Article I, § 19.

4. **Constitutional Law § 12— private detectives — special police — regulation by State**

The regulation of persons eligible to become licensed private detectives and commissioned special policemen is an exercise of authority in the interest of the general public rather than a particular class.

5. **Constitutional Law § 12— revocation of private detective's license held by special policeman**

The provision of G.S. 66-49.7(f) requiring the revocation of a private detective's license upon his being commissioned as a company or special policeman is a means reasonably necessary for the accomplishment of a public purpose which the General Assembly has a right to secure.

6. **Constitutional Law § 12— private detectives — special police — State regulation valid**

G.S. 66-49.7(f) is a valid legislative expression of a public policy in North Carolina prohibiting a special policeman, who is a public officer, from holding an incompatible second office; conversely, the statute is a valid regulation of the powers and scope of authority of private detectives, denying them power to arrest and otherwise conduct themselves as policemen and servants of the public.

APPEAL by plaintiffs from *Clark, Judge,* 31 July 1972 Session of WAKE County Superior Court.

This is a civil action to determine the constitutionality of G.S. 66-49.7(f), effective 1 October 1971, which statute provides that: "No [private detective] licensee shall hold a commission as a company or special police. The issuance of such a commission to a licensee shall automatically revoke the license of the licensee without the necessity of a hearing."

The plaintiff North Carolina Association of Licensed Detectives is a voluntary incorporated association with its principal office in Greensboro, North Carolina, the membership being composed of licensed private detectives. The plaintiff Detective

Service of North Carolina, Inc., is a corporation organized under the laws of North Carolina with its principal place of business in Greensboro, North Carolina, and is engaged in the business of providing investigative and security service to the general public.

G.S. 143A-54 transferred to the Attorney General of North Carolina the authority to issue commissions to special policemen, who, pursuant to G.S. 74A-1 *et seq.*, act in a protective capacity for the State or private institutions, or corporations.

The plaintiffs alleged in their complaint and offered in evidence testimony to the effect that prior to the effective date of G.S. 66-49.7(f), many members of the Association of Licensed Detectives, and Mr. Robert A. Buys, the sole employee of the Detective Service of North Carolina, Inc., simultaneously held a license as a private detective and a commission as a private or special policeman. As a result of the enactment of G.S. 66-49.7(f) these individuals were forced to resign their commissions as special policemen in order to retain their private detective licenses.

The plaintiffs argue that the loss of their commissions as special policemen has caused them to suffer financial loss, that it deprives them of the right to carry on both businesses at the same time, and denies them the equal protection of the law.

The superior court, after a hearing, held that G.S. 66-49.7(f) was a valid and constitutional exercise of legislative authority, dissolved the temporary restraining order previously entered in the cause, and denied the plaintiffs' application for a permanent injunction.

Plaintiff appellants have perfected this appeal, assailing the validity of G.S. 66-49.7(f) under Article I, Sections 1, 19, and 34 of the North Carolina Constitution.

Attorney General Robert Morgan by Associate Attorney Miss Ann Reed and Assistant Attorney General Richard B. Conely for defendant appellees.

Smith, Patterson, Follin & Curtis by Marion G. Follin III for plaintiff appellants.

CAMPBELL, Judge.

Appellants concede that the State may regulate the private detective business by the issuance of licenses to persons who

meet specified qualifications. There is authority supporting such regulation. *Lehon v. Atlanta,* 242 U.S. 53, 61 L.Ed. 145, 37 S.Ct. 70 (1916).

Private or special police are public officers, *Tate v. R. R.,* 205 N.C. 51, 169 S.E. 816 (1933), and, therefore, a proper subject of regulation by the State in exercise of its police power.

The main thrust of appellants' argument is that G.S. 66-49.7(f) deprives them of the right to pursue a lawful occupation; and, as the statute is not based upon a reasonable classification, it is therefore unconstitutional.

The Fifth and Fourteenth Amendments, Due Process Clause, together with the Law of the Land Clause of Article I, § 19 of the North Carolina Constitution, provide that no person shall be deprived of property without due process of law. However, none of these provisions has the effect of overriding the power of state and local government to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort or general welfare of the community. *Atlantic Coast Line R. Co. v. Goldsboro,* 232 U.S. 548, 58 L.Ed. 721, 34 S.Ct. 364 (1914).

Whether it is a violation of the Law of the Land Clause (Article I, § 19) or a valid exercise of the police power is a question of degree and of reasonableness in relation to the public good likely to result from it. *In re Hospital,* 282 N.C. 542, 193 S.E. 2d 729 (1973).

". . . The right to work and to earn a livelihood is a property right that cannot be taken away except under the police power of the State in the paramount public interest for reasons of health, safety, morals, or public welfare. . . ." *Roller v. Allen,* 245 N.C. 516, 96 S.E. 2d 851 (1957). Even though the state police power does extend to regulation of private detectives and private policemen, not every regulation of those activities must necessarily fall within the scope of the police power. *In re Hospital, supra.*

> ". . . If a statute is to be sustained as a legitimate exercise of the police power, it must have a rational, real, or substantial relation to the public health, morals, order, or safety, or the general welfare. In brief, it must be reasonably necessary to promote the accomplishment of a pub-

lic good, or to prevent the infliction of a public harm. . . ." *State v. Ballance,* 229 N.C. 764, 51 S.E. 2d 731 (1949).

Speaking on this issue, the United States Supreme Court held, in an opinion cited in *In re Hospital, supra;* that:

> " 'To justify the State in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations.' " *Lawton v. Steele,* 152 U.S. 133, 137, 38 L.Ed. 385, 14 S.Ct. 499 (1894).

[1] When the State's exercise of its police power works to deny a person, association or corporation the right to engage in a business, otherwise lawful, such deprivation of liberty requires a substantially greater likelihood of benefit to the public in order to enable it to survive an attack based upon Article I, § 19 of the Constitution of North Carolina. *In re Hospital, supra.*

[2] The principles applicable to an equal protection claim are similar: the classification must be reasonable, not arbitrary, and must rest on some ground of difference having a fair and substantial relation to the object of the legislation so that all persons similarly circumstanced shall be treated alike. Discrimination in a state statute must be based on differences that are reasonably related to the purposes of the statute.

A state police law's classification which has some reasonable basis does not offend against the equal protection clause of the Fourteenth Amendment merely because it is not made with mathematical nicety, or because in practice it results in some inequality. On the contrary, the discrimination must be shown to be "invidious discrimnation." *Morey v. Doud,* 354 U.S. 457, 1 L.Ed. 2d 1485, 77 S.Ct. 1344 (1957).

In *State v. Greenwood,* 280 N.C. 651, 187 S.E. 2d 8 (1972), the North Carolina Supreme Court held that the equal protection clause imposes upon lawmaking bodies the requirement that any legislative classification be based on differences that

are reasonably related to the purposes of the act in which it is found. While the equal protection clause does not require perfection in classification, the legislative determination is entitled to great weight, it does not allow arbitrary discrimination between that activity which is prohibited and that which is not.

Detectives who are private policemen would have access to persons, records, places and information not available to a detective without the benefit of such office. Private detectives, not being public officers, have no more right to carry firearms or other means of defense, than ordinary citizens, nor should they be permitted to wear badges or insignia similar to that of public officers. Private detectives who were allowed to be special policemen also would have authority to exercise "all the powers of municipal and county police officers to make arrests for both felonies and misdemeanors." (G.S. 74A-2).

[3] It is the purpose of G.S. 66-49.7(f) to prevent individuals from acting in the dual capacity of private detective and public, although limited, police officer. We hold, first, that there is a real and fundamental difference between private detectives and special police, which distinction is that while the former are private persons no different from ordinary citizens, the latter are public officers, and that this distinction between the two is a valid factual status reasonably related to the purpose of the Act upon which to base discrimination not constitutionally forbidden by the equal protection clause of Article I, § 19. *State v. Greenwood, supra.*

[4] We hold, second, that the regulation of persons eligible to become licensed private detectives and commissioned special policemen is an exercise of authority in the interest of the general public, rather than a particular class.

[5] Finally, we hold that the provisions of G.S. 66-49.7(f) are a means reasonably necessary for the accomplishment of a public purpose which the General Assembly has a right to secure.

[6] G.S. 66-49.7(f) is a valid legislative expression of a public policy in North Carolina prohibiting a special policeman, who is a public officer, from holding an incompatible second office. Conversely, G.S. 66-49.7(f) is a valid regulation of the powers and scope of authority of private detectives, denying them the power to arrest and otherwise conduct themselves as policemen and servants of the public.

We have considered but do not find merit in appellants' other assignments of error.

No error.

Judges MORRIS and PARKER concur.

STATE OF NORTH CAROLINA v. GEORGE RAY RAYNOR

No. 7311SC215

(Filed 28 March 1973)

1. **Automobiles § 129— breathalyzer test results — presumption of intoxication — conclusiveness**

G.S. 20-139.1 providing for the admission of breathalyzer test results and the presumption of intoxication arising therefrom is not intended to create a conclusive presumption nor shift the burden of proof to a defendant whose breathalyzer test shows a blood alcohol level of 0.10 percent or more.

2. **Automobiles § 129— drunken driving — instructions on breathalyzer evidence — placing burden on State — no error**

The trial judge in a drunken driving case properly placed the burden of proof on the State to show beyond a reasonable doubt that defendant was guilty as charged where the court instructed that, while the jury could infer from the breathalyzer evidence that defendant was driving under the influence of intoxicating liquor, they were not compelled to do so and were to consider that evidence together with all other evidence in the case in determining whether the State had proved beyond a reasonable doubt that the defendant was under the influence of intoxicating liquor at the time he drove or operated a vehicle upon the public streets or highways of the State.

3. **Criminal Law § 99— instruction by judge to witness — no expression of opinion — no error**

Where the trial judge commented that one of defendant's witnesses apparently did not understand the procedure upon objection by either counsel to questions asked of a witness and the judge then explained to the witness that he should remain silent or stop in the middle of his answer until the court ruled on the objection, the judge expressed no opinion in violation of G.S. 1-180 and no prejudice to defendant resulted.

APPEAL by defendant from *Godwin, Special Judge,* 9 October 1972 Session of JOHNSTON County Superior Court.

Defendant was charged in a Uniform Traffic Ticket with (1) operating a motor vehicle on U. S. Highway 301 near Four

Oaks while under the influence of intoxicating liquor, and (2) transporting tax-paid liquor with the seal broken in the passenger area of a motor vehicle. After pleading not guilty in District Court, defendant was tried and convicted on both counts. On appeal to Superior Court, defendant was found not guilty by a jury on the latter count but guilty as to the first, and from a judgment imposing a six-month suspended sentence conditioned on paying a fine and court costs, defendant appealed.

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

T. Yates Dobson, Jr., for defendant appellant.

MORRIS, Judge.

[1] Defendant contends that the trial court erred in its instructions to the jury as to the application of G.S. 20-139.1 in relation to the presumption raised by the introduction into evidence of the results of a breathalyzer test administered to defendant following his arrest. G.S. 20-139.1(a) provides in relevant part:

> *"Result of a chemical analysis admissible in evidence; presumption.*—(a) In any criminal action arising out of acts alleged to have been committed by any person while driving or operating a vehicle while under the influence of intoxicating liquor, the amount of alcohol in the person's blood at the time alleged as shown by chemical analysis of the person's breath or blood shall be admissible in evidence and shall give rise to the following presumptions:
>
> > (1) If there was at that time 0.10 percent or more by weight of alcohol in the person's blood, it shall be presumed that the person was under the influence of intoxicating liquor."

In *State v. Cooke,* 270 N.C. 644, 155 S.E. 2d 165 (1967), it was held that in G.S. 20-139.1 the General Assembly used the word *presumption* in the sense of a permissive inference, or *prima facie* evidence and that it was not intended to create a conclusive presumption nor shift the burden of proof to a defendant whose breathalyzer test shows a blood alcohol level of 0.10 percent or more.

[2] Defendant argues that in his charge the trial judge shifted the burden of proof and created a rebuttable presumption in the eyes of the jury.

The court explained to the jury that while they "may infer" from the breathalyzer evidence that defendant was driving under the influence of intoxicating liquor, they were "not compelled to do so" and were to "consider that evidence together with all other evidence in the case in determining whether the State has proved beyond a reasonable doubt that the defendant was under the influence of intoxicating liquor at the time he drove or operated a vehicle upon the public streets and highways of this State." It is obvious that the burden of proof was correctly placed on the State to show beyond a reasonable doubt that defendant was guilty as charged. The trial judge properly explained the law arising on the evidence as required by G.S. 1-180 and in accordance with *State v. Cooke, supra.* This assignment of error is overruled.

[3] Defendant also contends that the trial judge expressed an opinion in the presence of the jury in contravention of G.S. 1-180 in instructing a witness for defendant that when either counsel makes an objection to a question asked of a witness, the witness should remain silent or stop in the middle of his answer until the court rules on the objection. The trial judge prefaced his instruction with the following remark: "Let me make this clear to you. A lot of people don't understand it and apparently you do not understand it."

> "[R]emarks of the court during a trial will not entitle a defendant to a new trial unless they tend to prejudice the defendant, and the question of whether prejudice resulted is to be considered in the light of the circumstances under which the remarks were made. (Citations omitted.)" *State v. Byrd,* 10 N.C. App. 56, 60, 177 S.E. 2d 738 (1970).

We can conceive of no prejudice resulting from the instruction by the trial judge. It was in the proper exercise of his judicial function to so instruct a witness who had responded to a question before ruling could be made on defense counsel's objection to that question.

No error.

Judges CAMPBELL and PARKER concur.

STATE OF NORTH CAROLINA v. THOMAS JAMES BURRIS

No. 7319SC119

(Filed 28 March 1973)

1. **Automobile § 125; Indictment and Warrant § 9— two crimes charged — necessity for separate count charging each crime — quashal of warrant proper**

If it be intended to charge two or more of the three criminal offenses created and defined in G.S. 20-138, the warrant should contain a separate count, complete within itself, as to each criminal offense; therefore, the trial court should have quashed the warrant charging defendant with unlawfully and wilfully operating "a motor vehicle upon the public streets or highways while under the influence of some alcoholic beverage or narcotic drugs" since that language embraced two of the offenses in one count.

2. **Indictment and Warrant § 15— motion to quash warrant — discretionary matter — review of ruling**

Whether a motion to quash the warrant will be entertained when made for the first time in superior court from an appeal from recorder's court is for determination by the trial judge in the exercise of his discretion, and while the exercise of such discretion to rule on the motion is not reviewable on appeal, the judge's ruling on the motion is subject to review.

APPEAL by defendant from *Chess, Special Judge,* 18 September 1972 Session of ROWAN County Superior Court.

Defendant was tried in Rowan County Recorder's Court on 1 April 1965 upon a warrant, the pertinent part of which reads as follows:

> "In The County Court, Salisbury, N. C. The affiant being duly sworn upon his oath deposes and says that: On Sun the 21 day of Feb 1965 at 2:15 A.M. in Rowan County in the vicinity of Rockwell 2-S on US 52 Thomas J. Burris did unlawfully and willfully operate a motor vehicle upon the public streets or highways:
>
> *x* DD—While under the influence of some *alcoholic beverage or narcotic drugs.*" (Emphasis added.)

Defendant was found guilty and appealed to Rowan Superior Court.

Prior to pleading in Superior Court, defendant made a motion to quash the warrant for the reason that it charged in the alternative that defendant was under "the influence of some

alcoholic beverage or narcotic drugs." The trial court overruled defendant's motion and defendant pled not guilty. The jury found defendant guilty and from judgment entered thereon, defendant appealed.

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

Robert M. Davis for defendant appellant.

MORRIS, Judge.

[1, 2] Defendant contends on appeal that the warrant charged in one count two separate and distinct offenses alternatively, that is, in the disjunctive, and that the warrant was thereby rendered void for uncertainty. The above warrant contains no reference to any specific statute but the conduct charged was a violation of G.S. 20-138 as then written and the fact that the warrant contains no reference to G.S. 20-138 is immaterial. *State v. Smith,* 240 N.C. 99, 81 S.E. 2d 263 (1954). G.S. 20-138 at the time defendant was charged provided as follows:

> *"Persons under the influence of intoxicating liquor or narcotic drugs.*—It shall be unlawful and punishable, as provided in § 20-179, for any person, whether licensed or not, who is a habitual user of narcotic drugs or any person who is under the influence of intoxicating liquor or narcotic drugs, to drive any vehicle upon the highways within this State."

In regards to G.S. 20-138, Justice Bobbitt (now C.J.) in *State v. Thompson,* 257 N.C. 452, 126 S.E. 2d 58 (1962), cert. denied 371 U.S. 921, 9 L.Ed. 2d 230, 83 S.Ct. 288 (1962), stated the following at page 456:

> "G.S. § 20-138 creates and defines three separate criminal offenses. Under its provisions, it is unlawful and punishable as provided in G.S. § 20-179 for any person, whether licensed or not, (1) who is a habitual user of narcotic drugs, *or* (2) who is under the influence of intoxicating liquor, *or* (3) who is under the influence of narcotic drugs to drive any vehicle upon the highways within this State. . . .
>
> With reference to the drafting of criminal warrants based on violations of G.S. § 20-138, it is appropriate to emphasize: If it be intended to charge only one of the criminal

offenses created and defined by G.S. § 20-138, *e.g.*, the operation of a motor vehicle upon the public highway within this State while under the influence of intoxicating liquor, the warrant should charge this criminal offense and no other. If it be intended to charge two or more of the criminal offenses created and defined in G.S. § 20-138, the warrant should contain a separate count, complete within itself, as to each criminal offense."

However, in *Thompson*, it was held that defendant by going to trial without making a motion to quash had waived any duplicity that might have existed in the warrant.

In the case at hand no motion to quash the warrant appears in the record of the trial in the Recorder's Court. However, defendant did move to quash the warrant before pleading in Superior Court. Whether a motion to quash will be entertained when made for the first time in superior court from an appeal from recorder's court is for determination by the trial judge in the exercise of his discretion. *State v. St. Clair*, 246 N.C. 183, 97 S.E. 2d 840 (1957). While the exercise of such discretion to rule on the motion is not reviewable on appeal, his ruling on the motion is subject to review. *State v. Powell*, 10 N.C. App. 443, 179 S.E. 2d 153 (1971). Applying the principles enunciated in *State v. Thompson, supra*, we conclude that the trial judge erred in refusing to quash the warrant upon defendant's motion in Superior Court.

Reversed.

Judges CAMPBELL and HEDRICK concur.

STATE OF NORTH CAROLINA v. EMMETT ALSTON

No. 7314SC203

(Filed 28 March 1973)

1. **Criminal Law § 88— cross-examination of accomplice to show bias — leniency in accomplice's sentence**

In this prosecution for armed robbery and conspiracy to commit armed robbery, the trial court erred in refusing to allow defense counsel to cross-examine an alleged accomplice of defendant as to whether he was testifying against defendant because of an expectation

of leniency when he faced a possible sentence of 30 years, since defendant's right to show bias took precedence over the rule that it is improper to bring out before the jury the length of a possible sentence.

2. **Robbery § 4; Criminal Law §§ 9, 10— armed robbery — aider and abettor — accessory before the fact**

The trial court in an armed robbery prosecution erred in submitting an issue to the jury as to defendant's guilt as an aider and abettor, but should have submitted an issue as to defendant's guilt as an accessory before the fact, where the evidence tended to show that defendant participated in planning the robbery and furnished the guns, automobile and driver of the automobile used in the robbery, but there was no evidence that defendant personally assisted in the robbery or that he was in the vicinity where the robbery occurred.

ON *certiorari* to review a trial before *Cooper, Judge,* 30 May 1972 Criminal Session of DURHAM Superior Court.

Defendant was charged in indictment No. 72CR892 with armed robbery, and in indictment No. 72CR895 with conspiracy to commit armed robbery. Upon a verdict of guilty to both charges, defendant was sentenced to imprisonment for the term of twenty-five years in case No. 72CR892, and a term of ten years in case No. 72CR895.

The evidence tended to show that Alfred Jackson and Curtis Williams, together with defendant, planned to rob the McDougald Terrace office of the Durham Housing Authority on 3 September 1971; that defendant had introduced the robbery plan and encouraged Jackson and Williams to participate; that defendant furnished the guns used in the robbery, the automobile which was to have been used for escape, and the driver whose identity Jackson and Williams did not know. The defendant did not personally assist in the robbery, and there was no evidence that he was in the vicinity where the robbery took place.

Officer Henry H. Cameron testified that the Durham police had received information that the McDougald Terrace Housing office would be robbed during the first of the month of September 1971. He did not know the exact date of the robbery or the identity of the persons who would attempt it. He and Detective Hayes were concealed inside the McDougald Terrace office on 3 September 1971, and apprehended Jackson and Williams after they had taken money from the safe. Jackson and Williams also testified for the State.

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

Loflin, Anderson, Loflin & Goldsmith by Thomas F. Loflin III for defendant appellant.

CAMPBELL, Judge.

Defendant has asserted in several assignments of error that the trial court improperly conducted the trial. We think at least two of these assignments are well taken, and there must be a new trial. We will refrain from discussing the other assignments of error as they may not arise on a new trial.

[1] During the course of the trial, counsel for the defendant was attempting to question one of the two holdup men who testified against the defendant. The line of questioning was aimed at testing the credibility of the witness with particular reference to whether he was testifying against the defendant because of the possibility that he would be able to expect leniency in his own sentence when he was faced with a potential maximum sentence of 30 years. The trial judge intervened and ruled that this line of cross-examination could not proceed. The trial judge was acting on the premise that it was improper to bring out before the jury the possible sentence as that was a matter for the court and not for the jury. In the instant case the defendant's counsel had the right to probe and test the credibility of the witness, and this right took precedence over the prohibition the judge was seeking to maintain. Much latitude is allowed in showing the bias, hostility or other interest of a witness with respect to the case or other facts tending to prove that the testimony of the witness is unworthy of credit. *State v. Roberson,* 215 N.C. 784, 3 S.E. 2d 277 (1939). It was error to restrict the cross-examination.

[2] The trial judge submitted case No. 72CR892, which was the charge of armed robbery, on the basis of the defendant being an aider and abettor. There was no evidence in the record to support such a finding. There is no evidence which would support a finding that at the time the robbery was committed, defendant was situated where he could give Jackson or Williams any advice, aid, encouragement, or comfort, if needed, while they were perpetrating the robbery. Thus, defendant was neither actually nor constructively present at the time, and he could be guilty at most of being an accessory before the fact. An accessory be-

fore the fact is one who meets every requirement of a principal in the second degree, except that of presence at the time. *State v. Wiggins,* 16 N.C. App. 527, 192 S.E. 2d 680 (1972). On this record case No. 72CR892 (armed robbery) should have been submitted to the jury on whether or not the defendant was an accessory before the fact which was an included offense within the bill of indictment.

New trial in both cases.

Judges BRITT and GRAHAM concur.

ALMA D. HINTON v. JAMES W. HINTON

No. 7310DC46

(Filed 28 March 1973)

Divorce and Alimony § 18; Husband and Wife § 15— entirety property — wife not entitled to alimony — possession of property rests in husband

Since, as an incident of an entirety estate, the husband is entitled to the full possession, control and use of the estate and to the rents and profits arising therefrom during marriage, the wife claiming support is not entitled to exclusive possession and use of the property unless she is entitled to alimony or alimony *pendente lite;* therefore, the trial court erred in finding that plaintiff was not a dependent spouse in need of support but that she was in need of and entitled to possession of the home owned by the entireties since those findings were contradictory and mutually inconsistent.

APPEAL by defendant from *Winborne, District Judge,* 5 June 1972 Session of WAKE County District Court.

Plaintiff-wife filed complaint seeking alimony without divorce, alimony pendente lite, counsel fees, and exclusive possession of the home owned by plaintiff and defendant as tenants by the entirety.

With respect to her prayer for alimony pendente lite, the trial court made findings of fact and conclusions of law including inter alia:

"(3) The plaintiff is not substantially dependent upon the defendant nor is she substantially in need of his support and maintenance.

(4) The plaintiff is not a dependent spouse.

(5) The plaintiff is in need of and entitled to possession of the homeplace of the parties.

(6) The plaintiff is not entitled to recover attorney fees."

The trial court then refused to grant alimony pendente lite or counsel fees, but ordered the defendant to "vacate the premises immediately, with his personal possessions, and surrender the possession of the premises at 1812 Charles Street, Raleigh, N. C., to the plaintiff."

R. P. Upchurch for defendant appellant.

CAMPBELL, Judge.

Defendant contends that the trial court's order granting the plaintiff exclusive possession of the home was improper as such order was not consistent with the findings of fact and conclusions of law in the case. With this contention we agree.

Tenancy by the entirety is an estate in real property where such property is conveyed to husband and wife during coverture. As an incident of that entirety estate the husband is entitled to the full possession, control and use of the estate, and to the rents and profits arising therefrom to the exclusion of the wife during their marriage. *Highway Commission v. Myers,* 270 N.C. 258, 154 S.E. 2d 87 (1967); *Nesbitt v. Fairview Farms, Inc.,* 239 N.C. 481, 80 S.E. 2d 472 (1954).

Under the common law, unless and until there is an absolute divorce the husband's right to exclusive use and possession continues. Absolute divorce of the spouses converts the estate into a tenancy in common. *Lanier v. Dawes,* 255 N.C. 458, 121 S.E. 2d 857 (1961); *Davis v. Bass,* 188 N.C. 200, 124 S.E. 566 (1924); *McKinnon v. Caulk,* 167 N.C. 411, 83 S.E. 559 (1914).

Although the court has no authority to order the sale of land owned by the entirety in order to procure funds to pay alimony, the rents and profits which belong to the husband may be charged with the support of his wife. *Porter v. Bank,* 251 N.C. 573, 111 S.E. 2d 904 (1960); *Holton v. Holton,* 186 N.C. 355, 119 S.E. 751 (1923). Such rents and profits have

the same status as other income and assets owned exclusively by the husband. *In re Estate of Perry,* 256 N.C. 65, 123 S.E. 2d 99 (1961).

However, these rents and profits may not be reached unless the wife is entitled to alimony or alimony pendente lite, and such entitlement is determined by statute. Transfer of title or possession of real property is not an end in itself, but rather is only a means authorized by G.S. 50-16.7 of paying alimony or alimony pendente lite.

Unless the wife claiming support is entitled to alimony or alimony pendente lite she is not entitled to exclusive possession and use of her husband's entirety property. Even G.S. 50-17, which provides for a "writ of possession" states that such writ is available only where the court (1) *grants* alimony (2) by the assignment of real estate.

G.S. 50-16.1, *et seq.* effective 1 October 1967, keys all awards, in the nature of permanent alimony and alimony pendente lite, to a spouse who is a dependent spouse within the meaning of G.S. 50-16.1(3). *Sprinkle v. Sprinkle,* 17 N.C. App. 175, 193 S.E. 2d 468 (1972).

A finding by the trial court that plaintiff is neither presently dependent upon the defendant for her support, nor actually in need of such support—that she is not a dependent spouse—but that nevertheless she is in need of and entitled to possession of the home is contradictory and mutually inconsistent. Under any given circumstances, either the complaining spouse is or is not entitled to alimony. There is no authority for the court to state that she is not dependent, but simultaneously order that she be given some form of support.

Reversed.

Judges MORRIS and PARKER concur.

STATE OF NORTH CAROLINA v. DORSEY ALSTON

No. 7315SC213

(Filed 28 March 1973)

1. **Homicide § 19— exclusion of questions concerning deceased's reputation for violence**

The trial court in a homicide prosecution did not err in sustaining the State's objections to questions concerning deceased's reputation as a violent and dangerous fighting man where, at the time the questions were propounded, there had been no evidence that defendant acted in self defense, where there was no evidence that defendant was aware of the violent and dangerous character of deceased when the killing occurred, and where the record does not disclose what the answers of the witnesses would have been.

2. **Homicide § 25— submission of first degree murder — harmless error**

Conviction of second degree murder rendered harmless error, if any, in submitting to the jury the question of defendant's guilt of first degree murder, absent some showing that the verdict of guilty of second degree murder was affected by the submission of the greater offense.

APPEAL by defendant from *Cooper, Judge,* 4 September 1972 Session of Superior Court held in ORANGE County.

Defendant was charged in a bill of indictment with the murder of George Alvis Johnson.

At about 11:00 p.m. on 24 June 1972, a group of people assembled for a dance sponsored by the Elks Lodge at the Roberson Street Community Center in Chapel Hill. The State's evidence tended to show: that, at about 11:30 p.m., defendant obtained a butcher knife from the home of one Mary Harris; that a fight took place between defendant and deceased about forty-five minutes later; that one Willy B. Harris saw defendant stab deceased with the butcher knife; that defendant later had blood on his shirt and left the bloody butcher knife in the yard of one Clarence Hargraves; and that the body of deceased disclosed twelve stab wounds.

Defendant offered evidence which tended to show: that he was attacked by deceased and four other men; that he drew the butcher knife to protect himself; and that he did not intend to kill anyone.

The jury returned a verdict of guilty of murder in the second degree. Judgment of confinement for a term of twenty-five years was entered. Defendant appealed.

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

Michael D. Levine, for the defendant.

BROCK, Judge.

[1] Defendant assigns as error that the trial judge sustained the State's objection to questions concerning deceased's reputation as a violent and dangerous fighting man. In a homicide prosecution, where there is evidence of self-defense, the general character of the deceased as a violent and dangerous man is competent, if such character was known to the defendant. *State v. Johnson,* 270 N.C. 215, 154 S.E. 2d 48. However, at the time defendant propounded the questions to which the State objected, there had been no evidence offered that defendant acted in self-defense, nor had there been evidence that defendant was aware of the violent and dangerous character of the deceased. In fact, when defendant later testified, although he testified that he acted to protect himself from an attack by deceased and four other men, he stated that he did not know deceased very well, "but just by people calling him Abbie." Defendant also testified that there was no reason why Abbie might have jumped on him and that he was surprised that he had. Nowhere in defendant's evidence was there any indication that defendant thought that deceased had the character or reputation of being a violent and dangerous man. Additionally, the record does not disclose what the answers of the witnesses would have been. In the absence of such showing we cannot hold that the exclusion of the answer was prejudicial. This assignment of error is overruled.

[2] Defendant assigns as error that the trial judge submitted to the jury, and instructed thereon, the issue of first degree murder. The jury actually found defendant guilty of only second degree murder.

"Where defendant is convicted of murder in the second degree, any error in the instructions of the court relating to murder in the first degree cannot be held prejudicial in the absence of a showing that the verdict of second degree murder was thereby affected." 4 Strong, N. C. Index 2d, Homicide, § 32, p. 261. There is no such showing in this case. "Also, a verdict of guilty of murder in the second degree renders immaterial the court's refusal to direct a verdict of not guilty to

the capital charge." 4 Strong, N. C. Index 2d, *supra. See also State v. Sallie,* 13 N.C. App. 499, 186 S.E. 2d 667. This assignment of error is overruled.

No error.

Judges MORRIS and PARKER concur.

ELIZABETH R. TAYLOR v. RICHARD F. TAYLOR

No. 7316DC102

(Filed 28 March 1973)

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

Where the consent judgment in question provided that defendant pay plaintiff $80 monthly per child, defendant's obligation to pay child support for his daughter ceased when she attained her majority; therefore, the trial court erred in directing defendant to pay plaintiff the $80 monthly until the child reached age 21 and in ordering defendant to pay plaintiff's counsel $500 for expenses incurred in instituting the suit.

APPEAL by defendant from *Britt, Judge,* 14 September 1972 Session of District Court held in ROBESON County.

This is an appeal from an order denying defendant's motion in the cause to be relieved of any obligation to make payments for the support of his daughter, Susan Leigh Taylor, under the provisions of a consent judgment entered in the District Court held in Robeson County. The record reveals that in the district court on 22 December 1970, a consent order was entered in pertinent part as follows:

> "Defendant agrees to pay monthly to the Plaintiff, commencing 1 January 1971, the sum of Six Hundred Fifty ($650.00) Dollars for the following purposes:
>
> a. As alimony, the sum of $250.00
> b. As child support, the sum of $80.00 per child, a total of $400.00."

The parties stipulated that Susan Leigh Taylor became 18 years of age on 26 August 1972, and that the parties to

this action were granted an absolute divorce on 5 February 1970.

From an order denying the motion and awarding plaintiff's counsel an attorney's fee of $500.00, defendant appealed.

Johnson, Hedgpeth, Biggs & Campbell by John Wishart Campbell for plaintiff appellee.

McLean, Stacy, Henry & McLean by H. E. Stacy, Jr., for defendant appellant.

HEDRICK, Judge.

Defendant assigns as error the trial court's conclusion that defendant had the duty to support Susan Leigh Taylor "until she attains the age of 21 years or is otherwise emancipated," and the award of an attorney's fee to plaintiff's counsel for his services in defense of the motion.

In denying the motion, the trial judge apparently relied on our decision in *Shoaf v. Shoaf,* filed 26 April 1972 and reported in 14 N.C. App. 231, 188 S.E. 2d 19. However, our decision was reversed by the Supreme Court in an opinion filed 15 November 1972 and reported in 282 N.C. 287, 192 S.E. 2d 299. In *Shoaf,* the consent judgment provided that the father would pay child support "until such time as said minor child reaches his majority or is otherwise emancipated." The Supreme Court held that even though the consent judgment was entered prior to the enactment of G.S. 48A, the father's legal obligation to support his son ceased when the son attained his majority, age 18. G.S. 48A.

In the present case the consent order, which was entered prior to the enactment of G.S. 48A, merely provides that the defendant agrees to pay "child support" at the rate of $80.00 monthly for each child. It was stipulated that Susan Leigh Taylor became 18 years of age on 26 August 1972. Clearly, the defendant's legal obligation to contribute to her support ceased when she obtained her majority, which is age 18. Likewise, any obligation the defendant might have had to pay legal expenses incurred by the plaintiff in employing counsel to secure support for defendant's minor daughter, *Andrews v. Andrews,* 12 N.C. App. 410, 183 S.E. 2d 843 (1971), also ceased when the daughter reached age 18. *Crouch v. Crouch,* 14 N.C. App. 49, 187 S.E. 2d 348 (1972), cert. denied, 281 N.C. 314 (1972). Thus, the trial court erred in concluding that the defendant had

the duty to support Susan Leigh Taylor "until she attains the age of 21 years or is otherwise emancipated"; and even though it is evident plaintiff's attorney rendered valuable legal services to plaintiff, the trial court was without authority to order the defendant to pay such expenses.

For the reasons stated the order appealed from is

Reversed.

Judges CAMPBELL and GRAHAM concur.

ASSOCIATED POULTRY, INC. v. WAKE FARMERS COOPERATIVE, INC. (CARL HOLLEMAN, PERMANENT RECEIVER)

No. 7315SC125

(Filed 28 March 1973)

Receivers § 12— purchase of eggs — assignment of purchase price — assets in receivership — no priority status

Where the F.H.A. had a security interest in the eggs and proceeds from the eggs of J. H. Muster, a farmers cooperative consented to pay directly to the F.H.A. the purchase price of Muster's eggs sold to or by the cooperative, and the transfer of Muster's eggs to the cooperative was treated by the parties as a sale with an assignment of the purchase price to the F.H.A., the cooperative did not act as a trustee holding the purchase price of the eggs in trust but a mere debtor and creditor relationship was established; consequently, Muster and the F.H.A. were not entitled to a priority status in the distribution of the cooperative's assets in receivership for amounts due for the purchase of Muster's eggs.

APPEAL from *Cooper, Judge,* 18 September 1972 Session of Superior Court held in CHATHAM County.

On 19 April 1971 a complaint was filed by Associated Poultry, Inc., against defendant, Wake Farmers Cooperative, Inc. (Wake), in which plaintiff sought, among other things, to have a receiver appointed for defendant. Following a hearing, and pursuant to an order of Judge Cooper filed 7 May 1971, Carl P. Holleman was appointed as permanent receiver of defendant corporation. In response to published notice to the creditors of defendant, J. H. Muster and Farmers Home Administration, United States Department of Agriculture (F.H.A.), appellants

in this appeal, filed a claim in the amount of $7,982.81 for eggs delivered and sold to, by and through defendant on their behalf. Appellants alleged they were entitled to "a superior lien on the proceeds of the sale" of the eggs involved.

In the report of the receiver, filed 24 April 1972, Holleman allowed appellants' claim in the amount of $6,880.38 as a general claim. Appellants filed exceptions to this report in which they alleged their claim was for $7,980.81 and excepted to the allowance of their claim as a general claim. A jury trial was waived on the issues raised by the exceptions and, after hearing the evidence, Judge Cooper made findings of fact and conclusions of law and entered an order denying appellants any "security interest in or priority in the assets of" Wake and allowing their claim in the amount of $7,980.81 as a general claim. Muster and F.H.A. appealed.

Vaughan S. Winborne for plaintiff appellants.

No brief filed for defendant appellees.

VAUGHN, Judge.

The evidence presented before Judge Cooper tended to show that J. H. and Margaret C. Muster executed a financing statement in favor of F.H.A. covering the proceeds and products of their crops, livestock, supplies, other farm products, farm equipment and inventory as collateral for a loan. A copy of this financing statement was filed with the Register of Deeds of Wake County on 11 December 1967. F.H.A. requested and received from J. H. Muster a "Consent to Payment of Proceeds from Sale of Farm Products" which gave notice that the F.H.A. held a perfected security interest in the eggs and proceeds from the eggs of J. H. Muster and directed Wake to pay the purchase price of such products sold to, by or through Wake directly to F.H.A. The "effective date" of the consent was stated to be 16 February 1971, but the receipt acknowledgment and agreement to pay as the consent document directed was not signed by a representative of Wake until 22 April 1971.

Appellants challenge the denial of their claim to a priority position among the creditors of Wake and the classification of their claim "as a general claim." Appellants assert that Wake acted as a trustee holding the purchase price of the eggs in trust for F.H.A. Appellants' claim to a priority status in the

distribution of Wake's assets in receivership is based upon that premise. Their argument is without merit. An examination of the evidence concerning all the circumstances of the transactions between the Musters, F.H.A. and Wake discloses that the parties treated the transfer of the Musters' eggs to Wake as a sale, with an assignment of the purchase price running to F.H.A. Upon delivery of the Musters' eggs to Wake, they were graded and a record of the amount owed the Musters was kept. The eggs were then commingled with eggs of other farmers and, after marketing, the proceeds were deposited into a general account from which payment was to be made based upon the previously established value. The "Consent to Payment . . . " form, offered as an exhibit by appellants, characterizes Wake as a "Purchaser" and seeks to have "100 per cent of the purchase price" of the eggs paid directly to F.H.A. by virtue of F.H.A.'s security interest and the consent of J. H. Muster. Appellants have failed to establish anything beyond a debtor and creditor relationship between them and Wake. The court did not err in failing to find that appellants are entitled to preferential status as to the assets of Wake.

Affirmed.

Judges BRITT and MORRIS concur.

MARTHA M. LANG v. MICHELLE MONGER AND ELMER EUGENE MONGER

No. 7312DC22

(Filed 28 March 1973)

Evidence §§ 47, 50— expert medical testimony — opinion not based on personal knowledge or hypothetical question — admission improper

The trial court in a personal injury action committed reversible error in allowing plaintiff's expert medical witness to state to the jury as a fact that in the accident in suit plaintiff had sustained a measure of lasting disability where such opinion was not founded on facts within the witness's personal knowledge nor was it the result of a hypothetical question based on facts in evidence as to the acccident and injury.

APPEAL by defendants from *Herring, District Judge,* 26 June 1972 Civil Session of CUMBERLAND County District Court.

Plaintiff filed complaint to recover for personal injury and monetary loss arising out of an automobile collision occurring when defendants' automobile ran into the back of plaintiff's automobile on 25 August 1969. The defendants admitted that Michelle Monger was negligent in the operation of her vehicle, and that her negligence was the proximate cause of the collision. The only issue involved at trial concerned the amount of damages to which plaintiff was entitled, which issue the jury answered in favor of the plaintiff in the sum of $5,300.00.

The plaintiff testified that she suffered pain in her neck and back, that she had lost the use of her right arm and hand for a period of time, and that she had incessant headaches. She was treated immediately after the accident at Womack Army Hospital at Fort Bragg. Beginning on 16 September 1969 plaintiff was treated by Dr. John W. Baluss, Jr., which treatment continued periodically until October 1970, and at irregular intervals thereafter.

Dr. Baluss testified that based on his examination he diagnosed that plaintiff had suffered a severe cervical spine strain with right fifth cervical nerve root compression, which caused some mild nerve changes in the right hand.

Pope, Reid & Lewis by Marland C. Reid and Michael R. Spears for plaintiff appellee.

Quillin, Russ & Worth by Walker Y. Worth, Jr. for defendant appellants.

CAMPBELL, Judge.

Defendant assigned as error a great portion of the testimony of plaintiff's expert medical witness, Dr. Baluss. Dr. Baluss testified that in his opinion plaintiff was suffering pain when he first examined her on September 16, 1969. We find no error in this testimony.

Subsequently, the following transpired:

> "Q. Dr. Baluss, based on your examination and treatment of Mrs. Lang from the first time she saw you in September, 1969, through 1972, do you have an opinion satisfactory to yourself as to a medical certainty whether or not the condition for which you were treating her is per-

manent and whether or not those conditions were, in fact, caused by an automobile accident on August 25, 1969?

Objection by Attorney McLeod.

COURT: Overruled.

A. Yes, sir.

Motion to strike by Attorney McLeod.

COURT: Denied.

Q. What is your opinion?

Objection by Attorney McLeod.

COURT: Overruled.

A. I thought or my belief is that she had a measure of lasting disability as a result of the accident described in August of 1969.

Motion to strike by Attorney McLeod.

COURT: Motion denied."

We are of the opinion that this evidence was incompetent and that it was error to overrule the objection thereto.

Dr. Baluss had no personal knowledge that plaintiff was involved in an automobile accident on August 25, 1969, or if she was, that she sustained any injuries in the accident. Yet he stated to the jury as a fact that in the accident, in suit, plaintiff had sustained a measure of lasting disability. This constituted error for the same reason set out so clearly by Justice Sharp in *Todd v. Watts,* 269 N.C. 417, 152 S.E. 2d 448 (1967). No useful purpose would be accomplished by repeating the words of Justice Sharp.

New trial.

Judges BRITT and GRAHAM concur.

STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION, AND DUKE TELEPHONE COMPANY AND DUKE UNIVERSITY v. GENERAL TELEPHONE COMPANY OF THE SOUTHEAST

No. 7310UC226

(Filed 28 March 1973)

Telephone and Telegraph Companies § 1; Utilities Commission § 9— petition for certificate of public convenience and necessity — denial of motion to dismiss — premature appeal

A telephone company's appeal from the denial of its motion to dismiss on jurisdictional grounds a petition of Duke Telephone Company and Duke University for a certificate of public convenience and necessity to provide telephone service at Duke University is dismissed as premature since no final order has been entered by the Utilities Commission in the proceeding.

APPEAL by intervenor, General Telephone Company of the Southeast, from an order of the North Carolina Utilities Commission dated 11 December 1972.

Petitioners, Duke Telephone Company and Duke University, instituted this proceeding on 9 October 1972 by filing with the North Carolina Utilities Commission a joint petition "for a certificate of public convenience and necessity authorizing it to provide telephone service at Duke University." On 1 December 1972, General Telephone Company of the Southeast (General Telephone) filed a "petition for leave to intervene and motion to dismiss application" alleging "that neither Duke University nor its wholly-owned subsidiary, Duke Telephone Company, is a 'public utility' within the meaning of General Statute 62-110, the certification statute in this State . . . . " The Utilities Commission, by order dated 11 December 1972, granted General Telephone's petition to intervene, but denied the motion of General Telephone to dismiss the joint petition of Duke Telephone Company and Duke University. General Telephone appealed.

Edward B. Hipp, Maurice W. Horne and William E. Anderson, for North Carolina Utilities Commission.

Boyce, Mitchell, Burns & Smith by F. Kent Burns for petitioners appellee, Duke Telephone Company and Duke University.

R. Frost Branon, Jr., Ward W. Wueste, Jr., and Newsom, Graham, Strayhorn, Hedrick & Murray by A. H. Graham, Jr., for intervenor appellant, General Telephone Company of the Southeast.

HEDRICK, Judge.

Motions to dismiss intervenor's appeal as being premature and fragmentary were filed in this court by both the Utilities Commission and petitioners.

The North Carolina Utilities Commission is, by statute, vested with jurisdiction over public utilities. G.S. 62-30. Telephone companies are utilities within the jurisdiction of the Utilities Commission. G.S. 62-3 (23) a 6. G.S. 62-110 in pertinent part provides:

> "No public utility shall hereafter begin the construction or operation of any public utility plant or system or acquire ownership or control thereof, either directly or indirectly, without first obtaining from the Commission a certificate that public convenience and necessity requires, or will require, such construction, acquisition, or operation . . . . "

Petitioners, Duke Telephone Company and Duke University, by applying for a certificate of convenience and necessity to provide telephone service at Duke University, have complied with the mandate of G.S. 62-110. The Utilities Commission, by denying intervenor's motion to summarily dismiss the Duke petition because of an alleged lack of jurisdiction, has rendered no final determination on the merits of the petition, but instead has concluded that the issues of fact and law raised by the petition can only be determined after a hearing.

The right of appeal lies from a final decision of the Utilities Commission. G.S. 7A-29; G.S. 62-90. Since no final order has been rendered by the Utilities Commission in this case, the appeal of General Telephone is premature and is therefore

Dismissed.

Judges BRITT and PARKER concur.

STATE OF NORTH CAROLINA v. HARRY LEE DUNN

No. 7310SC70

(Filed 28 March 1973)

Robbery § 4— common law robbery — no error in trial

Defendant in a common law robbery case had a fair trial free from prejudicial error.

State v. Dunn

APPEAL by defendant from *Canaday, Judge,* 10 July 1972 Session of Superior Court held in WAKE County.

Defendant was charged in a bill of indictment with common law robbery. The evidence for the State tended to show the following: On 7 May 1972, between ten and eleven o'clock p.m., defendant went into the Kwik-Pik store on the old Garner Road. He demanded of the cashier that she "[t]ake the money out of the cash register." Defendant had one hand in his pocket and the cashier heard a "click." She gave defendant the money because she was afraid and she thought she was protecting her life. The cashier had seen defendant before and identified him as the perpetrator of the robbery.

The jury found defendant guilty of common law robbery. He appealed.

Attorney General Morgan, by Associate Attorney Kramer, for the State.

Charles H. Yarborough, Jr., for the defendant.

BROCK, Judge.

The trial court was properly organized and had jurisdiction of the defendant and the subject matter. The bill of indictment was proper in form. Defendant was duly arraigned upon the charge of common law robbery and entered a plea of not guilty. The evidence was sufficient to be submitted to the jury, the verdict of the jury was proper in form, and the judgment was correctly entered. The sentence imposed does not exceed the maximum allowed by law.

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

No error.

Judges HEDRICK and VAUGHN concur.

RULES OF THE JUDICIAL STANDARDS COMMISSION

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RULE 1

Authority

These rules are promulgated pursuant to the authority contained in G.S. 7A-377, and are effective January 1, 1973.

RULE 2

Organization; Officers; Meetings; Quorum

The Commission shall have a Chairman, who is the Court of Appeals member, and a Vice-Chairman, who shall be elected by the members. The Vice-Chairman shall preside in the absence of the Chairman. The Commission shall also have a Secretary, who shall be elected by the members and perform such duties as the Commission may assign. The Vice-Chairman and Secretary shall serve for one-year terms, and may succeed themselves.

The Commission shall meet on the call of the Chairman or of any four members.

A quorum for the conduct of business shall consist of any four members, except as otherwise provided in these rules.

Each member of the Commission, including the Chairman, Vice-Chairman, Secretary, or other presiding member, shall be a voting member.

The Commission shall ordinarily meet in Raleigh, but may meet anywhere in the State. The Commission's address is P. O. Box 1122, Raleigh, N. C. 27602.

RULE 3

Interested Party

A judge who is a member of the Commission is disqualified from acting in any case in which he is a respondent, except in his own defense.

RULE 4

Confidentiality of Proceedings

(a) ALL papers filed with and proceedings before the Commission are confidential, unless the respondent judge otherwise requests. The recommendations of the Commission to the Supreme Court, and the record filed in support of the recommendations are not confidential.

(b) At the request of the judge involved:

1) when a judge is publicly charged with involvement in proceedings before the Commission and the result of such publicity is substantial unfairness to him, the Commission may issue a short statement of clarification and correction; or

2) when a judge is publicly associated with having engaged in serious reprehensible conduct or having committed a major offense, and after a preliminary investigation or a formal hearing it is determined that there is no basis for further proceedings or recommendations, the Commission may issue a short explanatory statement.

(c) Upon resolution of the Commission:

when a formal hearing has been ordered in a proceeding and the Commission determines that the subject matter is generally known to the public and in which there is broad public interest, and the Commission further determines that confidence in the administration of justice is threatened due to lack of information concerning the status of the proceeding and the requirements of due process, the Commission may, after permitting the judge involved the right of consultation with the Commission, issue one or more short announcements confirming the hearing, clarifying the procedural aspects, and defending the right of the judge to a fair hearing.

(d) All written communications to a judge (counsel, guardian, guardian ad litem) pursuant to these rules shall be enclosed in a securely sealed inner envelope marked "Confidental."

RULE 5

Defamatory Matter

Testimony and other evidence presented to the Commission is privileged in any action for defamation. No other publication of such evidence shall be privileged, except that the record filed by the Commission in the Supreme Court continues to be privileged.

RULE 6

Unfounded or Frivolous Complaints

(a) Upon receipt of a written complaint that is obviously unfounded or frivolous, the Commission shall write a short

letter of explanation to the complainant. The judge involved shall not be notified of these complaints unless otherwise determined.

(b) A determination that a complaint is unfounded or frivolous may be made by two Commission members one of whom must be a judge or attorney. Such determination may be reconsidered by the full Commission at its next meeting.

RULE 7

Preliminary Investigation

(a) The Commission, upon receiving a written complaint, not obviously unfounded or frivolous, alleging facts indicating that a judge may be guilty of wilful misconduct in office, wilful and persistent failure to perform his duties, habitual intemperance, conviction of a crime involving moral turpitude, or conduct prejudicial to the administration of justice that brings the judicial office into disrepute, or alleging that a judge is suffering from a mental or physical incapacity interfering with the performance of his duties, which incapacity is, or is likely to become, permanent, shall make a preliminary investigation to determine whether formal proceedings should be instituted. The Commission may also make a preliminary investigation on its own motion.

(b) The judge shall be notified of the investigation, the nature of the charge, and whether the investigation is on the Commission's own motion or upon written complaint, and afforded a reasonable opportunity to present such relevant matters as he may choose. Such notice shall be in writing, and may be transmitted by a member of the Commission, any person of suitable age and discretion designated by it, or by certified or registered mail.

If the preliminary investigation does not disclose sufficient cause to warrant further proceedings, the judge shall be so notified, and the case closed.

RULE 8

Notice of Formal Proceedings

After the preliminary investigation has been completed, if the Commission concludes that formal proceedings should be instituted, it shall promptly so notify the judge. Such notice shall be entitled "BEFORE THE JUDICIAL STANDARDS COMMIS-

SION, Inquiry Concerning a Judge, No. ....." The notice shall identify the complainant, and shall specify in ordinary and concise language the charge or charges against the judge. The judge shall be advised of alleged facts upon which such charges are based, and a copy of the verified complaint shall be furnished to the judge, and the notice shall advise the judge of his right to file a written, verified answer to the charges against him within 20 days after service of the notice upon him. The notice shall be served upon the judge by personal service by a member of the Commission, or some person of suitable age and discretion designated by it. If, after reasonable efforts to do so, personal service cannot be effected, service by certified or registered mail is authorized. Notice by mail shall be addressed to the judge at his residence of record.

RULE 9

Answer

(a) Within 20 days after service of the complaint and notice of formal proceedings the judge may file with the Commission an original and 8 copies of an answer, which shall be verified.

(b) The notice, complaint and answer constitute the pleadings. No further pleadings may be filed, and no motions may be filed against any of the pleadings.

RULE 10

Formal Proceedings

Upon the filing of an answer, or upon the expiration of the time allowed for its filing, the Commission shall order a formal proceeding before it concerning the charges. The proceeding shall be held no sooner than 10 days after filing of the answer, or after the deadline for filing of the answer, unless the judge consents to an earlier hearing. The notice shall be served in the same manner as the notice of charges under Rule 8.

At the date set for the formal proceeding, the Commission shall proceed whether or not the judge has filed an answer, and whether or not he appears in person or through counsel, but failure of the judge to answer or to appear shall not be taken as evidence of the facts alleged in the charges.

Special counsel (who shall be an attorney) employed by the Commission, or counsel supplied by the Attorney General at the request of the Commission, shall present the evidence in

support of the charges. Counsel shall be sworn to preserve the confidential nature of the proceeding.

The proceeding shall be recorded by a reporter employed by the Commission for this purpose. The reporter shall also be sworn to preserve the confidential nature of the proceeding.

RULE 11

Witnesses; Oaths; Subpoenas; Compensation

Witnesses shall take an oath or affirmation to tell the truth and not to divulge the name of the judge or the existence of the proceeding until the matter is no longer confidential under these rules. The oath to witnesses may be administered by any member of the Commission.

Subpoenas to witnesses shall be issued in the name of the State, and shall be signed by a member of the Commission. They shall be served, without fee, by any officer authorized to serve process of the General Court of Justice.

Witnesses are entitled to the same compensation and reimbursement for travel expenses as witnesses in a civil case in the General Court of Justice. Vouchers authorizing disbursements for Commission witnesses shall be signed by the Chairman or Secretary of the Commission.

RULE 12

Medical Examination

When the mental or physical health of a judge is in issue, the Commission may request the judge to submit to an examination by a licensed physician or physicians of its choosing. If the judge fails to submit to the examination, the Commission may take his failure into account, unless it has good reason to believe that the judge's failure was due to circumstances beyond his control. The judge shall be furnished a copy of the report of any examination conducted under this rule.

The examining physician or physicians shall receive the fee of an expert witness, to be set by the Commission.

RULE 13

Rights of Respondent

In formal proceedings involving his censure, removal, or retirement, a judge shall have the right and opportunity to de-

fend against the charges by introduction of evidence, representation by counsel, and examination and cross-examination of witnesses. He shall also have the right to the issuance of subpoenas for attendance of witnesses to testify or to produce books, papers, and other evidentiary matter.

A copy of the transcript of proceedings prepared for transmission to the Supreme Court shall be furnished to the judge and, if he has objections to it, he may within 10 days present his objections to the Commission, which shall consider his objections and settle the record prior to transmitting it to the Supreme Court.

The judge has the right to have all or any portion of the testimony in the proceedings transcribed at his own expense.

Once the judge has informed the Commission that he has counsel, a copy of any notices, pleadings, or other written communications (other than the transcript) sent to the judge shall be furnished to counsel by any reliable means.

RULE 14

Evidence

At a formal proceeding before the Commission, legal evidence only shall be received, and oral evidence shall be taken only on oath or affirmation.

Rulings on evidentiary matters shall be made by the Chairman, or the Vice-Chairman presiding in his absence.

RULE 15

Amendments to Notice or Answer

The Commission, at any time prior to its recommendation, may allow or require amendments to the notice of formal proceedings, and may allow amendments to the answer. The notice may be amended to conform to proof or to set forth additional facts, whether occurring before or after the commencement of the hearings. In case such an amendment is made, the judge shall be given reasonable time both to answer the amendment and to prepare and present his defense against the matters charged thereby.

RULE 16

Commission Voting

The affirmative vote of at least five members of the Commission is necessary to recommend to the Supreme Court

censure or removal of a judge. A vote of four (a quorum) is necessary for any other official action, except as specified in Rule 6 for disposing of unfounded or frivolous complaints.

RULE 17

Contempt

The Commission has the same power as a trial court of the General Court of Justice to punish for contempt, or for refusal to obey lawful orders or process issued by the Commission.

RULE 18

Record of Proceedings

The Commission shall keep a record of all preliminary investigations and formal proceedings concerning a judge. In formal proceedings testimony shall be recorded verbatim, and if a recommendation to the Supreme Court for censure or removal is made, a transcript of the evidence and all proceedings therein shall be prepared, and the Commission shall make written findings of fact and conclusions of law in support of its recommendation.

RULE 19

Transmission of Recommendations to Supreme Court

Upon reaching a recommendation to censure or remove a judge, the Commission shall promptly file with the Clerk of the Supreme Court the transcript of proceedings, and its findings of fact, conclusions of law, and recommendation, certified by the Chairman or Secretary. The Commission shall concurrently transmit to the judge a copy of the transcript (if the judge objected to the original transcript, and settlement proceedings resulting in charges in the transcript were had), its findings, conclusions, and recommendation.

RULE 20

Proceedings in the Supreme Court

Proceedings in the Supreme Court shall be as prescribed by Supreme Court Rule. *See* G.S. 7A-33.

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.

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ABORTION

§ 3. Offense of Causing Miscarriage of Pregnant Woman

Trial court did not err in allowing State's rebuttal witness to testify that defendant performed an abortion on her in 1968. *S. v. Coleman*, 11.

APPEAL AND ERROR

§ 39. Time of Docketing

The trial court was without authority to enter a valid order extending the time for docketing appeal after the original 90-day period had expired. *Lambert v. Patterson*, 148.

Appeal is dismissed for failure to file record on appeal in time allowed. *James v. Greenway, Inc.*, 156.

§ 57. Findings

It was improper for the court to recite as a fact its own opinion as to the competency and skill of an attorney in its order setting an attorney's fee in an action tried before another judge. *Tripp v. Tripp*, 64.

§ 68. Law of the Case and Subsequent Proceedings

Decision on former appeal that plaintiff's complaint stated a claim for relief for punitive damages does not constitute the law of the case on question of whether plaintiff's evidence is sufficient to support submission of an issue of punitive damages to the jury. *Clouse v. Motors, Inc.*, 669.

ARREST AND BAIL

§ 3. Right of Officers to Arrest Without Warrant

Arrest of defendant without a warrant for misdemeanor larceny of bed sheets from a department store was lawful. *S. v. Jones*, 54.

Where defendant took flight upon confrontation with officers and tossed away an aluminum foil object, officers had probable cause to believe that a felony or misdemeanor was being committed in their presence. *S. v. Harrington*, 221.

Officers had reasonable ground in believing that defendant had just committed the crime of felonious breaking and entering and their search of defendant was incident to a lawful arrest. *S. v. Cooper*, 184.

Warrantless arrest of defendant was lawful where the arresting officer knew of outstanding bills of indictment against defendant charging felonies and where he had probable cause to believe that defendant would evade arrest if not immediately taken into custody. *S. v. Denton*, 684.

§ 6. Resisting Arrest

In a prosecution for resisting arrest for a misdemeanor, the trial court's instruction requiring the jury to find merely that defendant resisted arrest "after an officer had given him notice that he was arresting him for a criminal offense" *held* erroneous in failing to require a jury finding that the officer had reasonable grounds to believe defendant had committed the misdemeanor in his presence. *S. v. Jefferies*, 195.

ARREST AND BAIL—Continued

Verdict of not guilty of the misdemeanor for which defendant was arrested was not tantamount to a finding that the arresting officer did not have reasonable grounds to believe that defendant had committed such offense in his presence and that defendant therefore could lawfully resist the arrest. *Ibid.*

§ 7. Right of Person Arrested to Communicate With Friends

Refusal of the arresting officer to search for witnesses did not violate defendant's rights. *S. v. Dale-Williams*, 121.

ASSAULT AND BATTERY

§ 2. Defenses in Civil Actions for Assault

Plaintiff's claims for assault and false imprisonment were barred by the one year statute of limitation. *Priddy v. Department Store*, 322.

§ 5. Assault With a Deadly Weapon

Defendant could be convicted of felonious assault and armed robbery based on one continuous course of conduct. *S. v. Kinsey*, 57.

§ 9. Defense of Others

Trial court properly failed to instruct on defense of a third person. *S. v. Moses*, 115.

§ 14. Sufficiency of Evidence and Nonsuit

State's evidence was sufficient for jury on three charges of felonious assault and one charge of assault on a police officer. *S. v. Mitchell*, 1.

Evidence was sufficient for jury on question of serious injury in felonious assault case. *S. v. Kinsey*, 57.

ATTORNEY AND CLIENT

§ 5. Liabilities to Client

Complaint was sufficient to state a claim for relief against two attorneys based on fraud in telling plaintiff that a settlement of his case was in the offing and that the case would be tried if the settlement was insufficient. *Brantley v. Dunstan*, 19.

§ 9. Persons Liable for Compensation of Attorney

Trial court had authority to tax a reasonable attorney's fee as part of the costs in an action for a declaratory judgment and for instructions to trustees in connection with the sale of trust property. *Tripp v. Tripp*, 64.

AUTOMOBILES

§ 1. Authority to Suspend Driver's License

Department of Motor Vehicles had authority to suspend for 60 days limited driving privilege granted defendant convicted of drunken driving for defendant's wilful refusal to take a breathalyzer test at the time of his arrest for drunken driving. *Vuncannon v. Garrett*, 440.

AUTOMOBILES—Continued

§ 3. Driving After Revocation of License

Evidence was sufficient to support jury verdict finding defendant guilty of driving while his license was permanently revoked. *S. v. Sykes*, 361.

§ 45. Relevancy and Competency of Evidence in Action for Negligent Operation of Vehicle

Testimony that immediately after officers stopped an automobile driven by defendant, a passing motorist told officers in defendant's presence that a woman was lying in the highway just up the road was hearsay and not admissible for the purpose of showing defendant's reaction to the statement. *Jones v. Seagroves*, 467.

§ 57. Negligence in Intersection Collision

Trial court's findings of fact in personal injury action supported his conclusion that plaintiff was injured by defendant's negligence in an intersection collision. *Smith v. House*, 567.

§ 58. Negligence in Turning

Trial court erred in directing verdict for plaintiff where the evidence showed plaintiff was negligent in making a left turn into defendant's vehicle at an intersection. *Hinson v. Parker*, 677.

§ 63. Negligence in Striking Child

Trial court properly directed verdict for defendant driver who struck and injured a child on a tricycle. *Winters v. Burch*, 660.

§ 68. Sufficiency of Evidence of Defective Vehicle

Evidence that automobile struck from rear had no right taillight was insufficient to show that negligence by the driver was a proximate cause of the collision. *Thomas v. Insurance Co.*, 125.

§ 69. Negligence in Striking Bicyclist

Plaintiff presented jury question as to whether defendant was negligent in failing to keep his vehicle under control and striking a bicyclist. *Miller v. Enzor*, 510.

§ 72. Sudden Emergencies

Summary judgment was improperly entered where plaintiff contended that she suffered personal injuries after losing control of her car due to an emergency caused by defendant. *Roberts v. Whitley*, 554.

§ 76. Contributory Negligence in Following Too Closely

Whether plaintiff was contributorily negligent in following a vehicle too closely was a triable issue in personal injury action. *Roberts v. Whitley*, 554.

§ 85. Contributory Negligence of Persons on Bicycles

Whether a bicyclist was contributorily negligent in riding on a highway without lights at night was a question for the jury. *Miller v. Enzor*, 510.

§ 90. Instructions in Accident Cases

Trial court failed to apply law to evidence in merely instructing jury that defendant was negligent if she improperly passed plaintiff's automo-

AUTOMOBILES—Continued

bile, failed to maintain proper lookout or drove recklessly and carelessly. *Maynard v. Pigford,* 129.

§ 95. Negligence of Driver Imputed to Passenger

Negligence of minor driver of an automobile will not be imputed to her mother where the evidence discloses that the mother was simply a passenger in the automobile. *Ellis v. Gillis,* 297.

§ 112. Competency of Evidence in Involuntary Manslaughter Case

Trial court committed prejudicial error in permitting a State's witness to testify prior to the time defendant took the stand that defendant had previously been convicted of reckless driving while his license was suspended and for driving while his license was suspended. *S. v. Thomas,* 8.

§ 113. Sufficiency of Evidence in Involuntary Manslaughter Case

State's evidence was sufficient for jury to find defendant was guilty of involuntary manslaughter when his car struck and killed a child playing in a yard beside the road. *S. v. Grissom,* 374.

§ 125. Warrant for Operating Vehicle While Under Influence of Intoxicating Liquor

Trial court should have quashed warrant charging defendant with driving while under the influence of "some alcoholic beverages or narcotic drugs." *State v. Burris,* 710.

§ 126. Competency and Relevancy of Evidence in Prosecution for Driving Under the Influence

Breathalyzer test results were admissible though test was given two hours after arrest and though defendant claimed to have consumed alcoholic beverage after his arrest. *S. v. Shadding,* 279.

Failure to give statutory warning before administering breathalyzer test rendered results of the test inadmissible. *Ibid.*

Statements by officer administering breathalyzer test to defendant as to effect of defendant's refusal to take the test did not amount to coercion. *S. v. Coley,* 443.

Evidence of prior convictions was admissible in prosecution charging defendant with driving under the influence, second offense. *S. v. St. John,* 587.

§ 127. Sufficiency of Evidence and Nonsuit in Prosecution for Driving Under the Influence

Evidence was sufficient to submit the case to the jury and to support the verdict finding defendant guilty of driving under the influence of intoxicants. *S. v. Belk,* 123; *S. v. Sykes,* 361.

§ 129. Instructions in Prosecution for Driving Under the Influence

G.S. 20-139.1 providing for admission of breathalyzer test results and presumption of intoxication arising therefrom does not create a conclusive presumpton or shift the burden of proof to defendant, and the trial judge in a drunken driving case gave proper instructions placing the burden of proof on the State. *S. v. Raynor,* 707.

BAILMENT

§ 5. Rights in Regard to Third Persons

A bailor for hire of a motor vehicle is liable for injury to the bailee or other persons proximately resulting from a defective condition of the vehicle of which he has knowledge or by the exercise of reasonable care could have discovered. *Mann v. Transportation Co.*, 256.

BANKS AND BANKING

§ 1. Control and Regulation in General

Record supported Banking Commission's findings that probable volume of business and reasonable public demand in the primary service area of a proposed branch are sufficient to maintain solvency of a new branch and of the existing bank. *Banking Comm. v. Bank*, 557.

BILLS AND NOTES

§ 8. Makers and Persons Primarily Liable

Trial court's findings compelled a conclusion of law that defendant signed promissory notes as a comaker without any right as an accommodation maker. *Schafran v. Harris*, 500.

§ 19. Competency of Parol Evidence

Parol evidence rule prohibits defendant from presenting evidence of a parol agreement that he be credited on his note to plaintiff for the amount of two past due customer notes which were in defendant's possession at the time he executed the note to plaintiff. *Borden, Inc. v. Brower*, 249.

BROKERS AND FACTORS

§ 4. Duties and Liabilities of Broker or Factor to Principal

An agent employed to sell his principal's property may not himself become the purchaser absent a good faith disclosure to the principal and a consent to the transaction by the principal after such disclosure. *Real Estate Exchange & Investors v. Tongue*, 575.

§ 6. Right to Commissions

Allegations by plaintiff real estate agent that it was granted for a period of time the exclusive right to sell defendants' property for a certain price and upon specified terms, and during such period plaintiff itself offered to purchase the property at the price and upon the terms stipulated are held insufficient to state a claim for relief in an action to recover a real estate agent's commission. *Real Estate Exchange & Investors v. Tongue*, 575.

BURGLARY AND UNLAWFUL BREAKINGS

§ 5. Sufficiency of Evidence and Nonsuit

Evidence that defendants approached stolen guns hidden in the woods was sufficient for jury on issue of defendants' guilt of breaking and entering and larceny. *S. v. Greene*, 51.

BURGLARY AND UNLAWFUL BREAKINGS—Continued

State's evidence was sufficient for jury on issues of defendant's guilt of breaking and entering and safecracking by acting as a lookout. *S. v. Connors,* 60.

Evidence was sufficient to withstand nonsuit in a case charging defendant with felonious breaking and entering a service station and with felonious larceny. *S. v. Carter,* 234.

CARRIERS

§ 19. Liability for Injury to Passengers

Evidence was insufficient to support finding that defendant bus company was negligent in delivering to its codefendant a bus with a defective steering mechanism. *Mann v. Transportation Co.,* 256.

CONSPIRACY

§ 6. Sufficiency of Evidence and Nonsuit

There was sufficient evidence of conspiracy by defendants and others to burn a board of education office building to warrant submission of the case to the jury. *S. v. DeGraffenreidt,* 550.

CONSTITUTIONAL LAW

§ 12. Regulation of Trades and Professions

Local act granting discretionary authority to the governing bodies of municipalities in Vance, Scotland and Moore counties to refuse to issue a license for the sale of wine within the corporate limits of such municipalities is unconstitutional. *Food Fair v. City of Henderson,* 335.

Statute requiring the revocation of a private detective's license upon his being commissioned a company or special policeman is a regulation of the two professions within the scope of the State's police power. *Assoc. of Licensed Detectives v. Morgan,* 701.

§ 13. Safety, Sanitation and Health

Municipal ordinance prohibiting an open air public meeting on a public street, alley or sidewalk without a license is constitutional. *S. v. Clemmons,* 112.

§ 14. Police Power in Regulation of Morals and Public Welfare

Trial court properly denied defendants' motions to quash warrants against them made on the ground that the ordinance under which they were charged requiring observance of Sunday as a uniform day of rest was unconstitutional. *S. v. Atlas,* 99.

Evidence of Sunday sales of newspapers was properly excluded in defendants' trial for Sunday sale of clothing. *Ibid.*

§ 20. Equal Protection

Prohibition against an individual serving as a private detective and a special police officer at the same time does not constitute a denial of equal protection. *Assoc. of Licensed Detectives v. Morgan,* 701.

CONSTITUTIONAL LAW—Continued

§ 29. Right to Trial by Duly Constituted Jury

Absence of names of persons 18 to 21 years old from jury list did not require trial judge to quash the array. *S. v. Barnwell,* 299.

§ 30. Due Process in Trial

Delay between defendant's arrest and trial for rape caused by unavailability of the prosecuting witness did not violate defendant's right to a speedy trial. *S. v. Satchell,* 312.

§ 31. Right of Confrontation and Access to Evidence

Defendant was not denied due process by State's failure to furnish exhibits to defendant and to arrange for pretrial examination of expert witness in compliance with pretrial order. *S. v. Mason,* 44.

Disclosure of name of confidential informer was not required. *S. v. Cameron,* 229; *S. v. Hendrickson,* 356.

In escape prosecution, defendant's constitutional rights were not denied by trial court's refusal to subpoena inmates who would have testified that prison officials had punished defendant for the escape. *S. v. Carroll,* 691.

§ 32. Right to Counsel

Investigatory questions asked defendant before he was taken into custody and his answers thereto were admissible. *S. v. Salem,* 269.

An adjudication of delinquency must be set aside where the record fails to show that the juvenile's parents were advised of their right, if indigent, to appointment of counsel or that they waived that right. *In re Stanley,* 370.

§ 36. Cruel and Unusual Punishment

Segregated confinement of a prison inmate in solitary or maximum security is not per se cruel and unusual punishment. *S. v. Carroll,* 691.

CONTEMPT OF COURT

§ 6. Hearings on Orders to Show Cause; Findings

Evidence in contempt proceeding was sufficient to support finding that defendant possessed ability and means to make child support payments. *Carroll v. Sandlin,* 140.

CONTRACTS

§ 4. Consideration

Trial court erred in dismissing plaintiff's claim against defendant where defendant agreed in writing to pay the amount of the fee earned by plaintiff in securing employment for a codefendant. *Bowling v. Hines,* 697.

§ 27. Sufficiency of Evidence

Plaintiffs' evidence was insufficient to establish the existence of a contract between the parties. *Hamm v. Texaco Inc.,* 451.

CONVICTS AND PRISONERS

§ 2. Discipline and Management

Segregated confinement of a prison inmate in solitary or maximum security is not per se cruel and unusual punishment. *S. v. Carroll,* 691.

COSTS

§ 1. Recovery of Costs as Matter of Right by Successful Party

Trial court erred in awarding attorney fees to landowner for costs incurred in action instituted by the condemnor adjudicating condemnor's right to condemn landowner's property and the amount to be paid as just compensation. *Housing Authority v. Farabee,* 431.

Respondent in a child custody proceeding was not entitled to an award of counsel fees or to have court costs taxed against petitioner father. *In re Cox,* 687.

§ 4. Items of Cost and Amount Allowed

Trial court had authority to tax a reasonable attorney's fee as part of the costs in an action for a declaratory judgment and for instructions to trustees in connection with the sale of trust property. *Tripp v. Tripp,* 64.

Trial court did not err in admission of hearsay evidence in a hearing upon a motion that an attorney's fee be taxed as part of the costs. *Ibid.*

COUNTIES

§ 2. Governmental and Private Powers

Statute authorizing counties to regulate collection and disposal of "garbage" relates only to putrescible wastes. *Transportation Service v. County of Robeson,* 210.

CRIME AGAINST NATURE

§ 2. Prosecutions

G.S. 14-177 providing that the crime against nature is a felony punishable by fine or imprisonment in the discretion of the court is constitutional. *S. v. Moles,* 664.

The sole testimony of an accomplice will support a conviction in a prosecution for crime against nature. *Ibid.*

CRIMINAL LAW

§ 6. Mental Capacity as Affected by Intoxicating Liquor

Evidence was insufficient to require an instruction on drunkenness as a defense. *S. v. Moles,* 664.

§ 9. Principals in the First or Second Degree; Aiders and Abettors

Trial court in armed robbery prosecution erred in submitting an issue to the jury as to defendant's guilt as an aider and abettor but should have submitted an issue as to his guilt as an accessory before the fact. *S. v. Alston,* 712.

CRIMINAL LAW—Continued

§ 11. Accessories After the Fact

In a case charging defendant as accessory after the fact to murder, evidence was sufficient to show the commission of a murder and to withstand nonsuit. *S. v. Williams*, 39.

§ 18. Jurisdiction on Appeal to Superior Court

The purpose of G.S. 15-177.1 is to allow a completely new trial in superior court without a consideration of matters in the inferior court in the trial from which defendant appealed; however, the statute does not remove from consideration in superior court proceedings in the inferior court which occurred prior to the trial appealed from. *S. v. Coats*, 407.

§ 21. Preliminary Proceedings

Defendant was not entitled to preliminary hearing as a matter of right. *S. v. Harrington*, 221.

§ 23. Plea of Guilty

Defendant's plea of guilty was voluntary. *S. v. Gray*, 131; *S. v. Simons*, 138; *S. v. Godwin*, 590; *S. v. Petty*, 591.

§ 26. Plea of Former Jeopardy

Defendant could be convicted of felonious assault and armed robbery based on one continuous course of conduct. *S. v. Kinsey*, 57.

Conviction of defendant for both possession and distribution of heroin constituted double jeopardy. *S. v. Thornton*, 225.

It is possible for a person to be twice placed in jeopardy within the district court system. *S. v. Coats*, 407.

G.S. 15-177.1 constituted no impediment upon defendant's right to assert his plea of former jeopardy upon his trial de novo in superior court and the superior court judge erred in declaring the statute unconstitutional. *Ibid.*

Continuance of a case upon motion of the State in mid-trial caused double jeopardy to attach when defendant was brought to trial in district court two weeks later for the same offense. *Ibid.*

Trial of defendant for escape following administrative discipline of defendant for the escape did not constitute double jeopardy. *S. v. Carroll*, 691.

§ 30. Pleas of the State

Entry of *nolle prosequi* with leave against an alleged co-conspirator did not require dismissal of the indictment against defendant. *S. v. Wood*, 352.

§ 33. Facts Relevant to Issues

Evidence of permanency of injuries to child was admissible in child abuse prosecution to show seriousness of injuries. *S. v. Fredell*, 205.

§ 34. Evidence of Defendant's Guilt of Other Offenses

Trial court committed prejudicial error in permitting a State's witness to testify prior to the time defendant took the stand that defendant

CRIMINAL LAW—Continued

had previously been convicted of reckless driving while his license was suspended and for driving while his license was suspended. *S. v. Thomas*, 8.

Testimony by witness as to commission of another robbery by defendant was competent as proof of identity of defendant. *S. v. Lassiter*, 35.

Prejudicial error did not result from testimony as to defendant's prior convictions where the jury was properly admonished to disregard testimony. *S. v. Penny*, 147.

Trial court in armed robbery prosecution did not err in allowing into evidence testimony with respect to a subsequent robbery. *S. v. Reed*, 580.

Evidence of prior convictions was admissible in prosecution charging defendant with driving under the influence, second offense. *S. v. St. John*, 587.

Testimony by a witness that defendant was involved with him in 40 or 50 other crimes for which the witness was under indictment was admissible to show common plan or scheme connecting defendant with the crime charged. *S. v. Smith*, 694.

§ 36.1 Evidence of Alibi

Failure of the court to charge on the defense of alibi was proper. *S. v. Dale-Williams*, 121.

§ 42. Articles Connected With the Crime

A skin segment of a murder victim was admissible in accessory after the fact to murder trial. *S. v. Williams*, 39.

A shotgun identified as having been in defendant's possession at the scene of the crime was admissible in a first degree murder case. *S. v. Ferguson*, 367.

Admission of a facsimile of the knife used in a robbery was proper. *S. v. McLeod*, 577.

§ 43. Photographs

Photographs must be introduced in evidence in order for defendant to use them to illustrate testimony of State's witness. *S. v. Mitchell*, 1.

Photographs were admissible for illustrative purposes in first degree murder prosecution. *S. v. Brice*, 189; *S. v. Barnwell*, 299.

Photographs of defendants at the time of their arrests were admissible for illustration. *S. v. Balsom*, 655.

§ 58. Evidence in Regard to Handwriting

Testimony with respect to handwriting of defendant and the contents of notes allegedly written by defendant was properly admitted in incest prosecution. *S. v. Forehand*, 287.

§ 66. Evidence of Identity by Sight

Trial court properly determined that in-court identification testimony was not tainted by any pretrial photographic identification. *S. v. West*, 5; *S. v. Kirk*, 68; *S. v. Belton*, 92; *S. v. Phifer*, 101.

CRIMINAL LAW—Continued

Trial court did not err in permitting testimony and subsequently conducting a *voir dire* with respect to an in-court identification of defendant. *S. v. Evans*, 561.

§ 73. Hearsay Testimony

Testimony by arresting officer with respect to a telephone call was admissible to explain his subsequent actions. *S. v. Shadding*, 279.

§ 75. Voluntariness of Confession and Admissibility

Statements volunteered by defendant before Miranda warnings were given were admissible. *S. v. Hardy*, 169.

Trial court properly admitted defendant's in-custody statements for impeachment purposes without first conducting a voir dire hearing. *S. v. Brice*, 189; *S. v. Evans*, 561.

Defendant's in-custody statements made after he had been advised of his rights and in the presence of counsel were properly admitted. *S. v. Satchell*, 312.

§ 77. Admissions and Declarations

Trial court properly allowed witnesses to testify as to incriminating statements which they overheard defendant make at time of the shooting or shortly thereafter. *S. v. Brice*, 189.

Investigatory questions asked defendant before he was taken into custody and his answers thereto were admissible. *S. v. Salem*, 269.

Admission of an oral incriminating statement did not require admission of an earlier, self-serving declaration of defendant. *S. v. Barnwell*, 299.

Voluntary statements by defendant to a companion were admissible. *S. v. Reed*, 580.

§ 79. Acts and Declarations of Accomplice

Statement signed by defendant's accomplice was properly admitted for purpose of corroborating accomplice's testimony. *S. v. Mills*, 461.

§ 80. Records and Private Writings

The reading of a list of items seized from defendant's apartment under a search warrant was not error though the list contained some non-contraband items. *S. v. Salem*, 269.

§ 83. Competency of Wife to Testify For or Against Spouse

The wife's testimony was competent in a prosecution charging the husband and a third person with rape of the wife. *S. v. Martin*, 317.

§ 84. Evidence Obtained by Unlawful Means

Police officer had a right to detain defendant temporarily to ascertain his name and purpose for being on the street at 2:45 a.m., and had a right to make a protective search for weapons, and implements of housebreaking discovered in the search were properly seized. *S. v. Streeter*, 48.

CRIMINAL LAW—Continued

Affidavit and search warrant were sufficient to support search of defendant's premises and evidence seized as a result thereof was admissible. *S. v. McCuien,* 109.

Testimony by an officer as to items discovered in a search of defendant's truck preparatory to impounding the vehicle was admissible. *S. v. All,* 284.

Any error in admitting into evidence bolt cutters allegedly seized in unlawful search of defendant's vehicle was harmless beyond reasonable doubt. *Ibid.*

Envelopes of marijuana found under valid search warrant were admissible. *S. v. Tennyson,* 349.

LSD seized pursuant to a valid search warrant was admissible. *S. v. Balsom,* 655.

Evdience seized from defendant's vehicle was admissible where defendant consented to a search and a valid search warrant had previously been obtained. *S. v. O'Neal,* 644.

§ 85. **Character Evidence Relating to Defendant**

Evidence of defendant's reputation was properly admitted after defendant had already testified in his own behalf. *S. v. Moles,* 664.

§ 86. **Credibility of Defendant**

Failure of trial court to sustain defendant's objection to question asked him on cross-examination as to whether he had been tried for assault with intent to kill in S. C. was harmless error. *S. v. Brice,* 189.

Trial court did not err in allowing solicitor to question defendant further as to whether he had been convicted of specified offenses after defendant stated that he had only been convicted of traffic violations. *S. v. Mills,* 461.

Defendant could not complain of reference to arrest warrants for unrelated offenses in his unresponsive answer to the solicitor's question. *S. v. Blue,* 526.

Defendant's denial of impeaching question did not prevent solicitor from rephrasing his question to make it more specific. *Ibid.*

§ 87. **Direct Examinations of Witness**

A single leading question put to an accomplice who was testifying against defendants did not constitute prejudicial error. *S. v. House,* 97.

§ 88. **Cross-Examination**

Trial court did not abuse its discretion in permitting the State to recall one defendant for further cross-examination after the defendants had presented their evidence. *S. v. West,* 5.

Cross-examination of defendant with respect to his prior conduct and with respect to the whereabouts of a potential witness was proper. *S. v. Lea,* 71.

CRIMINAL LAW—Continued

The trial court did not err in refusing to allow cross-examination of the prosecuting witness in an incest case as to whether she had previously charged another male with rape, cross-examination as to what a friend had told her regarding her personal matters, and cross-examination as to evidence in another case. *S. v. Forehand*, 287.

Trial court properly refused to allow cross-examination of a witness which invaded the province of the jury. *S. v. McLeod*, 577.

Trial court erred in refusing to allow defense counsel to cross-examine an alleged accomplice as to whether he was testifying against defendant because of an expectation of leniency when he faced a possible sentence of 30 years. *S. v. Alston*, 712.

§ 89. Credibility of Witness; Corroboration and Impeachment

Inquiry as to witness's involvement in other robberies was proper for purposes of impeachment. *S. v. Lassiter*, 35.

Statement signed by defendant's accomplice was properly admitted for purpose of corroborating accomplice's testimony. *S. v. Mills*, 461.

Evidence of a prior inconsistent statement made by a defense witness was admissible for purpose of impeaching the witness. *S. v. Moles*, 664.

Sheriff's testimony as to a statement made to him by person with whom defendant allegedly committed crime against nature was admissible to corroborate such person's testimony. *Ibid.*

§ 91. Continuance

Trial court did not abuse its discretion in denying defendant's motion for continuance made on the ground that the State had failed to furnish to defendant all reports required by a pretrial order. *S. v. Mason*, 44.

Trial court properly denied motion by defendant represented by court-appointed counsel for continuance so that he could employ private counsel. *S. v. Ray*, 135.

Continuance was properly denied where no prejudice appeared from return of additional bills of indictment and newspaper coverage thereof. *S. v. Cameron*, 229.

§ 92. Consolidation of Counts

Trial court properly consolidated charge of assault upon a law officer and three charges of felonious assault on other persons. *S. v. Mitchell*, 1.

Consolidation of charges against two defendants was proper. *S. v. Salem*, 269.

§ 95. Admission of Evidence Competent for Restricted Purpose

Error in overruling defendant's objection to admission of his codefendant's confession implicating defendant was not cured by the court's instruction, given at the close of all the evidence, that such evidence could be used only against the declarant. *S. v. McEachin*, 634.

§ 99. Expression of Opinion on Evidence During Trial

Questions asked witnesses by trial judge did not amount to an expression of opinion. *S. v. Williams*, 31; *S. v. Tennyson*, 349.

CRIMINAL LAW—Continued

Comments of the trial judge as to location of a witness's residence and as to drinking habits of the witness, defense counsel and the judge did not constitute reversible error. *S. v. Blue*, 526.

The trial judge expressed no opinion in explaining to a witness what he should do upon objection by counsel to questions put to him. *S. v. Raynor*, 707.

§ 106. Sufficiency of Evidence to Overrule Nonsuit

There is no requirement that defendant be connected with the commission of a crime apart from the connection contained in his confession. *S. v. Thomas*, 152.

§ 112. Instructions on Presumptions

Trial court did not commit prejudicial error in defining reasonable doubt as a "possibility of innocence." *S. v. Greene*, 51.

§ 113. Statement of Evidence and Application of Law Thereto

Failure of the trial court to use the word "alibi" in its instructions did not constitute error. *S. v. Belton*, 92.

Trial court in a kidnapping and felonious assault case erred in not instructing on defendant's defense of coercion. *S. v. Crews*, 141.

Trial court's instructions adequately apprised the jury of its responsibility as to each defendant separately. *S. v. Carter*, 234.

Mistake of trial judge in his recapitulation of the evidence was not prejudicial error. *S. v. Evans*, 561.

In this prosecution of three defendants for crime against nature wherein a witness testified that he saw two of the defendants sexually assault the victim, the trial judge committed prejudicial error in recapitulating the testimony of the witness when he stated that the witness testified that he saw the third defendant sexually assault the victim. *S. v. McLean*, 629.

§ 114. Expression of Opinion by Court on Evidence in the Charge

Trial court committed prejudicial error in expressing an opinion that evidence offered by the State was sufficient to show the existence of a conspiracy. *S. v. Wood*, 352.

In a prosecution for crime against nature, trial judge expressed an opinion in charging the jury that a prison sentence "was never intended to include a gang rape," and that the State contended that the victim's testimony was corroborated by testimony of another prisoner and a staff nurse who had no interest in the outcome. *S. v. McLean*, 629.

§ 116. Charge on Failure of Defendant to Testify

Trial court's instruction on failure of defendant to testify did not constitute prejudicial error. *S. v. House*, 97; *S. v. Phifer*, 101.

§ 124. Sufficiency of Verdict

Where the verdict was in improper language, rephrasing by the clerk did not constitute error. *S. v. Martin*, 317.

CRIMINAL LAW—Continued

§ 128. Discretionary Powers of Trial Court to Order Mistrial

Trial court in breaking and entering and larceny case properly denied motions for mistrial made when State's witness testified on rebuttal that one defendant's wife gave him a stolen silver dollar. *S. v. Bryant*, 137.

Trial court properly denied defendant's motion for mistrial made on ground that police detective had intimidated a witness subpoenaed by defendant. *S. v. Faison*, 200.

§ 138. Severity of Sentence and Determination Thereof

Trial judge was not required to identify various factors that may have influenced him in arriving at a sentence. *S. v. Tuggle*, 329.

Imposition of greater sentence upon appeal from district court to superior court did not constitute error. *Ibid.*

§ 143. Revocation of Suspension of Judgment

There was no prejudicial error in defendant's trial for illegal possession of whiskey, beer for sale, and in a subsequent hearing for revocation of defendant's probation. *S. v. Thompson*, 589.

§ 145.1 Probation

Defendant was accorded procedural due process in probation revocation proceedings. *S. v. Allen*, 586.

§ 149. Right of State to Appeal

State may appeal when judgment has been given for a defendant upon declaring a statute unconstitutional. *S. v. Coats*, 407.

§ 150. Right of Defendant to Appeal

Action of trial court in substituting judgment committing juvenile for judgment placing juvenile on probation after juvenile gave notice of appeal of court's order requiring him to shave and cut his hair was an infringement of his right to appeal. *In re Moses*, 104.

§ 156. Certiorari

On certiorari the record proper will be examined for error of law appearing thereon, even in absence of exceptions. *S. v. Lewis*, 117.

§ 158. Conclusiveness of Record

Assignment of error based on a statement of the solicitor is overruled where the record does not show what the solicitor said. *S. v. Smith*, 694.

§ 163. Exceptions and Assignments of Error to Charge

Defendant's contentions with respect to jury charge are not considered on appeal where no exception is taken or assignment of error is made. *S. v. Williams*, 31.

§ 168. Harmless and Prejudicial Error in Instructions

In this prosecution of three defendants for crime against nature wherein a witness testified that he saw two of the defendants sexually assault the victim, the trial judge committed prejudicial error in recapitulating the testimony of the witness when he stated that the witness testified that he saw the third defendant sexually assault the victim. *S. v. McLean*, 629.

CRIMINAL LAW—Continued

§ 169. Harmless and Prejudicial Error in Exclusion of Evidence

Trial court's refusal to allow defendant to elicit testimony from rape victim that she had previously had intercourse "over several dozen times" was harmless error. *S. v. Satchell,* 312.

DAMAGES

§ 13. Competency and Relevancy of Evidence on Issue of Compensatory Damages

Evidence tending to show that plaintiff's business lost $1500 and that six automobiles he had purchased to repair and resell had depreciated $1500 in value during plaintiff's disability would not have been of any aid to the jury in determining the pecuniary value or loss of time or loss or impairment of earning capacity, and exclusion of such evidence in an action for compensatory damages was not prejudicial. *Love v. Hunt,* 673.

§ 15. Sufficiency of Evidence as to Damages

Plaintiff's evidence in an action to recover damages for fraud in sale of automobile was sufficient for submission of issue of compensatory damages but was insufficient for submission of issue of punitive damages. *Clouse v. Motors, Inc.,* 669.

§ 16. Instructions on Measure of Damages

Failure of trial court to repeat the evidence when instructing on measurement of damages was not error where the judge had previously reviewed the evidence. *Love v. Hunt,* 673.

DEEDS

§ 4. Competency of Grantor

Instruction that grantor had sufficient mental capacity to execute a deed "if he understood the act in which he was engaged and its scope and effect" was sufficient without the addition of the phrase "and whether he knew what land he was disposing of, to whom and how." *Bodenheimer v. Bodenheimer,* 434.

DIVORCE AND ALIMONY

§ 16. Alimony Without Divorce

Trial judge's instruction on the question of whether plaintiff was the dependent spouse was error in an action for permanent alimony. *Yandle v. Yandle,* 294.

Where wife filed counterclaim for alimony based on abandonment in husband's action for divorce from bed and board, but a consent judgment entered in the action made no provision for alimony, the consent judgment was a final judgment as to all issues raised in the pleadings and the wife surrendered her right to pursue her claim for alimony when she consented to the judgment. *Hinson v. Hinson,* 505.

§ 18. Alimony and Subsistence Pendente Lite

Dismissal of defendant's claim for alimony pendente lite, counsel fees and permanent alimony without divorce was error where trial court failed

DIVORCE AND ALIMONY—Continued

to make findings of fact on alleged grounds for permanent alimony. *Sprinkle v. Sprinkle*, 175.

Where trial court found facts which showed that wife was a dependent spouse, denial of alimony pendente lite was error without finding against the wife on any one of the other issues raised in her application for alimony pendente lite. *Ibid.*

Spouse who is not entitled to alimony pendente lite is not entitled to award of counsel fees. *Ibid.*

Award of temporary alimony is vacated where trial court made no finding that dependent spouse is entitled thereto. *Medlin v. Medlin*, 582.

A wife who was not entitled to alimony or alimony pendente lite was not entitled to possession of the home owned by husband and wife by the entireties. *Hinton v. Hinton*, 715.

§ 20. Decree of Divorce as Affecting Right to Alimony

Trial court properly dismissed wife's action for alimony without divorce and terminated an award of alimony pendente lite on the ground of absolute divorce obtained by the husband while the wife's action was awaiting a new trial as ordered by the Court of Appeals. *Smith v. Smith*, 416.

Where a judgment awarding the wife alimony pendente lite to be continued until the award of permanent alimony was rendered before rendering of judgment for absolute divorce, rights given the wife by the prior judgment could not be destroyed by the subsequently rendered decree of absolute divorce. *Johnson v. Johnson*, 398.

Judgment determining right of the wife to be awarded permanent alimony and right to have the amount thereof determined by the court could not be impaired or destroyed by subsequent decree of absolute divorce. *Ibid.*

§ 21. Enforcing Payment of Alimony

Evidence in contempt proceeding was sufficient to support finding that defendant possessed ability and means to make child support payments. *Carroll v. Sandlin*, 140.

Partial foreclosure of a deed of trust executed by defendant to secure alimony payments was proper upon defendant's failure to comply with an order entered after execution of the instrument. *Johnson v. Johnson*, 398.

§ 22. Custody and Support Proceedings Generally

Trial court's findings were sufficient to support custody and support orders. *Medlin v. Medlin*, 582.

§ 23. Support of Children of the Marriage

An order finding the amount of and adjudging defendant liable for arrearage in payments for child support was affirmed. *Johnson v. Johnson*, 398.

Trial court erred in directing defendant to make child support payments for child who had already reached her majority and in ordering defendant to pay counsel fees in the action. *Taylor v. Taylor*, 720.

DRAINAGE

§ 4. Powers and Authority of Drainage Commissioners

The commissioners of a drainage district had authority to grant petitioners permission to use a road over the spoil bank of a drainage canal as a means of ingress and egress to and from their property. *Taylor v. Askew*, 620.

EASEMENTS

§ 1. Nature and Creation

Easement in a deed granting the right "to get water from a spring above the tract with no controlling privileges" is an easement appurtenant to the land conveyed, not an easement in gross amounting to no more than a personal license, and is not so vague and indefinite as to make the attempted grant void for uncertainty. *Gibbs v. Wright*, 495.

§ 8. Nature and Extent of Easement

Addition of the words "with no controlling privileges" to a grant of an easement "to get water by conveying the same from a spring above the tract" merely manifested the intention of the parties that the grantee was not given the exclusive control of waters from the spring. *Gibbs v. Wright*, 495.

ESCAPE

§ 1. Elements of, and Prosecution for, the Offense

Indictment in felonious escape case was proper where it alleged the time and place of defendant's prior escape convictions and alleged the time and place of defendant's original conviction for which he was in lawful custody. *S. v. Walters*, 94.

Superior court records were admissible to show defendant's confinement and prior escape in a felonious escape case. *Ibid.*

Evidence of defendants' felonious escape was sufficient to be submitted to the jury. *S. v. Sherman*, 153.

In escape prosecution, defendant's constitutional rights were not denied by trial court's refusal to subpoena inmates who would have testified that prison officials had punished defendant for the escape. *S. v. Carroll*, 691.

Trial court properly permitted witness to testify that defendant was an "inmate" and had been "captured." *Ibid.*

EVIDENCE

§ 15. Relevancy and Competency of Evidence

Checks drawn by defendant and his explanation thereof were admissible in trial of defendant's counterclaim for loans made to plaintiff. *Chance v. Jackson*, 638.

§ 29. Accounts, Ledgers, and Private Writings

Trial court properly admitted documents tending to prove that goods were sold and delivered to defendant. *Planters Industries v. Wiggins*, 132.

EVIDENCE—Continued

Trial court committed reversible error in allowing plaintiff to introduce evidence of a notebook which it contended was its accounts payable ledger where the notebook was not properly authenticated. *Knitting Mills v. Realty Corp.*, 428.

Hospital records which were insufficiently identified and authenticated were properly excluded. *Crutcher v. Noel*, 540.

Checks drawn by defendant and his explanation thereof were admissible in trial of defendant's counterclaim for loans made to plaintiff. *Chance v. Jackson*, 638.

§ 32. Parol Evidence Affecting Writings

Parol evidence rule prohibits defendant from presenting evidence of a parol agreement that he be credited on his note to plaintiff for the amount of two past due customer notes which were in defendant's possession at the time he executed the note to plaintiff. *Borden, Inc. v. Brower*, 249.

§ 33. Hearsay Evidence

Testimony that immediately after officers stopped an automobile driven by defendant, a passing motorist told officers in defendant's presence that a woman was lying in the highway just up the road was hearsay and not admissible for the purpose of showing defendant's reaction to the statement. *Jones v. Seagroves*, 467.

§ 47. Expert Testimony in General

Expert opinion based on facts not in evidence or within personal knowledge of witness was properly stricken. *Crutcher v. Noel*, 540.

§ 48. Competency and Qualification of Experts

Trial court in malpractice case did not err in failing to declare a witness an expert, and exclusion of his testimony as an expert is not presented for review. *Dickens v. Everhart*, 362.

Witness's testimony as an expert was properly excluded where there was no finding that the witness was an expert. *Crutcher v. Noel*, 540.

§ 50. Medical Testimony

An expert medical witness's opinion not based on personal knowledge or a proper hypothetical question was improperly admitted. *Lang v. Monger*, 724.

EXECUTORS AND ADMINISTRATORS

§ 23. Widow's Year's Support

Superior court properly dismissed an appeal from a magistrate's denial of a widow's application for a year's allowance on the ground that there had been no notice of appeal to superior court. *In re Godwin*, 365.

FALSE IMPRISONMENT

§ 2. Actions For

Plaintiff's claims for assault and false imprisonment were barred by the one year statute of limitation. *Priddy v. Department Store*, 322.

FALSE PRETENSE

§ 2. Indictment and Warrant

Indictment charging defendant with obtaining money by false pretense was sufficient though it failed expressly to allege that the prosecuting witness was actually deceived. *S. v. Hinson,* 25.

§ 3. Evidence and Nonsuit

Evidence was sufficient to withstand defendant's motion for nonsuit in case for obtaining money by false pretense. *S. v. Hinson,* 25.

FRAUD

§ 9. Pleadings

Complaint was sufficient to state a claim for relief against two attorneys based on fraud in telling plaintiff that a settlement of his case was in the offing and that the case would be tried if the settlement was insufficient. *Brantley v. Dunstan,* 19.

§ 12. Sufficiency of Evidence

Plaintiff's evidence in an action to recover damages for fraud in sale of an automobile was sufficient for submission of issue of compensatory damages but was insufficient for submission of issue of punitive damages. *Clouse v. Motors, Inc.,* 669.

FRAUDS, STATUTE OF

§ 5. Contracts to Answer for the Debt or Default of Another

Statute of frauds was inapplicable where plaintiff did not plead it as an affirmative defense to defendant's counterclaim and where defendant's evidence would support a jury finding that plaintiff's obligation was based on original promise to repay loans. *Chance v. Jackson,* 638.

Trial court erred in dismissing plaintiff's claim against defendant where defendant agreed in writing to pay the amount of the fee earned by plaintiff in securing employment for a codefendant. *Bowling v. Hines,* 697.

GUARANTY

Trial court erred in dismissing plaintiff's claim against defendant where defendant agreed in writing to pay the amount of the fee earned by plaintiff in securing employment for a codefendant. *Bowling v. Hines,* 697.

HIGHWAYS AND CARTWAYS

§ 12. Nature and Grounds of Remedy to Establish Cartway

Petitioners had no right to condemn a cartway over respondents' land where commissioners of a drainage district had offered to allow petitioners to use a road over the spoil bank of a drainage canal to reach their property. *Taylor v. Askew,* 620.

HOMICIDE

§ 12. **Indictment**

Murder indictment will support plea of nolo contendere to voluntary manslaughter. *S. v. Johnson,* 158.

§ 15. **Relevancy and Competency of Evidence**

Failure of trial court to strike conclusion by a lay witness that deceased suffered a "nasty" wound was not prejudicial error. *S. v. Brice,* 189.

§ 19. **Evidence Competent on Question of Self-Defense**

Trial court in homicide case properly refused to permit witness to testify that she saw deceased assault her brother with a pistol and knife on an occasion prior to the date of the homicide. *S. v. Brice,* 189.

Trial court in homicide prosecution did not err in sustaining State's objection to questions concerning deceased's reputation as a violent and dangerous fighting man. *S. v. Alston,* 718.

§ 21. **Sufficiency of Evidence and Nonsuit**

Evidence in second degree murder case was sufficient to withstand nonsuit. *S. v. Davis,* 84.

Involuntary manslaughter was properly submitted to the jury where defendant's own version of how the shooting occurred presented a jury question on that issue. *S. v. Barnwell,* 299.

There was sufficient evidence that defendant shot deceased to support conviction of first degree murder. *S. v. Ferguson,* 367.

§ 24. **Instructions on Presumptions and Burden of Proof**

It was unnecessary for the trial court in a murder case to define malice in its jury charge where the evidence tended to show an intentional killing. *S. v. Rummage,* 239.

Evidence of motive in a first-degree murder case, though weak, was sufficient to justify court's refusal to charge the jury that there was no evidence at all of motive. *S. v. Barnwell,* 299.

§ 25. **Instructions on First Degree Murder**

Conviction of second degree murder rendered harmless error, if any, in submitting question of defendant's guilt of first degree murder. *S. v. Alston,* 712.

§ 26. **Instructions on Second Degree Murder**

Trial judge's charge in a second degree murder case contained no improper expression of opinion. *S. v. Mitchum,* 372.

§ 30. **Submission of Question of Guilt of Lesser Degrees of the Crime**

Where evidence tended to show commission of first degree murder, trial court properly refused to submit to the jury the lesser included offense of manslaughter. *S. v. Lea,* 71.

HUSBAND AND WIFE

§ 10. Validity of Separation Agreement

A deed of separation properly acknoweldged by the wife was valid without acknowledgment by the husband. *Kanoy v. Kanoy*, 344.

§ 15. Nature and Incidents of Estate by Entireties

A wife who was not entitled to alimony or alimony pendente lite was not entitled to possession of the home owned by husband and wife by the entireties. *Hinton v. Hinton*, 715.

Neither a conveyance of entirety property by plaintiff's husband alone to defendants nor defendants' possession of the property since 1955 could defeat plaintiff's right of survivorship so long as plaintiff's marriage to grantor husband remained undissolved. *Harris v. Parker*, 606.

§ 17. Termination and Survivorship of Estate by Entireties

Trial court erred in granting summary judgment without first affording defendants an opportunity to complete their discovery proceedings with respect to the crucial fact of divorce which had been initiated by the filing of interrogatories. *Harris v. Parker*, 606.

INCEST

Evidence that defendant had had prior sexual relations with his 14-year-old daughter was admissible for purpose of showing quo animo. *S. v. Forehand*, 287.

INDICTMENT AND WARRANT

§ 8. Joinder of Counts, Merger and Duplicity

Trial court should have quashed warrant against defendant which attempted to charge him with two offenses in a single count. *S. v. Burris*, 710.

§ 14. Grounds and Procedure on Motions to Quash

Defendant is not entitled to have the warrant on which he is tried quashed on the ground it was issued after an illegal arrest. *S. v. Jones*, 54.

§ 15. Time for Making Motion to Quash

Though entertainment of a motion to quash a warrant is a discretionary matter, when the motion is made for the first time in superior court upon appeal from recorder's court the superior court judge's ruling on the motion is subject to review. *S. v. Burris*, 710.

INFANTS

§ 9. Hearing and Grounds for Awarding Custody of Minors

Trial court's decision awarding custody to the Department of Social Services rather than to the mother is not disturbed on appeal. *In re Cox*, 687.

§ 10. Commitment of Minors for Deliquency

Evidence supported court's determination that respondent was a delinquent child in that she had violated conditions of her probation by failing to attend school. *In re Dowell*, 134.

INFANTS—Continued

An adjudication of delinquency must be set aside where the record fails to show that the juvenile's parents were advised of their right, if indigent, to appointment of counsel or that they waived that right. *In re Stanley*, 370.

§ 11. Abuse and Neglect of Child

Provisions of child abuse statute are severable, and defendant cannot complain of unconstitutional vagueness of provision under which she is not charged. *S. v. Fredell*, 205.

INSURANCE

§ 6. Construction and Operation of Policy

Plaintiff's evidence presented jury question as to whether he complied with the provision of an insurance policy requiring that he keep records of all insured property in such manner that the insurer could determine amount of loss. *Todd v. Insurance Co.*, 274.

§ 8. Modification, Waiver and Estoppel

Sixty-seven year old named insured obtained no coverage under policy with age limitation of less than 66 years. *Currie v. Insurance Co.*, 458.

§ 14. Provisions Excluding Liability if Death Results From Stipulated Causes

Plaintiff was precluded from recovering for the death of insured by a clause in the policy excluding recovery for death within one year resulting from an act of war. *Cohen v. Insurance Co.*, 584.

§ 109. Conclusiveness of Judgment Rendered in Action Against Insured

A father and son were not "legally obligated" to pay damages to plaintiff within the meaning of an automobile policy issued to the father where a consent judgment dismissed the action against the father, provided that plaintiff shall recover against the son, and further provided that the judgment shall not be a lien upon any of the son's property. *Huffman v. Insurance Co.*, 292.

§ 131. Arbitration and Adjustment

Findings by the trial court were sufficient to support the court's dismissal of an action to recover "additional living expense" under a homeowner's insurance policy on the ground that arbitration to determine the amount of plaintiff's loss had been conducted pursuant to the terms of the policy and that an arbitration award had been made to plaintiff. *Knapp v. Insurance Co.*, 455.

INTOXICATING LIQUOR

§ 2. Duties and Authority of ABC Boards; Beer and Wine Licenses

Local act granting discretionary authority to the governing bodies of municipalities in Vance, Scotland and Moore counties to refuse to issue a license for the sale of wine within the corporate limits of such municipalities is unconstitutional. *Food Fair v. City of Henderson*, 335.

In a proceeding to revoke petitioners' ABC permits, there was sufficient evidence to support the State's charge that petitioners sold liquor

INTOXICATING LIQUOR—Continued

on the licensed premises in violation of G.S. 18A-3(a), though the evidence was insufficient to support the State's charge that petitioners violated G.S. 18A-25(b) by selling on the licensed premises liquor purchased from a county or municipal store. *Hill v. Board of Alcoholic Control*, 592.

§ 5. Possession and Possession For Sale

There was no prejudicial error in defendant's trial for illegal possession of whiskey, beer for sale, and in a subsequent hearing for revocation of defendant's probation. *S. v. Thompson*, 589.

JUDGMENTS

§ 1. Judgment on the Merits

Court erred in entering judgment on the merits where case had been placed on motion calendar for disposition of motion to strike and to amend. *Sifford v. Parking Service*, 157.

§ 6. Correction of Judgment in Trial Court

Trial court had no authority to allow plaintiff's motion under Rule 60 "to correct" a default judgment to make it a specific lien on defendants' property so as to affect adversely the rights of innocent third parties. *H & B Co. v. Hammond*, 534.

§ 9. Jurisdiction to Enter Consent Judgment

The trial court was without jurisdiction to enter a judgment based upon settlement where one party had repudiated the settlement. *Freedle v. Moorefield*, 331.

§ 35. Conclusiveness of Judgments and Bar in General

Res judicata was inapplicable in an action for specific performance of a contract to buy land. *Yancey v. Watkins*, 515.

Identity of parties was not a prerequisite to a plea of res judicata in this action against a soft drink bottler where plaintiff had previously brought an action against the retailer for the same injury. *Gillispie v. Bottling Co.*, 545.

§ 36. Parties Concluded

Where wife and child recovered judgments against defendants in personal injury action in federal court, action was instituted in State court for death of husband and child in same accident, and wife and child who were plaintiffs in the federal action would be the sole beneficiaries of wrongful death recovery, there was a sufficient identity of parties in the two actions to support a plea of res judicata in the state action so that the only issue for the jury was the issue of damages. *King v. Grindstaff*, 613.

§ 37. Matters Concluded

Plaintiffs' prior trespass action against electric membership corporation constituted res judicata to action based upon same allegations with additional allegations of a "taking" of their property. *Taylor v. Electric Membership Corp.*, 143.

Where wife filed counterclaim for alimony based on abandonment in husband's action for divorce from bed and board, but a consent judgment

JUDGMENTS—Continued

entered in the action made no provision for alimony, the consent judgment was a final judgment as to all issues raised in the pleadings and the wife surrendered her right to pursue her claim for alimony when she consented to the judgment. *Hinson v. Hinson,* 505.

Plaintiff's personal injury action against defendant soft drink bottler based on defendant's alleged breach of implied warranty of merchantability was barred where plaintiff, in a prior action against retailer of the soft drink, had ample opportunity for a judicial investigation of his asserted rights and the identical issue was considered and determined adversely to him. *Gillispie v. Bottling Co.,* 545.

§ 40. Judgments as of Nonsuit

Directed verdict constituted judgment on the merits for res judicata purposes. *Taylor v. Electric Membership Corp.,* 143.

Where order of voluntary dismissal without prejudice was entered in plaintiff's original action, a second action filed by plaintiff was properly dismissed where instituted before costs in the original action were paid and after statute of limitations had run. *Cheshire v. Aircraft Corp.,* 74.

§ 45. Plea of Bar

The affirmative defense of a prior judgment as a bar to the present action was properly raised by Rule 12(b)(6) motion to dismiss the complaint for failure to state a claim for relief. *Smith v. Smith,* 416.

JURY

§ 5. Selection Generally

Conferences between the sheriff and the solicitor during the jury selection did not constitute prejudicial error. *S. v. Barnwell,* 299.

§ 7. Challenges

Absence of names of persons 18 to 21 years old from jury list did not require trial judge to quash the array. *S. v. Barnwell,* 299.

LABORERS' AND MATERIALMEN'S LIENS

§ 8. Enforcement of Lien

Trial court had no authority to allow plaintiff's motion under Rule 60 "to correct" a default judgment to make it a specific lien on defendants' property so as to affect adversely the rights of innocent third parties. *H & B Co. v. Hammond,* 534.

LARCENY

§ 7. Sufficiency of Evidence and Nonsuit

Evidence that defendants approached stolen guns hidden in the woods was sufficient for jury on issue of defendants' guilt of breaking and entering and larceny. *S. v. Greene,* 51.

Evidence was sufficient to withstand motion for nonsuit in a case charging defendant with felonious breaking and entering of a service station and with felonious larceny. *S. v. Carter,* 234.

LARCENY—Continued

State's evidence was sufficient for jury on issue of defendant's guilt of larceny of automobile in his possession some 3 months after the theft. *S. v. Coleman,* 119.

Evidence was sufficient to present a jury question where defendant was charged with larceny of an automobile, *S. v. Marsh,* 327; of a tray of rings, *S. v. Washington,* 569; of clothing, *S. v. O'Neal,* 644.

LIMITATION OF ACTIONS

§ 4. Accrual of Right of Action and Time from Which Statute Begins to Run

Trial court in a personal injury action erred in dismissing defendant's third party action for indemnity against a manufacturer of an elevator on the ground that the statute of limitations barred the indemnity action. *Hager v. Equipment Co.,* 489.

§ 12. Institution of Action and Discontinuance

Where order of voluntary dismissal without prejudice was entered in plaintiff's original action, a second action filed by plaintiff was properly dismissed where instituted before costs in the original action were paid and after statute of limitations had run. *Cheshire v. Aircraft Corp.,* 74.

MALICIOUS PROSECUTION

§ 4. Probable Cause

Conviction of plaintiff in district court conclusively established existence of probable cause though plaintiff was afterwards acquitted in superior court. *Priddy v. Department Store,* 322.

MASTER AND SERVANT

§ 56. Causal Relation Between Employment and Injury

Hand injury sustained by plaintiff while using a power saw to build a doghouse in his employer's shop was an injury arising out of and in the course of plaintiff's employment. *Lee v. Henderson & Associates,* 475.

§ 60. Personal Missions

Death of employee of Duke University caused from choking on a piece of meat in a restaurant near Washington, D. C., arose out of and in the course of his employment. *Bartlett v. Duke University,* 598.

§ 72. Partial Disability

Evidence was sufficient to support determination that plaintiff is totally and permanently disabled by reason of extensive burns sustained on both legs when he set fire to his trousers while using an electric welder's torch. *Martin v. Service Co.,* 359.

§ 93. Proceedings before the Commission

Hearing commissioner in workmen's compensation proceeding did not abuse his discretion in denying plaintiff's motion for a further hearing in order to present rebuttal testimony. *Benfield v. Troutman,* 572.

MASTER AND SERVANT—Continued

§ 96. Review of Industrial Commission's Findings

Evidence supported Industrial Commission's finding of fact that plaintiff's headaches were unrelated to the injury in question. *Gaddy v. Kern*, 680.

§ 108. Right to Unemployment Compensation

Claimant's discharge for wilful refusal to wear ear protective devices as required by employer policy made mandatory by federal statute constituted a discharge for misconduct connected with his employment within the meaning of the Unemployment Compensation Act. *In re Collingsworth*, 340.

MUNICIPAL CORPORATIONS

§ 30. Zoning Ordinances and Building Permits

An optionee of land has no standing to challenge the denial of a special use permit to allow construction of a service station on the land. *Refining Co. v. Board of Aldermen*, 624.

There was sufficient evidence to support board of aldermen's denial of a special use permit to allow construction of a service station on the ground the service station would substantially increase traffic at an intersection. *Ibid.*

Plaintiff's actions in reliance upon building permits issued by defendant were taken in good faith where plaintiff made substantial expenditures and where the permits had been issued pursuant to a final court judgment which had not been appealed. *Thomasville v. City of Thomasville*, 483.

In an action to enjoin defendant city from withdrawing building permit issued plaintiff, trial court did not err in allowing into evidence expenditures made by plaintiff before obtaining the permits. *Ibid.*

§ 33. Control and Regulation of, and Authority Over, Streets

Municipal ordinance prohibiting an open air public meeting on a public street, alley or sidewalk without a license is constitutional. *S. v. Clemmons*, 112.

NARCOTICS

§ 3. Competency and Relevancy of Evidence

The search warrant and affidavit were in substantial compliance with statutory and constitutional requirements, and evidence obtained as a result of a search of defendant's dormitory room thereunder was admissible. *S. v. Dover*, 150.

§ 4. Sufficiency of Evidence and Nonsuit

State's evidence was sufficient for jury in prosecution for possession and transportation of heroin thrown from car driven by defendant. *S. v. Mason*, 44.

Evidence was sufficient to show defendant's constructive possession of marijuana found in his bedroom. *S. v. Salem*, 269.

NARCOTICS—Continued

Evidence of felonious possession of LSD was sufficient to withstand nonsuit against one defendant only. *S. v. Balsom*, 655.

§ 4.5. Instructions

Trial court erred in assuming in instructions that substance purchased from defendant was same substance tested by S.B.I. chemist. *S. v. Thornton*, 225.

§ 5. Verdict and Punishment

Conviction of defendant for both possession and distribution of heroin constituted double jeopardy. *S. v. Thornton*, 225.

NEGLIGENCE

§ 5. Dangerous Machinery

Summary judgment was improper in a negligence case where material issues of fact were raised as to instructions given plaintiff in the use of a metal shearing machine. *Kiser v. Snyder*, 445.

§ 5.1. Duties to Invitees in Business Places

Plaintiff child was an implied invitee in defendant's laundromat and defendant was under duty to exercise ordinary care to maintain premises in reasonably safe condition. *Foster v. Weitzel*, 90.

§ 11. Primary and Secondary Liability

There can be no indemity among joint tortfeasors when both are actively negligent. *Mann v. Transportation Co.*, 256.

§ 57. Sufficiency of Evidence and Nonsuit in Action by Invitee

Plaintiff's evidence was insufficient to show actionable negligence on part of defendant in action to recover for injuries sustained when plaintiff slipped on patch of ice located in garage area behind defendant's store. *McArver v. Pound & Moore, Inc.*, 87.

§ 59. Duties and Liabilities to Licensee

Taxi driver entered plaintiffs' land as a licensee, not a trespasser, and was not liable to plaintiffs for damages caused when the taxi rolled down a hill and struck their house while the driver was attempting to defend himself from assault by the passenger. *Smith v. VonCannon*, 438.

PARENT AND CHILD

§ 7. Duty to Support and Right of Child to Sue for Support

Trial court erred in directing defendant to make child support payments for child who had already reached her majority and in ordering defendant to pay counsel fees in the action. *Taylor v. Taylor*, 720.

§ 8. Liability of Parent for Torts of Child

Complaint stated claim for relief in action by minor plaintiff to recover for injuries sustained when he was struck by a golf club swung by defendant's eight-year-old son. *Patterson v. Weatherspoon*, 236.

PARTNERSHIP

§ 9. Dissolution of Partnership and Accounting

Partnership for the practice of urology was a partnership at will, and withdrawal of a partner is not a breach of contract for which that partner may be held liable in damages to his copartner. *Langdon v. Hurdle*, 530.

PHYSICIANS, SURGEONS AND ALLIED PROFESSIONS

§ 6. Revocation of License for Unethical or Criminal Conduct

The State Board of Dental Examiners properly suspended the licenses of three dentists because of substandard dental work and discrepancies between charges for work and work actually performed under a federally financed program that furnished dental treatment to medically indigent school children. *In re Hawkins*, 378.

The statute providing for suspension of a dentist's license for "malpractice," "wilful neglect" and "unprofessional conduct" is not unconstitutionally vague and indefinite. *Ibid.*

PLEADINGS

§ 32. Motions to be Allowed to Amend

Court erred in entering judgment on the merits where case had been placed on motion calendar for disposition of motions to strike and to amend. *Sifford v. Parking Service*, 157.

PRINCIPAL AND AGENT

§ 9. Liability of Principal for Torts of Agent

Finding that truck driver was acting in the scope of his employment was implicit in federal court's determination that the corporate defendant was liable for the negligence of the truck driver. *King v. Grindstaff*, 613.

§ 10. Rights and Duties of Agent as Respects Principal

An agent employed to sell his principal's property may not himself become the purchaser absent a good faith disclosure to the principal and a consent to the transaction by the principal after such disclosure. *Real Estate Exchange & Investors v. Tongue*, 575.

Allegations by plaintiff real estate agent that it was granted for a period of time the exclusive right to sell defendants' property for a certain price and upon specified terms, and during such period plaintiff itself offered to purchase the property at the price and upon the terms stipulated are held insufficient to state a claim for relief in an action to recover a real estate agent's commission. *Ibid.*

RAPE

§ 10. Competency and Relevancy of Evidence

Trial court's refusal to allow defendant to elicit testimony from rape victim that she had previously had intercourse "over several dozen times" was harmless error. *S. v. Satchell*, 312.

RAPE—Continued

§ 11. Sufficiency of Evidence

State's evidence was sufficient for jury in rape case. *S. v. Satchell*, 312.

RECEIVERS

§ 12. Liens, Priorities and Payments

Egg producer and F.H.A. were not entitled to a priority status in the distribution of farm cooperative's assets in receivership for amounts due for the purchase of the producer's eggs. *Poultry, Inc. v. Farmers Cooperative, Inc.*, 722.

RECEIVING STOLEN GOODS

§ 5. Sufficiency of Evidence and Nonsuit

State's evidence was sufficient to support a jury finding that defendant knew when he received stolen wire that it had been stolen. *S. v. St. Clair*, 22.

§ 6. Instructions

Trial court erred in instructing jury that defendant had guilty knowledge if he "believed" or "had good reason to believe" someone else had stolen the property. *S. v. St. Clair*, 22; *S. v. Grant*, 15.

REFERENCE

§ 8. Review of Exceptions by the Court

Referee's report will not be set aside on the ground that plaintiff's testimony before the referee was improperly influenced by motions made to him by his wife where no timely objection was made at the hearing and the misconduct was harmless. *Rouse v. Wheeler*, 422.

Only the judge, not the referee, has authority to enter judgment upon a reference. *Ibid.*

REGISTRATION

§ 3. Registration as Notice

Default judgment on file in Davie County did not constitute constructive notice that it was subject to be amended to make it a specific lien against property described in a notice and claim of lien previously filed by plaintiff in that county. *H & B Co. v. Hammond*, 534.

ROBBERY

§ 4. Sufficiency of Evidence and Nonsuit

There was no fatal variance between indictment charging armed robbery and evidence showing attempted armed robbery. *S. v. Kinsey*, 57.

Evidence was sufficient to withstand motion for nonsuit in prosecution for armed robbery of a restaurant. *S. v. Reed*, 580.

ROBBERY—Continued

Trial court in armed robbery prosecution erred in submitting an issue to the jury as to defendant's guilt as an aider and abettor but should have submitted an issue as to his guilt as an accessory before the fact. *S. v. Alston*, 712.

Defendant in a common law robbery case had a fair trial free from prejudicial error. *S. v. Dunn*, 728.

§ 5. Instructions and Submission of Lesser Degrees of the Crime

Though evidence failed to support the charge of common law robbery, trial court properly submitted the case to the jury on the lesser included offense of larceny from the person. *S. v. Kirk*, 68.

Trial court was not required to give instructions on lesser included offenses in prosecution for robbery with a dangerous weapon. *S. v. McLeod*, 577.

§ 6. Verdict and Sentence

Defendant could be convicted of felonious assault and armed robbery based on one continuous course of conduct. *S. v. Kinsey*, 57.

RULES OF CIVIL PROCEDURE

§ 6. Time of Action

It was not necessary for defendant to move for enlargement of time to file answer where the trial judge set aside entry of default and ordered that defendant's answer be filed and remain of record. *Hubbard v. Lumley*, 649.

§ 7. Pleadings Allowed; Form of Motion

Motion for involuntary dismissal may not be properly made pursuant to Rule 7. *Smith v. Smith*, 416.

§ 8. General Rules of Pleading

Statute of frauds was inapplicable where plaintiff did not plead it as an affirmative defense to defendant's counterclaim and where defendant's evidence would support a jury finding that plaintiff's obligation was based on original promise to repay loans. *Chance v. Jackson*, 638.

§ 12. Motion for Judgment on Pleadings

The affirmative defense of a prior judgment as a bar to the present action was properly raised by Rule 12(b)(6) motion to dismiss the complaint for failure to state a claim for relief. *Smith v. Smith*, 416.

§ 33. Interrogatories to Parties

Trial court erred in granting summary judgment without first affording defendants an opportunity to complete their discovery proceedings which had been initiated by the filing of interrogatories. *Harris v. Parker*, 606.

§ 41. Dismissal of Actions

Where order of voluntary dismissal without prejudice was entered in plaintiff's original action, a second action filed by plaintiff was properly dismissed where instituted before costs in the original action were paid and after statute of limitations had run. *Cheshire v. Aircraft Corp.*, 74.

RULES OF CIVIL PROCEDURE—Continued

Motion for involuntary dismissal pursuant to Rule 41 is improperly entertained prior to trial of the cause. *Smith v. Smith*, 416.

Motion to dismiss under Rule 41 is properly made only in cases tried by the judge without a jury. *Hamm v. Texaco Inc.*, 451.

§ 51. Instructions to Jury

Trial court did not fail to review any of the evidence in violation of Rule 51 where the court stated to the jury what the parties contended the evidence tended to show. *Bodenheimer v. Bodenheimer*, 434.

§ 53. Referees

Only the judge, not the referee, has authority to enter judgment upon a reference. *Rouse v. Wheeler*, 422.

§ 55. Default

Trial court did not err in setting aside entry of default against defendant where there was good cause shown for defendant's failure to file answer on time. *Hubbard v. Lumley*, 649.

§ 56. Summary Judgment

Plaintiff's motion for summary judgment was improperly allowed where plaintiff failed to serve his motion at least 10 days before the time fixed for the hearing and failed to give defendant the extra three days notice required when service is by mail. *Trust Co. v. Rush*, 564.

Summary judgment was improper in a negligence case where material issues of fact were raised as to instructions given plaintiff in the use of a metal shearing machine. *Kiser v. Snyder*, 445.

Entry of summary judgment for plaintiff was improper where it was based on the judge's finding that plaintiff and grantor of the deed in question never obtained any divorce. *Harris v. Parker*, 606.

§ 60. Relief From Judgment or Order

Trial court had no authority to allow plaintiff's motion under Rule 60 "to correct" a default judgment to make it a specific lien on defendants' property so as to affect adversely the rights of innocent third parties. *H & B Co. v. Hammond*, 534.

SAFECRACKING

State's evidence was sufficient for jury on issues of defendant's guilt of breaking and entering and safecracking by acting as a lookout. *S. v. Connors*, 60.

SALES

§ 10. Recovery of Goods or Purchase Price

Defendant could reject nonconforming goods within reasonable time but he was under a duty to hold rejected goods with reasonable care for a time sufficient to permit the seller to remove them. *Electric Co. v. Shook*, 81.

SALES—Continued

In action for goods sold and delivered, court should submit separate issues as to the existence of the account and amount due thereon. *Planters Industries v. Wiggins*, 132.

§ 13. Action to Recover Purchase Price

Plaintiff was not prejudiced by fact that trial court may have applied inappropriate measure of damages where the amount awarded defendants was not more than they were entitled to as a matter of law. *Industrial Corp. v. Door Corp.*, 155.

§ 14. Action for Breach of Warranty

Purchaser of a television set from a retailer has no cause of action against the manufacturer for breach of implied warranty because there is no privity of contract. *Insurance Co. v. Vick*, 106.

SEARCHES AND SEIZURES

§ 1. Search Without Warrant

Police officer had a right to detain defendant temporarily to ascertain his name and purpose for being on the street at 2:45 a.m., and had a right to make a protective search for weapons, and implements of housebreaking discovered in the search were properly seized. *S. v. Streeter*, 48.

Police officer had probable cause to conduct a warrantless search of defendant's station wagon for a stolen television set. *S. v. Faison*, 200.

Officers had reasonable grounds to believe that defendant had just committed the crime of felonious breaking and entering and their search of defendant was incident to a lawful arrest. *S. v. Cooper*, 184.

Any error in admitting into evidence bolt cutters allegedly seized in unlawful search of defendant's vehicle was harmless beyond reasonable doubt. *S. v. All*, 284.

Testimony by an officer as to items discovered in a search of defendant's truck preparatory to impounding the vehicle was admissible. *Ibid.*

§ 2. Consent to Search Without Warrant

Evidence seized from defendant's vehicle was admissible where defendant consented to a search and a valid search warrant had previously been obtained. *S. v. O'Neal*, 644.

§ 3. Requisites and Validity of Search Warrant

Affidavit and search warrant were sufficient to support search of defendant's premises and evidence seized as a result thereof was admissible. *S. v. McCuien*, 109; *S. v. Dover*, 150.

Search warrant obtained after defendant's arrest was valid and a search of defendant's vehicle conducted pursuant to the warrant was lawful. *S. v. Faison*, 200.

§ 4. Search Under Warrant

Continuance of search of defendant's automobile at another location after a hostile crowd had gathered at the arrest scene did not violate defendant's rights. *S. v. Hardy*, 169.

SUNDAYS AND HOLIDAYS

Trial court properly denied defendants' motions to quash warrants against them made on the ground that the ordinance under which they were charged requiring observance of Sunday as a uniform day of rest was unconstitutional. *S. v. Atlas*, 99.

Evidence of Sunday sales of newspapers was properly excluded in defendants' trial for Sunday sale of clothing. *Ibid.*

TELEPHONE AND TELEGRAPH COMPANIES

§ 1. Control and Regulation

No certificate of public convenience and necessity was required for Southern Bell to extend its telephone services into an area already served by a telephone company operated by the Town of Pineville. *Utilities Comm. v. Town of Pineville*, 522.

Telephone company's appeal from denial of its motion to dismiss on jurisdictional grounds a petition of Duke Telephone Company and Duke University for a certificate of public convenience and necessity to provide telephone service to Duke University is dismissed as premature. *Utilities Comm. v. Telephone Co.*, 727.

TRESPASS

§ 7. Sufficiency of Evidence and Nonsuit

Taxi driver entered plaintiffs' land as a licensee, not a trespasser, and was not liable to plaintiffs for damages caused when the taxi rolled down a hill and struck their house while the driver was attempting to defend himself from assault by the passenger. *Smith v. VonCannon*, 438.

TRESPASS TO TRY TITLE

§ 4. Sufficiency of Evidence and Nonsuit

Plaintiff's evidence was sufficient to show superior title from a common source. *Thompson v. Hayes*, 216.

TRIAL

§ 12. Rights and Conduct of Parties and Witnesses

Referee's report will not be set aside on the ground that plaintiff's testimony before the referee was improperly influenced by motions made to him by his wife where no timely objection was made at the hearing and the misconduct was harmless. *Rouse v. Wheeler*, 422.

§ 16. Withdrawal of Evidence

Trial court's instructions that the jury should disregard a witness's testimony as to what transpired after plaintiff was placed in an ambulance did not result in excluding competent evidence as to the condition of plaintiff immediately following the accident and during the succeeding months. *Jones v. Seagroves*, 467.

§ 33. Statement of Evidence and Application of Law in Instructions

Plaintiff is entitled to a new trial where the trial court failed adequately to declare and explain the law arising on the evidence as to what constitutes a contract. *Chance v. Jackson*, 638.

TRIAL—Continued

Failure of trial court to repeat the evidence when instructing on measurement of damages was not error where the judge had previously reviewed the evidence. *Love v. Hunt*, 673.

§ 35. Instructions on Burden of Proof

Trial court's instruction defining the term "greater weight of the evidence" was correct when read contextually. *Jones v. Seagroves*, 467.

§ 36. Expression of Opinion on Evidence in Instructions

The trial court did not give unequal stress to contentions of either party in its instructions. *Dickens v. Everhart*, 362.

TRUSTS

§ 4. Construction, Operation and Modification of Charitable Trusts

Trial court had authority to tax a reasonable attorney's fee as part of the costs in an action for a declaratory judgment and for instructions to trustees in connection with the sale of trust property. *Tripp v. Tripp*, 64.

UNIFORM COMMERCIAL CODE

§ 20. Breach and Repudiation of Sale

Defendant could reject nonconforming goods within reasonable time but he was under a duty to hold rejected goods with reasonable care for a time sufficient to permit the seller to remove them. *Electric Co. v. Shook*, 81.

USURY

§ 1. Contracts and Transactions Usurious

Forbearance agreement secured by a second deed of trust and executed after the effective date of G.S. 24-1.1(3) was not usurious in providing for interest of 9% per annum. *Ausband v. Trust Co.*, 325.

UTILITIES COMMISSION

§ 7. Hearings and Orders on Services

No certificate of public convenience and necessity was required for Southern Bell to extend its telephone services into an area already served by a telephone company operated by the Town of Pineville. *Utilities Comm. v. Town of Pineville*, 522.

§ 9. Appeal and Review

Telephone company's appeal from denial of its motion to dismiss on jurisdictional grounds a petition of Duke Telephone Company and Duke University for a certificate of public convenience and necessity to provide telephone service to Duke University is dismissed as premature. *Utilities Comm. v. Telephone Co.*, 727.

VENDOR AND PURCHASER

§ 2. Duration of Option

Where option to purchase land does not specify time within which the right to buy must be exercised, a reasonable time is implied. *Yancey v. Watkins,* 515.

Whether plaintiff acted within a reasonable time in tendering payment 45 years after he was given the option to purchase was a jury question. *Ibid.*

WAREHOUSEMEN

§ 1. Liabilities of Warehousemen

Indictment for issuing false warehouse receipts sufficiently notified defendant of the receipts which he was charged with having issued. *S. v. Woodcock,* 242.

Warehouse receipts were "issued" by a warehouse manager when, after they had been signed by him, they were at his direction delivered to the bank. *Ibid.*

WATERS AND WATERCOURSES

§ 1. Surface Waters

Plaintiffs' evidence was sufficient to support their claim for damages to their pasture where it tended to show that water from a heavy rain carried dirt and rocks onto their pasture from a high embankment constructed on defendant's land, but was insufficient to support their claim for destruction of a bridge on their land where it tended to show that such destruction was caused by the flow of the water which had been accelerated by construction of the embankment. *Ayers v. Tomrich Corp.,* 263.

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